Complaints Commissioner

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The Complaints Commissioner's Final Report into the Financial Conduct Authority's Oversight of Premier FX Limited (PFX)

The complaint

1. On 4 December 2020 you, the Premier FX Liquidation Committee (the Committee), represented by three members of the group, made a complaint to the FCA about its regulation of firm Premier FX Limited (PFX) and matters connected to this. The complaint was submitted on behalf of a group of consumers who were affected by the failure of the firm and complained about the FCA in connection to this firm.

2. Following the resolution of some administrative matters, including establishing your authority to act on behalf of the remaining members of the Committee, and extensive correspondence about the substance of the complaint points to be covered, you agreed the list of complaint points the FCA were to investigate.

3. The FCA issued its Final Decision on 18 August 2022 and the Committee asked me to review your complaint about the FCA on 16 October 2022, stating that you are representing 40 complainants at this point.

4. Three additional complaints were submitted but the complainants were part of the Committee members and I am reviewing all complaints on this matter in this report.

5. I have carried out my own due diligence and requested that all complainants wishing to pursue their complaint with my office confirm this to me in writing, noting that they wished the Committee to represent them, where this was the case.

6. Following on from the responses, there are currently 33 complaints (some of which are joint) which I have accepted into the Complaints Scheme. All Committee members who had complained to the FCA but did not escalate their complaint to me either on their own or through the Committee are <u>not included</u> in this complaint. A schedule of the names of complainants whose complaints

had been accepted into the Complaints Scheme will accompany this report but will not be published. In this report, any reference to PFX Committee members will refer only to the 33 complaints I have accepted into the Scheme.

***Preliminary points* and background**

7. You have raised a number of allegations in response to my preliminary report which did not form part of your original complaint either to the FCA as per the Decision Letter it issued you on 18 August 2022 or when you referred the complaint to me on 16 October 2022. I am unable to review these additional allegations. This is because under the Complaints Scheme, it is desirable for complaints to reviewed by the Regulators in the first instance as that is usually the best way of resolving matters. I note that some of these allegations may be covered in other complaints about the FCA's connection with PFX (this is not the only complaint members of the Committee have brought to me: there are others which have been brought individually and will be reviewed under separate cover).

8. Before I go into the analysis of the complaint points, I think it is appropriate to set out the background and the sequence of events that have led to the complaint being submitted to the FCA and referred to me.

9. For those wishing to gain further information about PFX and the role of its bank Barclays in the events that unfolded, the FCA issued two Final Notices that provide further and more detailed background:

   a. Final Notice 2021: Premier FX Limited (fca.org.uk)

   b. Final Notice 2022: Barclays Bank Plc (fca.org.uk)

History of PFX

10. PFX was authorised by the Financial Services Authority (FSA) as a payment institution and given permission to provide the service of money remittance from 25 February 2011.

11. PFX used accounts at Barclays Bank Plc (Barclays) to conduct its business and was subject to all the relevant Barclays' terms and conditions.

12. In its Decision Letter dated 18 August 2022 (Decision Letter), the FCA says that PFX was re-authorised by it on 23 May 2018, but on *"13 August 2018, on the*

application of the [FCA], the High Court appointed administrators on the basis that Premier FX was unable to pay its debts as they fell due and was cashflow insolvent."

13. This action was taken following the issues becoming apparent after the death of Peter Rexstrew, the sole shareholder and director of PFX, on 16 June 2018.

14. *"Based on the balances in Premier FX's accounts on the day he died, if all of the creditors currently claiming in Premier FX's liquidation were to have sought their funds on 18 June 2018, Premier FX would not have been able to meet their claims in full on that day.*

15. *Peter Rexstrew's children, Katy Grogan and Charlie Rexstrew, were appointed as directors on 18 June 2018. Over the course of the following weeks, Premier FX began to be contacted by customers asking for confirmation of the balance of their funds held by the firm and, in some cases, requesting interest payments. Many of these customers were Peter Rexstrew's own personal customers and staff were unable to locate a record of their funds on Premier FX's client relationship management system. Several of Peter Rexstrew's customers who had transferred significant funds to Premier FX had not even been registered on the system by Peter Rexstrew.*

16. *The new directors and other Premier FX staff made genuine attempts to respond to these customers' queries. Some were repaid but, when an increasing number of customers came forward asking for confirmation of the balance of their funds held by the firm, Premier FX realised that the firm held insufficient funds in its accounts to cover all of these claims. Six weeks after Peter Rexstrew's death, having sought insolvency and legal advice, the new directors announced that Premier FX had ceased trading. They reported the matter to the Authority on 1 August 2018."*[1]

17. Following its investigations, the FCA found that PFX *"seriously misled customers by informing them that:*

    (1) it was able to hold their funds indefinitely without the need for a payment order for onward transfer;

[1] Final Notice 2021: Premier FX Limited (fca.org.uk)

(2) their funds would be held in secure, segregated client accounts; and

(3) their funds would be protected by the Financial Services Compensation Scheme ("FSCS").

2.3. None of these matters were true. However, as a result of these misrepresentations, many customers paid their funds to Premier FX (in some cases hundreds of thousands of pounds sterling, euros or US dollars) to hold without a payment order for onward transfer on the basis that the funds would be repayable on demand.

2.4. Some customers were offered and were paid interest. Other customers were offered a "worst case exchange rate deal" in which an exchange rate was fixed at the rate on the day that the customer's funds were received by Premier FX but no future date for exchange and remittance was agreed. Whenever the customer subsequently decided to instruct Premier FX to remit the funds, Premier FX would exchange the funds at the higher of the spot rate on that day and the agreed fixed rate. Accordingly, the customer would benefit if the exchange rate had improved since the date, they transferred their funds to Premier FX and would also benefit if the exchange rate had worsened since that date as the fixed rate acted as a floor. Several customers would often pay in a lump sum and withdraw smaller amounts on a monthly basis.

2.5. Customer funds were not held in secure, segregated client accounts. Of the accounts which received these funds, only the main pounds sterling account was designated as a "client account" under Premier FX's banking arrangements. Premier FX did not maintain a client account in any of the other currencies which it mainly traded, including euros and US dollars. In the event that Premier FX became insolvent, any funds in these accounts could have been set-off against an overdrawn balance in another Premier FX account. These accounts were therefore not "secure".

2.6. Customers who paid funds to Premier FX to hold without a payment order for onward transfer were also told their funds would be "segregated". In reality, these customers' funds became comingled with the funds of other customers and Premier FX's own funds the moment they were credited to Premier FX's account. The funds were frequently moved into other Premier FX accounts

shortly after they were received. At this point it appears that Premier FX ultimately used the funds to make payments to, or on behalf of, other customers or to meet its own business expenses."[2]

18. The FCA also found that *"Although Peter Rexstrew controlled Premier FX, there is no clear explanation for how or why he moved funds between the bank accounts. The overall appearance is one of disorganisation and disarray, where Premier FX's accounts were not used for their intended purposes.*

    2.9. For example, there were excessive transfers of funds from Premier FX's pounds sterling client account to its pounds sterling office account during the relevant period (over £10 million). However, only 4% appears to have been spent on business expenses during the relevant period. Approximately 70% of the funds were transferred to other Premier FX accounts and the rest appears to have been used to settle customers' payments out of the office account.

    2.10. Conversely, whereas Peter Rexstrew used the office account to settle customers' payments, he used funds in the pounds sterling client account to pay salaries, maintenance and to acquire Global Currency Service in 2016. The Authority did not identify excessive payments made to Premier FX staff during the relevant period."[3]

19. There were a number of other financial irregularities identified by the FCA, in addition to the firm conducting regulated activities, which fell outside of its permission of money remittance ("*misuse of…accounts and…failure to safeguard the relevant funds of payment service users*"[4]), painting a picture of disorganisation and disarray in the affairs of the firm.

20. In addition to the failures of the firm, it was also found that Barclays failed to meet its obligations in relation to the accounts held by PFX:

    "…none of the 73 accounts that Premier FX maintained in the UK between 1 January 2013 and 13 August 2018 were designated in such a way that showed they were a safeguarding account; and

[2] Final Notice 2021: Premier FX Limited (fca.org.uk)
[3] Final Notice 2021: Premier FX Limited (fca.org.uk)
[4] Final Notice 2021: Premier FX Limited (fca.org.uk)

(2) aside from three accounts whose terms and conditions excluded a right of set-off over the funds in those accounts, Premier FX took no steps to ask its bank to acknowledge that it had no rights (e.g. a right of set off) or interest (e.g. a charge) over the funds in the other 70 accounts.

2.23. Accordingly, in the event of Premier FX's insolvency, there was a material risk that any relevant funds held by Premier FX would not be readily identifiable and could be subject to claims from other creditors, thus increasing the time and costs of distributing them".[5]

Barclays

21. The FCA found that Barclays did not act with due skill, care and diligence in its monitoring of PFX and it imposed a financial penalty of £783,800 on the bank, pursuant to section 206 of the Financial Services and Markets Act 2000.

22. Following regulatory action by the FCA, the FCA announced that Barclays voluntarily agreed to:

"resolve this matter and qualified for a 30% (stage 1) discount…Were it not for this discount, the Authority would have imposed a financial penalty of £1,119,767 on Barclays.

1.3. Barclays has agreed to make an ex gratia payment of £10,076,943.75 to be distributed amongst Premier FX's customers pursuant to a plan agreed with the Authority."[6]

Payments received by the consumers to date

23. The effect on customers of the fund is that they were unable to access their funds for a long time, during which they suffered the distress and inconvenience of not knowing if they would recoup their losses. The FCA has confirmed that PFX customers with accepted claims by the liquidator recovered the principal sum they paid to PFX (some three years and eight months after they lost access to their money). The voluntary payment made by Barclays totalled £10,076,943.75 represented the difference between the distribution made by the liquidator and accepted claims.

[5] Final Notice 2021: Premier FX Limited (fca.org.uk)
[6] Final Notice 2022: Barclays Bank Plc (fca.org.uk)

24. No interest or any additional ex gratia payment was offered by Barclays or the FCA.

What the complaint is about

25. The complaint submitted by the Committee on behalf of its members was summarised into six complaint points (with Part five having sub complaint points) by the FCA in its Decision Letter. These complaint points are:

*"**Part One***

26. *You allege that the FCA's Register (the Register) of authorised firms is not fit for purpose. That this is evidenced by admissions made by Andrew Bailey, former CEO of the FCA, to the Treasury Select Committee. That the FCA advises consumers to select firms that are listed on the Register and that you followed this advice and, as a result, became the victim of a fraud. In particular, you allege that the FCA's Register for Premier FX simply stated that Premier FX had authorisation for 'Money Remittance', but there was no explanation as to what that meant and the Register failed to identify any limit as to the time that Premier FX could hold client money for."*

What the regulator decided

27. The FCA did not uphold this complaint point, explaining that *"The Financial Services Register (the Register) is a public record of firms, individuals and other bodies that are, or have been, authorised and regulated by the Prudential Regulation Authority (PRA) and/or the FCA. Consumers can search the Register for firms and individuals to identify the regulated activities that firms and individuals are permitted to carry out. It is a consumer's responsibility to conduct their own due diligence on a firm prior to deciding to use them for financial services."*

28. The Decision Letter went on to explain that it is not possible to have unique information displayed on the Financial Services (FS) Register for each regulated firm and it is the consumer's responsibility to understand what each regulated activity stands for as well as what the various permissions allow firms to do.

29. The Decision Letter stated that *"the FCA Handbook accurately reflects the definition of the PSRs… I do not agree that the Register entry for Premier FX*

should have contained more detail than it did. It is my view that it clearly stated the firm was only able to perform the regulated payment service of money remittance and a definition for money remittance is publicly available in our Handbook or information could have been obtained from our Contact Centre.

30. *I also conclude that, on the basis of the definition for Money Remittance contained within our Handbook, it's clear that Premier FX were not authorised to accept deposits, hold money for an extended period of time, nor offer interest payments."*

*"**Part Two***

31. *You allege that the Register contained false and misleading information in respect of whether the Financial Services Compensation Scheme (FSCS) applied to Premier FX. You allege that the Register said "It cannot be determined if FSCS cover would apply to this firm. Please contact the firm directly to understand whether their products/services would be covered by FSCS".*

32. *You allege that this information was materially false and misleading because the FCA knew that payment services providers are not and were not covered by the FSCS scheme. You therefore question: 1) why the FCA did not make clear on the Register that payment services firms were not covered and; 2) why the FCA would give such advice, as firms perpetrating criminality are likely to say that they are covered by the FSCS.*

33. *You say that the burden of responsibility does not rest with the client of the firm to check but is an FCA duty. Finally, you allege that as a direct consequence of this failure, consumers used Premier FX when they might not have done, had they known that the firm was not covered by the FSCS."*

What the regulator decided

34. The FCA did not uphold this complaint point.

35. The Decision Letter explains that the FSCS is an independent organisation set up by Government. Furthermore, it says *"The FCA wants to help consumers by making them aware, where possible, of the services that are available to them under the Financial Services and Markets Act 2000 (FSMA) should things go*

wrong. Consumers can check the Register to see if it is likely that the firm they are dealing with is covered by the Financial Ombudsman Service or the FSCS (schemes under FSMA).

36. *There are many factors that need to be considered before deciding whether a service or product is covered by any of the schemes under FSMA. For some firms, it is easier to discern whether or not their activities would be covered.*

37. *… In these instances, because it would be more difficult to discern whether or not the firm's activities would be covered,* ***the FCA's approach in 2018 was that the Register would not definitively state whether FSCS cover might apply*** *[my emphasis]..*

38. ***It is a consumer's responsibility to conduct their own due diligence*** *[my emphasis] on a firm prior to deciding to use them for financial services."*

39. The wording displayed on the FS Register in 2018 in relation to FSCS cover was "*'It cannot be determined if FSCS cover would apply to this firm.* ***Please contact the firm directly to understand whether their products/services would be covered by FSCS****' [my emphasis].*

40. *… In the circumstances, I consider that the entry in place on the Register at the time was accurate and that the entry was a consistent one with the FCA's approach to all firms with PSD permissions in 2018.*

41. *It was, and remains, the responsibility of the consumer to establish if a firm's services are covered by the FSCS.* ***I also note it was Premier FX, not the FCA, that informed customers that it was covered by the FSCS*** *[my emphasis]."*

*"**Part Three***

42. *You allege that the FCA failed to conduct a robust re-authorisation process of Premier FX in 2018. You provide a quote attributed to Andrew Bailey and [a member of FCA staff], that said that payment institutions were asked only one question as part of their re-authorisations, and that was "Has anything changed?." You quote an extract from the PSRs to demonstrate that this was an inadequate re-authorisation process. You allege that the FCA failed to ensure that Premier FX had insurance, had capital assets protection, and properly*

segregated client money in separate accounts. You say that the re-authorisation of Premier FX in May 2018 should not have happened because the FCA was in possession of adverse information relating to Premier FX, including that they had been subject to fines imposed by the Portuguese authorities. You allege that the FCA was also told of concerns relating to Premier FX prior to re-authorisation, by a customer, an employee, and other FX firms operating in Portugal. You also allege that staff at Premier FX had no formal financial services qualifications, contrary to the PSRs 2017."

What the regulator decided

43. The FCA upheld this complaint.

44. The decision explained that whilst the process for re-authorisation did not require firms to resubmit information, *"where the FCA held concerns about a firm during reauthorisation under the PSRs, it was expected these would be assessed"* and *"that the FCA was in possession of a number of concerns regarding Premier FX at the time of the firm's reauthorisation in 2018. These concerns, when taken together, should have caused the FCA to further investigate and consider closely whether Premier FX should be reauthorised under the PSRs 2017.*

45. *I have seen evidence that the Authorisations Division, when assessing Premier FX's application, did take some steps to probe the information provided and statements made by the firm. However, when taken together with all of the concerns held by the FCA (not just the Authorisations Division) at the time that Premier FX were granted reauthorisation, it is my view that the FCA did not go far enough to explore the concerns that were held.*

46. *Therefore, I am of the view that, because we did not adequately resolve the concerns that we held, it was not reasonable of the FCA to have granted reauthorisation on 23 May 2018."*

*"**Part Four***

47. *You allege that the FCA failed to identify that Premier FX's online documents contained materially false information relating to FSCS cover, Escrow and Forward Exchange accounts."*

What the regulator decided

48. The FCA did not uphold this complaint point, explaining that *"During the time that Premier FX was regulated by the FCA the firm was supervised on a risk-based approach. Today, the Supervision Division refer to this type of firm as being 'portfolio based' which means that the supervisory work that is undertaken is mainly reactive i.e. in response to third party reports, external notifications and firm returns, in addition to cross-sector thematic type work.*

49. *In the context of this allegation, I have, therefore, considered to what extent the FCA received notification about concerns to Premier FX's marketing materials and whether we acted appropriately. In order to do that, I have reviewed our internal, contemporaneous, records.*

50. *Having done so, I can confirm that the FCA was in possession of very limited adverse information regarding Premier FX's marketing materials. Of the material the FCA was in possession of, which was one report some time before Premier FX's insolvency, I can confirm this was shared with the relevant part of the FCA for them to consider.*

51. *In this case, having considered the steps that the FCA took, I am satisfied that the FCA did not act unreasonably in the way it responded to the limited adverse information it received regarding Premier FX's marketing materials."*

*"**Part Five***

52. *You allege that the FCA failed to properly supervise Premier FX. You allege that in November 2017, a new task force was established by the FCA to address known associated risks with FX companies. You say that this new task force, and the FCA, failed to act on intelligence provided by the Portuguese authorities, information provided by a customer of Premier FX and information provided by a former employee of Premier FX. You allege that Premier FX had not filed company accounts at Companies House since 2016, but this was not detected by the FCA.*

53. *You quote Nikhil Rathi, at a November 2020 Treasury Select Committee meeting, as describing the FCA's supervision of payment institutions as being "light touch". You would like to understand exactly what that means and complain that the consumer is not to know what firms are being supervised on a*

"light touch" basis and what firms are not. That a firm's authorised status means exactly the same thing to the consumer, irrespective of the type of supervision the FCA deploys on a firm.

54. *You say that because Premier FX had no professional indemnity insurance, they must not have been submitting their annual reports. That the FCA allowed this to occur."*

What the regulator decided

55. The FCA considered these allegations from different perspectives and set out its findings under different headings, disagreeing about some elements but ultimately and overall upholding the complaint.

56. The questions examined include, by its own summary:

*"**Did the FCA appropriately deal with concerns it was passed regarding Premier FX?***

57. *Having reviewed the information that is held on our systems, it is clear that the FCA held considerable adverse information regarding Premier FX (in addition to the one financial promotions related matter previously outlined). Whilst, for confidentiality reasons, I am not able to comment on the exact information held, nor the provenance of it, some of the information held related to concerns that the firm might be acting outside of their permissions and also information which, on the face of it, should have caused the FCA to question whether Premier FX were in financial difficulty.*

58. *I have assessed the actions, and inactions, that the FCA took in respect of each of the concerns raised to the FCA. Whilst it is accepted that the FCA has to supervise firms on a portfolio (reactive) basis (coupled with more proactive thematic type work), this approach does require the FCA to then react appropriately to any concerns that are shared about firms in line with a risk-based approach… In the case of Premier FX, based on the information I have reviewed, the FCA did not respond reasonably to concerns raised in the circumstances."*

"Did the FCA fail to ensure that the firm ring-fenced client monies in safeguarded accounts?

59. The Decision Letter explained that *"in my investigation I have identified that for several years immediately prior to Premier FX's reauthorisation, Premier FX did not report on its safeguarding measures and the relevant section within the form was left blank. This was an opportunity, over several years, for the FCA to explore the issue of safeguarding with the firm in closer detail.*

60. *Prior to Premier FX's reauthorisation in 2018, I have established that the FCA had cause to question the solvency of the firm in view of adverse information it had received. Since the safeguarding of customers' funds is the fundamental protection for a customer in the event an API becomes insolvent, the information the FCA were in possession of, coupled with the non-completion of the safeguarding section of the FSA056 forms, should have caused the FCA to apply proper scrutiny as to Premier FX's safeguarding arrangements at some point in the period prior to its insolvency.*

61. *For these reasons, I consider that this allegation should be partially upheld. I uphold the complaint partially because from 2011 to 2016, the FCA did conduct proper oversight in my assessment of Premier FX's safeguarding arrangements and did not have any indicators to imply any potential issues. However, as I explain above, from 2016 to the point of Premier FX's failure I believe the FCA could have done more in its regulatory work to test if Premier FX had appropriate safeguarding arrangements in place for customers. As we know now, Premier FX did not safeguard client monies."*

    "*It is alleged that Premier FX had not filed company accounts at Companies House since 2016, but this was not detected by the FCA. It is also alleged that because Premier FX had no professional indemnity insurance, they must not have been submitting their annual reports, and that the FCA allowed this to occur.*

62. *In view of the evidence, I am therefore unable to agree that this allegation should be upheld because:*

• It is not the FCA's responsibility to monitor compliance with Companies House filings;

• Notwithstanding this, Premier FX had not actually failed to submit any accounts. Companies House gives companies 9 months to submit accounts for the year end. Premier FX, therefore, had until the end of September 2018 to file their accounts for the year end 31 December 2017. Premier FX were put into administration, on application to the High Court, in August 2018;

• Premier FX did annually report to the FCA;

• Premier FX were not required to hold PII cover"

"*The FCA provided misleading information about the extent to which it was regulating the firm. The FCA has since admitted it regulated this firm with a 'light touch', but in truth the consumer is not to know when the FCA regulates a firm with a light touch or not. 'FCA authorised and regulated' was taken to mean a consistent, gold standard, of regulation and it was not applied to Premier FX.*

63. The FCA response explained that *"The reason the FCA is not able to supervise all firms in exactly the same way is because the FCA authorises and regulates a large number of firms, and the FCA is currently the conduct regulator for approximately 50,000 firms.*

64. ***The FCA therefore has to supervise firms on a risk-based approach and, currently, the FCA does this by supervising firms on a 'portfolio' basis or through dedicated supervision teams*** *[my emphasis].*

65. *Premier FX was supervised during its authorised period on a portfolio basis.* ***Under this model of supervision, the FCA reacts to third party reports, external notifications and firm returns, as well as undertaking wider thematic work across multiple firms to consider particular issues*** *[my emphasis]."*

"Light touch regulation"

66. *Having considered all of the evidence I do not uphold this allegation because:*

• whilst the FCA is under no obligation to inform consumers how it supervises firms, it has done so in publications including those specifically relating to the payments firms;

• within those publications the FCA has never stated that it regulates firms using a single approach or standard;

• the reason the FCA has not done so is because the FCA cannot supervise all firms in the same way and needs to apply a risk-based approach;

• in the context of the remarks that Charles Randell made at the Treasury Select Committee, I am not of the view that the remarks were intended to reflect that the FCA supervised firms like, and including Premier FX, in a 'light touch' way. Rather, I am of the view that these comments were an effort to articulate a difference between the regulatory regimes under which payments firms, such as Premier FX, are subject to and how they were designed; and

67. *Therefore, I do not agree that we have misled you, or other consumers, as to the degree of supervision or regulation that was extended to Premier FX nor other payments firms."*[7]

*"**Part Six***

68. *You also allege that the FCA failed to properly supervise Barclays bank. You say that Premier FX held seventy-three bank accounts with Barclays in a number of currencies. You say that, over a period of time, over £1 billion passed through Premier FX's accounts, but that Barclays did not identify the irregularities in the flow of monies. You allege that Barclays failed to effectively follow anti-money laundering regulations and procedures, by not conducting appropriate levels of due diligence and ongoing monitoring of the business relationship. You say that Barclays has been deliberately obstructive and has prevented access to important Barclays current, and former, staff. You allege that this information demonstrates that the FCA failed to properly supervise Barclays bank, as they are authorised and regulated by the FCA."*[8]

What the regulator decided

69. The FCA did not uphold this complaint point. In light of the information that emerged during the investigation into PFX, the FCA also took regulatory action against Barclays. *"On 24 February 2022, the FCA fined Barclays because it did*

[8] FCA DL dated 18 August 2022

not act with due skill, care and diligence in carrying out its ongoing monitoring of Premier FX with regards to anti money laundering (AML) and Enhanced Due Diligence (EDD) reviews of the relationship it held with PFX. In addition to the fine, Barclays also agreed to make a voluntary payment of £10,076,943.75 to the customers of Premier FX."[9]

70. In addition to the above, the FCA Decision Letter also set out that *"Having reviewed the records I am satisfied that the FCA proactively supervised Barclays in respect of its AML regulatory obligations. To be clear and for the avoidance of doubt, I have considered the supervision of Barclays with regard to the FCA's actions and inactions regarding Money Services Businesses (MSBs) like Premier FX, in addition to the wider application of AML regulatory obligations on Barclays.*

71. *In addition to considering what actions or inactions the FCA took to supervise Barclays, I also reviewed our internal records to establish if the FCA was on notice that Barclays was failing in its regulatory responsibilities with regards its ongoing monitoring of Premier FX. Having reviewed our records I am satisfied that the FCA has not acted unreasonably."*[10]

Why you are unhappy with the regulator's decision

72. In your complaint letter to me, you the Committee described the impact of the collapse of PFX on individuals, stating: *"hard-working individuals who have had their life savings or retirement funds stolen, resulting in some living in poverty and made homeless, and several having since died, the latter never knowing if their money was ever recovered… It was 3 years and 8 months from the victims' losing their money to partial recovery, a period that inflicted significant stress, financial hardship and anguish on the victims, an aspect grossly underestimated by the regulators. On top of this, the victims suffered significant financial loss due to the lost earning potential of their money throughout this period, a situation brought about by inexcusable failings of the FCA."*

73. You set out your main concerns about what you believe to be *"serious and significant regulatory failings by the FCA"* under the following headings:

[9] FCA DL dated 18 August 2022
[10] FCA DL dated 18 August 2022

a. *"*The Register, including the "**Definition of Money Remittance.**

(a) and "False and Misleading Information about FSCS cover (b)". This is **Element one** of your complaint to me.

b. The FCA's failure to take action appropriately in its "Authorisation and Supervision" of PFX. This is **Element two** of your complaint to me.

c. "False and Unlawful Marketing which the FCA failed to identify and act upon,*"* This is **Element three** of your complaint to me.

d. The FCA's failure to appropriately supervise Barclays**.**

This is **Element four** of your complaint to me.

e. The FCA's failure to *"seek the prosecution of their authorised firm's directors…or the Barclays Bank senior officer."* This is **Element Five** of your complaint to me.

f. Finally, you are unhappy that the FCA did not offer you any ex gratia compensation for the loss of access to your funds (although it did offer £300 per complainant for the delays in handling the complaints) and you request financial compensation of 8% compound interest on the amount of funds 'locked' for three years and eight months per eligible complainant, because you disagree with the assertion set out in the FCA's Decision Letter that *"the FCA's Enforcement Division recovered 100% of the claimant's money. [Your position is that] This is not true. [You] had [your] original principal returned, minus the interest contracted and promised by PFX, but not the financial redress for the consequential damages/compensation [you] requested for the lost revenue of [your] money for the 3 years and 8 months.*

It was overlooked by the FCA. Victims had to live with relatives, be repatriated, apply for public benefits to survive, and some were living in caravans after being comfortably retired following a working life of 45 years."

This is **Element six** of your complaint to me.

General points

74. As the FCA had upheld Part three and Part five of your complaint, you believe that the acceptance of these failures, *"Individually, and most certainly collectively…highlight a serious and significant failing by the FCA."*

75. Furthermore, you explained that you contest the FCA's decision to not uphold Part one and Part two of your complaint. The lack of accuracy and lack of sufficient attention paid to the Register was accepted in a statement made by the then CEO of the FCA, Andrew Bailey, to the Treasury Select Committee in 2019, in which he said *"It is a legal requirement that the register exists, but it was fairly neglected. It did not seem to have very high priority and profile within the institution, and things have come out of the woodwork that are not good…I have been very clear that the priority is both getting it sorted out and then maintaining it."* You believe this is evidence in support of your case.

76. Additionally, you feel that your position is further strengthened by the fact that FCA had confirmed to you in its Decision Letter that it *"has since introduced changes to the content of its Register of Companies…described by the author as: "In May 2022, further to consumer complaints in relation to the Register and engagement with the Complaints Commissioner regarding our regulation of London Capital & Finance plc (LCF), we made changes to the Register to make certain things clearer."*

77. You go on to argue that *"The complaint is in regards to the FCA's statement in the Register for PFX which was both false and misleading regarding the FSCS cover. The FCA Register stated: "It cannot be determined if FSCS cover would apply to this firm. Please contact the firm directly to understand whether their products/services would be covered by FSCS.*

78. *However, the FCA has since admitted that it was known that payment services companies such as PFX were not covered by FSCS. Why then did the register not say this?*

79. *…The introduction of the FSCS by the FCA's Register facilitated PFX in claiming to customers their funds were protected up to £85K by the FSCS and up to £5m under the firm's insurance. PFX had a document posted on their website from 2014 onwards entitled "Regulation and Client Security" which listed all the protections the firm held, most of which were false, untrue and*

unlawful. We assumed that as the firm was an API, these critical factors and claims were checked and verified."

80. It is also your position that the admissions of the FCA in response to your complaint about their own regulatory failings, as well as the statements quoted above make it clear that there has been significant failure by the regulator, *"The impact [of which] on the victims has been huge. The stress, gross inconvenience and unmitigated financial hardship resulting from such losses over almost 4 years is beyond imagination".* It is for these reasons you are asking for *"additional consequential damages"* at 8% compounded interest on top of the capital losses you had recovered through the liquidator and the payment made by Barclays.

My analysis

81. This complaint raises serious concerns about the actions and inactions of the FCA in connection to PFX and sets out clearly the impact of lengthy proceedings on individuals, some of whom did not live to see the situation and the complaint resolved.

82. I am sorry it has also taken my office a considerable amount of time to be able to resolve your complaint. This has been a complex and thorough investigation with voluminous material to review. Significant work has been undertaken to enable me to appropriately assess and address all of your complaint points, but the process is now complete, and my Final decision is set out below.

83. In recognition of the fact that the delays at my office would also have added to the already significant distress and inconvenience experienced by your group of complainants, I am also offering an ex gratia payment of £100 to the complainants to be remitted by my office.

Element one – the status of the Register

a) Definition of Money Remittance

84. In its Decision Letter, the FCA had set out that *"It is a consumer's responsibility to conduct their own due diligence on a firm prior to deciding to use them for financial services"*. Furthermore, it was also asserted that as the FCA regulates over 50,000 firms, it is not possible for it to have bespoke messages and

individualised information on the Register for each of these firms, as it would require a disproportionate number of resources to achieve this.

85. I accept the above points made by the FCA. It is not reasonable to expect the FCA to create and maintain fully individualised pages for all of 50,000 plus regulated firms.

86. I also agree with the position that consumers must carry out their own due diligence with the tools available to them to verify whether they are dealing with a regulated firm. You accept this too.

87. You state in your complaint to me, "*the FCA's TV advertisement and ScamSmart advises people to use companies that are listed on the FCA's web-based Register before doing business with a financial company. FCA executives regularly state on consumer affairs programmes "If the victims had used an FCA registered and authorised firm, they would not have had their money stolen". We followed this direction...*". Therefore, it is not contested that consumers hold a certain level of responsibility to ensure they protect themselves from unauthorised firms and scams.

88. However, you go on to state *"The [Committee] find it totally unreasonable for a member of the public to be expected to trawl through a detailed finance policy document, such as the FCA's PSR Handbook of 290 pages, to interpret the meaning of ''money remittance'",* as suggested they should by the FCA's Decision letter.

89. I agree with this position. I also find it unreasonable of the FCA to suggest that an average consumer would even know about the FCA Handbook, let alone the fact that there is a Glossary within it with definitions, which they should be checking in addition to the information on the Register to understand what activities of a firm are covered and what are not.

90. Following some updates and improvements, the Consumer pages of the FCA's website currently say *"Check the Financial Services Register to find out if a business is authorised"* and this link takes consumers to a page that sets out the steps they need to take to check the firm is authorised, what permissions the firm has and the protections available to consumers linked to these permissions.

91. But there was no instruction before May 2018, nor is there one today, to check the FCA Handbook for the definition of technical terms. There is no link to the Handbook on the Consumer pages of the FCA's website. In its present form, it is a regulatory tool aimed at firms to assist them in understanding the rules, their obligations and responsibilities. An average or typical consumer cannot be expected to know about this tool, let alone how to use it.

92. Although consumers have to conduct investigations on their own, I agree the Register could have been much more helpful in proactively guiding users to the relevant documentation and that it was woefully lacking in that respect. More can be done to provide users with information: I turn to this further below.

b) "False and misleading information about FSCS cover"

93. This was Part two of your complaint to the FCA and it is also covered under Element one by me because it is a complaint about the information provided on the Register, therefore intrinsically linked to the previous points about the information or lack thereof displayed on the Register.

94. You allege that the following sentence, which was displayed on the Register entry for PFX, stating "*It cannot be determined if FSCS cover would apply to this firm. Please contact the firm directly to understand whether their products/services would be covered by FSCS"* was "*materially false and misleading because the FCA knew that payment services providers [such as PFX] are not covered by the FSCS scheme."*

95. The FCA's Decision Letter to you explains that *"There are many factors that need to be considered before deciding whether a service or product is covered by any of the schemes under FSMA. For some firms, it is easier to discern whether or not their activities would be covered.*

96. *If a firm's permission indicates that the majority of its activities would be covered by a scheme, the Register uses terminology such as 'may be' covered by the schemes. This is because there may be certain exclusions and exemptions unique to a particular product or service that the firm provides…"*. However, you pointed out to me, and it was emphasised by the FCA, that this firm was only authorised to carry out **one** regulated activity.

97. Again, I disagree with the FCA's conclusion that "*In the circumstances, I consider that the entry in place on the Register at the time was accurate"*. It was known to the FCA that this firm only had permission to carry out one regulated activity, for which there was no FSCS cover available. The assertion that it was not possible to determine if protections were available to the clients of the firm are simply not correct.

98. The FCA itself had clearly conceded that it was **possible** to determine exactly what protections were offered by the firm because it goes on to state *"In May 2022, further to consumer feedback on our Register and engagement with the Complaints Commissioner regarding our regulation of London Capital & Finance (LCF),* ***we made changes to the Register to make certain things clearer*** *[my emphasis]. This included our warning messages on firms' Register entries regarding FSCS cover.*

99. *Following this work,* ***this now means that for some firms, including Premier FX, our message on FSCS protection reads 'The Financial Services Compensation Scheme will not be able to consider a claim against this firm if it fails*** *[my emphasis]****'.***

100. The FCA was able to and did eventually make the entry about FSCS cover clear and unambiguous on the FS Register, both for PFX and other firms.

101. There is a further assertion by the FCA in response to these complaint points, which is, on its face, correct, but which considering the facts of this complaint trouble me. This is because it appears to have been used to lay blame and responsibility at the feet of members of the Committee and shift the blame entirely onto PFX, therefore undermining your complaint about the FCA, when in fact this point supports your complaint on the whole.

102. This assertion is that *"It is a consumer's responsibility to conduct their own due diligence on a firm prior to deciding to use them for financial services."* The other assertion states: "***I also note it was Premier FX, not the FCA, that informed customers that it was covered by the FSCS"*** *[my emphasis]*.

103. However, you were not advancing an argument that consumers had no duty and / or responsibility to do their own due diligence. Your argument is that you

ended up losing some money **despite** carrying out your own due diligence and following the FCA's instructions.

104. You say that members of the Committee checked the FCA's Register. The firm was legitimate. The Register also stated that in order to verify whether FSCS cover was available to the customers of this firm, the firm should be contacted directly. Consumers had also done this, and *"On contacting PFX, clients were informed that PFX were covered by FSCS as stated on the PFX marketing documentation."*

105. I agree with your argument that: consumers state they followed all the steps they were advised to take by checking the Register and contacting the firm, but this was not enough. I will turn to this point below.

106. In summary, the facts of the case seem to me to be that:

    a. It would have been helpful if the FCA had disclosed on the Register prior to 2018 that money remittance firms were not covered by FSCS, although this was not a statutory or legal requirement on the part of the FCA.

    b. On the other hand, what is a legal requirement is that the register exists and this is held out as a reliable tool for consumers to use when deciding which financial services firms to use, but the register was fairly neglected during the period in question, and it did not have a high priority or profile within the FCA. As Andrew Bailey said to the Treasury Select Committee on 29 January 2019 'things have come out of the woodwork which were not good'. It is reasonable to expect the FCA to keep the Register in a way situations where 'things have come out of the woodwork which were not good' do not happen at the very least.

    c. In this specific case as in other cases, the FCA Register advised consumers to seek their own verification from the firm as to whether it was covered by FSCS. This is the Register messaging for many firms to this day.

    d. Whilst this messaging was not misleading per se, it advises a general process which has embedded potential for wrongdoing by firms, or fraud, and this wrongdoing / fraud happened to crystallise with respect to PFX. This is because the FCA and the consumers have no way of knowing

whether the firm they have been sent to query is being genuine, or even if it is, has correctly interpreted the true position. So, not only is the information supplied by the firm not subject to a reliable check, but consumers are not told that any information the firm provides may not be reliable either: the Register makes it seem that if the consumers were to ask the firm a question, and it provided an answer, that would be a sufficient measure to ensure accuracy about FSCS cover. It is not.

107. In summary, my view is that the Register was not misleading about the information it provided about the firm: so, I do not uphold that narrow point of complaint. The Register was however, inadequate and potentially unfit for purpose. The FCA needs to address the embedded potential for wrongdoing or fraud in referring consumers to firms, and it needs to clarify its messaging so consumers are told that a firm may not always be providing accurate information.

108. There is a debate to be had about the FCA's contributory role to consumer detriment (which I think is high) if the FCA's process which you were advised to follow (e.g. check the Register, contact the firm to ask it if it had FSCS cover) has embedded potential for fraud, which crystallises as has happened in your case.

109. This points to a systemic issue which should be addressed for the benefit of all consumers using the Register going forward, which is why in addition to the improvements already made to the Register, I also make the following **recommendations:**

    a. The terms defined in the FCA Handbook's Glossary should be hyperlinked to the relevant entries of the Register.

       It is accepted that consumers need to do their own due diligence. There are additional tools the FCA can make available to them to aid in this process, as a lot of the relevant information is already available on its pages aimed at firms.

       If this is challenging to achieve in a timely manner for operational reasons, at the very least additions should be made to the Consumer pages of the FCA's website, informing consumers about the existence of the Glossary,

of the need to understand what each term used on the Register actually means and hyperlinking the same to these pages.

b. The FCA has not accepted this recommendation. It says that 'the current volume of information displayed on the Register, coupled with the technicality of legal language, is already perceived as overwhelming by consumers. The definitions found in the Handbook Glossary are often technical and legalistic, potentially exacerbating the challenge of consumer comprehension….Introducing hyperlinks to an external site, such as the Handbook Glossary, raises concerns about potential disruptions to the user journey within the Register.

c. The aim of providing a simple and user-friendly experience for consumers is paramount, and the introduction of external links could adversely impact consumer satisfaction, potentially leading to them abandoning their Register search, which, of course, is the opposite aim of what we are trying to achieve.'

d. The FCA expresses willingness to engage with the Commissioner on the issues above, however, whilst it has provided arguments about why the Handbook should not be linked to the Register, The FCA has not provided a satisfactory way forward to assist consumers in understanding the definition of some of the services firms are authorised to undertake, which are not easy to understand for the layperson.

e. My concern on this point remains, and I recommend the FCA engage with the Commissioner on a satisfactory resolution of this, by explaining what alternative options for consumer protection it can offer if it will not accept my recommendation. It is my intention to report on the outcome of this in the Commissioner's annual report.

f. Additionally, instead of saying *"If the firm is authorised but you're not sure what protections you have, ask the firm using the details on the FS Register."*, I recommend this is changed to advise consumers to contact the FSCS (and/or the FOS) directly to verify the cover available to them.

g. The FCA has said that it considers that it has already met this recommendation as a result of the changes made to the Register over

recent years. It says that the ‘current consumer protection wording seeks to achieve a balance between a firm’s responsibility of informing consumers of the activity they are carrying out and if they consider this to be covered by the Financial Ombudsman or the FSCS, signposting consumers to the FSCS or the Financial Ombudsman for further information and making consumers aware that these organisations are the final decision makers about whether the cover they provide applies’

h. Regarding the Financial Services Register webpage: ‘We note that under the heading ‘how to check a firm is authorised’ it says at step 4 ‘If the firm is authorised but you’re not sure what protections you have, ask the firm using the details on the FS Register. If you’re struggling to check the FS Register, find out how to contact us’ which matches the language used in your recommendation’.

110. I disagree with the FCA’s assertions on both points above. The current wording on the Register ‘signposts consumers to the FSCS or the Financial Ombudsman for further information’ but only for information about what types of complaints they will consider generally: ‘There’s more information on the Financial Ombudsman Service’s website and the FSCS’s website about the kind of complaints and claims they can help with. The final decision on whether or not they will consider any complaint or claim is for the Financial Ombudsman Service or the FSCS’. My recommendation is very clearly about whether the FSCS and FOS protections apply to a given firm rather than the types of complaints these organisation look at. I reiterate my original recommendation and ask the FCA to accept it.

111. The Financial Services web page: again, the wording here is about contacting the FCA if one is ‘struggling to read the FCA Register’. This is clearly not what I recommended. I recommended that complainants should be directed to the FOS and the FSCS to determine if the firm has their protections. I reiterate my original recommendation and ask the FCA to accept it.

112. The PFX case has provided the perfect demonstration of the need for independent third-party verification of the types of cover available to consumers,

because whilst all authorised and regulated firms are expected to be compliant and honest, they are not.

113. The Committee has queried why the complaint about the Register is not upheld when I have disagreed with the FCA's conclusion about what information could have been available on the Register in 2018 and have stated the Register was inadequate. In addressing this query, I want to emphasise that I disagree with what the FCA Complaints Team are saying *now* (my emphasis) in the Decision Letter to you about what was or was not possible to determine about PFX in 2018. Whilst I do not agree with the FCA that it was not possible to determine if PFX had cover and state it in the Register in 2018, this does not mean, that your complaint that the Register was misleading or directly led to your losses is upheld, for the reasons I give above.

Element two – the FCA's authorisation and supervision of PFX

114. The FCA has accepted that it failed to appropriately regulate and supervise the firm, which then ultimately collapsed, and this caused its clients, many of whom are members of the Committee, financial loss, hardship and lost opportunities over several years. Whilst the primary cause of the losses were the actions of PFX, the FCA accepted its failures in relation to this firm and apologised *"unreservedly for the distress, and inconvenience, that our actions, and inactions, caused".*

115. As Part three and Part five of your complaint were upheld with a detailed enough explanation and an apology, setting out the recognition of the impact on complainants, and because, just like the FCA I am also bound by s348 of the Financial Services and Markets Act 2000, I cannot and do not need to analyse these points in detail. I agree the FCA was right to uphold these complaint points and I also uphold them. I attach as an appendix the FCA's response on this complaint point which also highlights the concerns you brought to the FCA. You have said that simply acknowledging the FCA's failure's is not good enough and you have expressed a wish to go over these failures in greater detail, and you have provided further commentary about why the failures are unacceptable.

116. It is not in dispute that there were failures. I appreciate that the Committee has done a great amount of work to understand and raise issues with the FCA and

others, as well as to represent those who lost access to their funds held by PFX and liaised with the FCA over a number of years on this matter. I also recognise that there are many issues which you would like to discuss. However, I do not need to review each and every detail or piece of information in order to come to a conclusion. In this case both the FCA and I uphold the complaint element, and I have recommended a remedy.

117. It is disappointing however, that the FCA did not provide you with an update on its initiatives after these events in 2018 to explain how it is strengthening its internal processes. This would no doubt have offered you some reassurance that the FCA is taking steps to address the shortcomings that occurred in this case in terms of authorisation and supervision processes, which was not directly conveyed to you in its Decision Letter. I **recommend** the FCA writes to you separately and copies me in with a brief note to explain what steps have been taken as a result of this case to strengthen these processes.

Element three – False and unlawful marketing

118. It is your contention that the FCA *"failed to identify that PFX's online documents contained materially false information relating to FSCS cover, Escrow and Forward Exchange accounts."*

119. You make the point that *"had the FCA undertaken any form of due diligence it would or should have included reviewing company information available on the web or other advertising media. The firm advertised its false and unlawful representations on its website in plain sight in a one page document entitled "Regulation and Client Security."*

120. The FCA's response to this complaint point provided the following background information, which confirmed that there were rules that applied to the marketing practices of money remittance firms. These include *"unfair contract terms legislation (the Unfair Terms in Consumer Contracts Regulations 1999 and, for contracts entered into since 1 October 2015, the Consumer Rights Act 2015) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). These require firms to use fair and clear terms in contracts and must avoid engaging in unfair commercial practices such as giving customers misleading information or marketing in a misleading way. The Payment Services Directive*

(PSD2) recitals indicate that consumer protections against misleading communications in the payments sector should be achieved via the CPRs."

121. *The FCA enforces the CPRs as a 'designated enforcer' via Part 8 of the Enterprise Act 2002. The FCA enforces unfair terms legislation as a regulator under the Consumer Rights Act 2015 (the CRA), and a qualifying body under the Unfair Terms in Consumer Contracts Regulations 1999."*

122. This complaint point was not upheld by the FCA because it concluded that *"FCA was in possession of* ***very limited adverse information regarding Premier FX's marketing materials*** *[my emphasis]. Of the material the FCA was in possession of, which was one report some time before Premier FX's insolvency, I can confirm this was shared with the relevant part of the FCA for them to consider."*

123. You assert that *"The FCA had received adverse information regarding PFX's unlawful financial irregularities in Portugal and their misleading and unlawful claims in their website marketing material whilst PFX were supervised on a 'reactive basis'.*

124. Whilst the concerns raised in relation to marketing materials may have been limited, the information received about the firm across different areas within the FCA suggested wider issues within the firm, and had there been a more holistic approach to regulation, the point is that the FCA could have, and should have, reached that awareness sooner that there were concerns which if acted upon, may have led to potentially better outcomes for consumers.

125. There is a danger of narrowing complaint points in a way which may seem to make each one individually not upheld, but which, taken as a whole paint a picture of missed opportunities by the FCA to act sooner, a lack of holistic approach to regulation, inadequate sharing of intelligence within the organisation and delayed regulatory action, leaving consumers exposed, as has happened in this case.

126. For these reasons, although I do not uphold this element of your complaint in its narrow form, there is a broader question about the FCA's overall authorisation and supervision of PFX, which in my view highlight supervisory failings on the part of the regulator.

Element four – failure by the FCA to appropriately supervise Barclays

127. The FCA reiterated the point in its Decision Letter that "*Barclays Bank Plc (Barclays) is a large British bank that offers retail, corporate and investment banking services, amongst other services… I have considered what actions the dedicated Barclays supervision team took during the relevant period that Premier FX was first authorised to the firm being placed into administration (2011 – 2018). My investigation focused specifically on the actions Supervision took regarding anti money laundering (AML) since these were the failings identified in the FCA's Final Notice.*"

128. This narrowed the investigation down to very specific areas of the FCA's supervisory work and I have not seen evidence that you objected to focusing your complaint in this way.

129. I have reviewed the relevant files, including confidential materials, about the work undertaken by the FCA and considered your allegation that "*the FCA's supervision of the bank's expediency in managing its API business clients appears based primarily on the fact that the FCA had established and issued the necessary Rules and Guidance for Barclays to follow without any checks that the bank was adhering to them.***"**

130. In light of the evidence I have seen, on the narrow point as investigated by the FCA, I accept its conclusion that "*the FCA proactively supervised Barclays in respect of its AML regulatory obligations*" and I agree with the decision not to uphold this complaint point.

131. You have expressed concerns around the FCA's reliance on confidentiality restrictions for not being able to share details with you about the exact nature of the work undertaken by supervision, but section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) does class 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.

132. 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. This can be frustrating for complainants, but it is better that I am able to see the confidential material. On occasions, I have persuaded the FCA to release further confidential information to help complainants understand what has happened, but this is not always possible. I shall continue to pursue this matter with the FCA.

Element five – failure by the FCA to *"seek the prosecution of their authorised firm's directors…or the Barclays Bank senior officer"*

133. This complaint point was not specifically addressed by the FCA. Under the Complaints Scheme to which both the regulators and I operate to, it is preferrable for the FCA to undertake its own review in the first instance, as that is usually the best way to resolve matters. However, in this instance, I am exercising my discretion to review this element of complaint without recourse to the FCA first. I appreciate the strong emotions and disappointment in not seeing someone be prosecuted following what was clearly significant failures by two firms, which has led you *"to conclude that there is very little purpose or point to the FCA as they currently interpret their role."*

134. However, the FCA has a range of powers available to it, including supervisory action, issuing fines and prosecuting individuals when it deems appropriate.

135. From the evidence I have seen, I do not think the actions taken by the FCA in relation to PFX and Barclays following the collapse of PFX and the exposure of the failures of the firm were unreasonable, even if they did not amount to prosecution, which would have been an action you would have preferred to see. For these reasons, I do not uphold this element of your complaint. Like the FCA, I am bound by confidentiality restrictions and I am limited in detail I can provide on this matter.

Element six – request for ex gratia compensation for consequential losses at 8% compounded interest

136. You believe Committee members who did not have access to their funds for three years and eight months, should be awarded compensation for consequential losses on top of the capital losses as whilst these were eventually repaid in full, you all experienced severe harm in the significant period of time you did not have access to your funds. This harm included, but is not limited to, loss of property purchases, having to live in a caravan with no funds available for other arrangements, having to claim benefits and therefore a devastating impact on retirement and relocation plans, general distress and inconvenience, all which was caused in large by the admitted failures of the FCA. Some consumers passed away without ever knowing if their money was recovered.

137. Furthermore, you argue that not only did you lose interest you would have earned on the capital amounts, the FCA had not taken appropriate note of the fact that it took years of dedicated work by the Committee to try to understand what happened with this firm and all the relevant rules to enable you to fight for compensation for your losses, as well as time put in to raise the matter with your MPs and the ongoing distress and inconvenience the situation as a whole had caused.

138. The FCA accepted there had been errors in its regulation of PFX but declined to offer ex gratia payment to cover consequential losses and/or ex gratia payment for distress and inconvenience (DNI) based on the following arguments:

    a. Customer funds were lost through the actions of PFX;

    b. Through the actions of the FCA's enforcement division, customers of PFX with accepted claims at the Liquidator, have been repaid 100% of their money;

    c. The FCA has to consider the impact of any ex gratia payments on firms and issuers of listed securities and indirectly on consumers.

139. I accept the FCA's points above, however, I think there are additional points which need to be made before I set out my conclusion:

a. Whilst customer funds were lost due to the actions of PFX, due to issues connected with the Register, and the serious failings of the FCA's oversight of PFX in my view were a significant contributory factor to the events that unfolded and therefore the detriment suffered by consumers.

b. Although consumers were repaid their money some three years and eight months after the events unfolded, during this period they claim they have suffered due to distress and inconvenience and consequential loss as described above. In considering what, if any compensatory remedy should be recommended, all relevant factors need to be taken into account and it is lawful for me to have regard to whether the FCA was a significant contributory factor of losses suffered by the complainants. The weight to be placed on this factor is a matter for me, the Commissioner.

c. Although the impact of ex gratia awards on firms and issuers of securities and thus indirectly consumers have to be considered, there is no sense in which the burden on firms and indirectly on consumers, is a "trump card" in deciding whether compensation should be recommended. Given that there are 33 complaints it is not the case that this burden would be disproportionate.

140. Although consumers were ultimately repaid their money, there was clearly a period of three years and eight months during which they suffered distress and inconvenience as well as consequential loss.

141. The question I have to decide is whether the FCA ought to be asked to offer an ex gratia payment to the complainants and if yes, what should it be.

142. I am mindful that investors should perform their own due diligence in dealing with firms and they have to accept that the FCA does not operate a zero failure regime. Having said that, the circumstances of this case are that the FCA Register was sufficiently inadequate to render the due diligence undertaken by consumers insufficient and enable to firm to mislead them, and its oversight of PFX had supervisory failings which were a major contributing factor to the detriment suffered by consumers. But for these failings and inadequacies, it is possible that consumer detriment may have been less.

143. Whilst the FCA Enforcement department's action led to complainants receiving their money back eventually from Barclays in addition to the liquidators, this was due to the FCA's regulatory intervention with Barclays.

144. Whilst the bank voluntarily agreed to repay PFX customers, the FCA must nevertheless be held to the same high standards it applies to the firms it regulates, and it must take responsibility for the role it played in these events, that is the failure to appropriately authorise and supervise PFX and the issues around the Register, with a recognition of the impact of this on innocent consumers who followed all the FCA advice available to them at the time but still fell victim to these financial crimes and suffered grave consequences.

145. I am also mindful that the FCA has a legal immunity from liability to pay damages (compensation) unless it is found that the FCA has acted in bad faith or has breached a complainant's human rights (for the sake of completeness, I have not found that the FCA has acted in bad faith).

146. Nevertheless, the Complaints Scheme does include provision to make ex-gratia payments as a remedy for a complaint. There is no requirement in the Financial Services Act 2012 or the Complaints Scheme wording for the losses to have been "*caused solely or primarily by the actions or inaction of the FCA*". Therefore, this provision set out in the FCA's Remedies Statement should not be applied so as to fetter the powers of the Commissioner or the FCA under the Scheme.

147. This position is accepted by the FCA, as confirmed in para.13 of the FCA's response[11] to my Report into its oversight of London Capital & Finance Plc (LCF) (15 February 2022)[12]:

148. "*We want to make clear that we agree we should assess* ***complaints in accordance with paragraph 7.14 of the Complaints Scheme. Where we are not the 'sole or primary cause' of the complainant's loss, this does not […] act as a block to the award of compensation where we consider compensation would be appropriate*** *[my emphasis]. In the case of LCF*

[11] The FCA's response to the Complaints Commissioner's Report into our oversight of LCF - 15 March 2022
[12] The-Complaints-Commissioner-Final-Report-LCF-15.02.2022.pdf (frccommissioner.org.uk)

bondholders, we have concluded that it is appropriate (in light of the paragraph 7.14 factors) to make ex gratia payments in cases where we gave investors incorrect information in direct communications which may have led them to believe that their investment would be safer than it was (incorrect information cases), even where the FCA was not the sole or primary cause of that loss."

149. The FCA's response, at p.17[13] to my Annual Report 2021/2022 (July 2022)[14], at p.17:

"*We agree with the Commissioner that in deciding what remedy is appropriate we should assess complaints in accordance with paragraph 7.14 of the Scheme. However, we do not agree that our approach to compensation introduces a self-devised 'test' for compensation where payments will never be available to complainants. As we stated in our response to the Commissioner, the Remedies Statement clarifies our general approach from which the FCA remains willing to depart (and has in the past departed) where justified and appropriate.*"

150. In this particular case, considering all the circumstances in the round, on the balance of probabilities I find it is reasonable that the FCA make an ex gratia payment award to the complainants in recognition of its significant failures to act, for which it has apologised unreservedly, which played a contributory role to the detriment of the complainants which culminated in loss of access to their funds for a period of over three and a half years. I have found, and the FCA accepted, numerous failures by it. These failures include failure to undertake appropriate checks before deciding to reauthorise PFX, inadequate supervision of PFX and the failure to display clear information on the Register at the relevant time, as well as the significant and prolonged negative impact on the members of the Committee which did not just include the loss of access to their funds, but the uncertainty, the effect of these events on their quality of life and the distress and inconvenience they have had to cope with. An ex gratia payment award by the FCA for its own failures with respect to PFX is appropriate.

[13] The Financial Conduct Authority's response to the Complaints Commissioner's Annual Report 2021/2022 (fca.org.uk)
[14] OCC-Annual-Report-2020-2021.pdf (frccommissioner.org.uk)

151. When deciding what recommendations to make, and how to determine the amount of compensation due, I must take into account a number of factors, as set out in the Complaints Scheme, established under Part 6 of the Financial Services Act 2012.

152. The FCA states in its response to my LCF report: "*As the Commissioner notes, the Complaints Scheme is not designed to deal with complex questions of causation although how far we could be said to have caused a complainant's loss is clearly relevant in how we apply the factors in paragraph 7.14 of the Complaints Scheme. However, as we explained above, the question of whether the FCA is the 'sole or primary cause' of loss is not intended to be, and does not in fact operate as, a barrier to awarding compensation where we consider that it would be appropriate under the paragraph 7.14 factors."*

153. It is clear that neither I, nor the FCA is bound to decide causation issues or calculate loss as a court would do. *Section 87(5) of the 2012 Act* requires that I must have power to make a recommendation *"if the investigator thinks it appropriate".* This is a broad discretion given to me. The reference in s.87(5)(a) to *"a compensatory payment to the complainant"* is in wide terms. There is nothing in Part 6 of the 2012 Act which specifies what compensatory payment may be recommended or how it should be calculated.

154. Similarly, nothing in the Scheme places limits on my discretion as regards the amount of compensation recommended or how it is calculated. Para.7.5 is the key provision, which specifies certain matters to which I must have regard in making my decision but is not exhaustive and does not set boundaries as to what I may decide (provided always of course that I act fairly and rationally). Para.7.6 refers very broadly to me being able to recommend a remedy "if appropriate", again implying a wide discretion.

155. However, the Scheme does provide (at para.7.1) that:

"*The Complaints Commissioner must at all times act independently of the regulators; they may conduct an investigation in whatever manner they think appropriate including obtaining, at the regulators' expense, such external resources as may be reasonable.* ***In considering what is appropriate, the Complaints Commissioner will take into account the need to ensure that***

complaints are dealt with fairly, quickly and cost effectively *[my emphasis].*"

156. As previously set out, the Scheme and the legislation does not require me to determine causation and loss in the same way a court would.

157. Additionally, if there are two or more options for determining a compensation award, it is most reasonable and practicable to select the one which is fair but quick and cost effective.

158. The FCA failed to appropriately supervise and re-authorise PFX. The firm acted in breach of their permissions and of the rules. As a result of these two elements (and failures on the part of Barclays), consumers lost access to their money for three years and eight months. Some died without knowing whether their losses had ever been recovered. As such, I **recommend** that the FCA pays **4% simple interest in total (not per year)** on the capital recovered from the Liquidator and Barclays per complaint (of which there are 33) in the attached schedule. This is subject to the money lost and recovered having been paid to PFX after 25 February 2011[15] .

159. I am aware that some Ombudsman schemes and some court decisions apply a redress figure of 8% (either simple interest per year or compounded interest) for consequential loss, which is why you have asked for this. I am mindful as set out above, the FCA, whilst a significant factor, was not the only party at fault in you losing access to your funds. It is for this reason that I recommend the FCA pay 4% simple interest in total (not per year) as ex gratia payment to you for its role in the distress and inconvenience, consequential loss and detriment you have suffered.

160. The FCA has not accepted my recommendation that any ex gratia compensation is appropriate apart from the amount offered for the delay in its complaints handling. It accepts the Register could have been more helpful, and that there were errors in re-authorising PFX in 2018.

161. It has offered the following additional rationale in appendix 2 which I summarise below, and which represents sufficiently new arguments such that they were not

[15] The date on which PFX was first authorised as a payment institution and given permissions to provide the payment service of money remittance by the Financial Services Authority.

presented to the complainants in the FCA Decision Letter, and which I summarise below:

a. Although there were errors by the FCA in reauthorising the firm in 2018, the FCA believes the firm would likely have fraudulently dissipated assets by this time and therefore even if the FCA had acted sooner, (the earliest being 2017 when it started receiving reports the firm was acting outside its permissions) the losses would have crystallised sooner but likely would not have been prevented. In addition, even if the FCA had acted sooner, the Enforcement investigation would still likely have taken a similar amount of time (i.e. 3 years and eight months) during which time the complainants would have suffered the distress of not having access to their capital.

b. 42% of complainants party to this complaint, had claims accepted by PFX's Liquidator in excess of the FSCS limit of £85,000 for deposits.

162. The FCA accepts that 'Nevertheless, we accept that we could have intervened sooner and in not doing so we may have contributed to the distress and inconvenience for some complainants who subsequently 'deposited' money.' The FCA does not propose, however, to try and identify who these complainants are and to offer any additional ex gratia compensation to them.

163. The FCA further makes the points that:

a. it does not consider that consumer interaction with the Register constitutes 'direct dealings' with the FCA;

b. and that if it were to accept any recommendation for ex gratia compensation on the basis I have proposed (in addition to which it queries my methodology) that it would have to offer the same opportunity to all customers of PFX not just the Committee members, which would significantly increase the ex gratia payment; and

c. such payments in any event would 'also call into question the legislative framework, which sets out that the FSCS, not the FCA, provides protection in certain circumstances for customers of financial services firms that have failed'.

164. I disagree with (b) and (c) above. In my view it is not possible to take the binary approach as in (b) as to what constitutes ‘direct dealings’ as defined by the Complaints Scheme. I do not agree that recommending an ex gratia payment for the FCA failings in re-authorising and supervising PFX calls into question the legislative framework. I also note that it has not been investigated when the amounts were transferred to PFX or dissipated by PFX so it cannot be determined with accuracy that these amounts would have been ‘gone’ by the time the FCA became aware of issues in 2017. This is mere speculation on the part of the FCA.

165. I note the FCA has introduced arguments which amount to a disagreement about the eligibility of some, but seemingly not all of the customers of PFX to be awarded a further ex gratia payment to that for complaint handling delays, as well as the methodology and quantum I propose. The FCA acknowledges that if it may have ‘intervened sooner and in not doing so we may have contributed to the distress and inconvenience for some complainants who subsequently ‘deposited’ money.’ So clearly there are some complainants it agrees could be eligible for a further ex gratia payment. The FCA also appears to query whether an ex gratia payment should be calculated on amounts deposited/invested over the FSCS limit. There may be a debate to be had about this, however, the FCA is not offering further discussion to determine eligibility, methodology and quantum. It has rejected my recommendation outright.

166. I am conscious that the complainants will not have had a chance to comment on the new perspective which the FCA offers above, and it may very well be that it would have had its own arguments to put forward in response.

167. I am also conscious that I do not have the power to direct that the FCA accept my recommendations, and that it has declined to offer an ex gratia payment for its supervisory failings twice now: first in its Decision Letter to the Committee, and second in response to my preliminary report. The reasons it provides evolve, but disappointingly, the FCA has not accepted that it ought to make an ex gratia payment for its supervisory failings, even if according to different criteria than the ones I propose.

168. I stated in my 2021/2 annual report that ‘More generally, I have noted that de facto, compensatory payments on an ex gratia basis due to supervisory or regulatory failings on the part of the FCA (and possibly the other Regulators) will never be available to complainants despite the FCA saying there are exceptional circumstances where it might be’, and I am afraid this case has proved to be no exception. If this is not precisely the case, where the FCA concedes it should make a de facto compensatory payment, for its supervisory or regulatory failures, then it is difficult to envisage a case when it will in fact ever do so.

169. Nevertheless, I reiterate my recommendation that it is appropriate for the FCA to pay an ex gratia payment to complainants, however, if the FCA does not accept my recommendation, as the Commissioner I can do no more for complainants under the Scheme.

170. The Committee also does not accept my recommendation as it feels that 8% remains more appropriate for the reasons it gives in appendix 3.

My decision

171. I note that the Committee feels that my report is thorough but ‘is leaning heavily towards making excuses for negligence and failures’ - in part due to the fact I have cited s348 of FSMA 2000 for not being able to disclose detailed information, that I have not upheld some of your complaints and the fact I have recommended that the FCA pay an ex gratia 4% and not 8% ex gratia compensation (which the FCA has not accepted). I appreciate that members of the Committee have suffered, however, whilst I have found that the FCA could and should have had better oversight of PFX, I have not found, as you claim that ‘the evidence that this theft and racketeering could have been easily prevented if statutory regulation and enforcement was done’ is made out. In essence, you are alleging the that your losses could and should have been prevented by the FCA. Unfortunately, that is not a finding I have made in this report. This is because I am not able to say what would have happened had the FCA acted differently, given the complexities of this case.

172. Element One: I do not uphold Element One, however, I find the Register has serious shortcomings and I have made two recommendations above. The FCA

has not accepted one recommendation and has misinterpreted the other. My recommendations are:

a. My concern on this point remains (i.e. that the terms defined in the FCA Handbook's Glossary should be made accessible to users of the Register, especially if the FCA expects consumers to have looked at it as part of their due diligence of a firm) , and I recommend the FCA engage with the Commissioner on a satisfactory resolution of this, by explaining what alternative options for consumer protection it can offer if it will not accept my recommendation. It is my intention to report on the outcome of this in the Annual Report 2022/3.

b. Additionally, instead of providing this information on the Register: "If the firm is authorised but you're not sure what protections you have, ask the firm using the details on the FS Register", I recommend the FCA advises consumers to contact the FSCS (and/or the FOS) directly to verify the cover available to them.

173. Element Two: *the FCA's authorisation and supervision of PFX*: I agree with the FCA to uphold complaints in relation to this matter, I make a finding that there has been supervisory failure on the part of the FCA with respect to PFX, and I also uphold the complaint. I welcome the fact that the FCA has offered an apology, however, I consider this inadequate and I recommend a further remedy under Element Six. It is disappointing however, that the FCA did not provide you with an update on its initiatives after these events in 2018 to explain how it is strengthening its internal processes. This would no doubt have offered you some reassurance that the FCA is taking steps to address the shortcomings that occurred in this case in terms of authorisation and supervision processes, which was not directly conveyed to you in its Decision Letter. I recommend the FCA writes to you separately and copies me in with a brief note to explain what steps have been taken as a result of this case to strengthen these processes also recommend that the FCA writes to you separately and copies me in with a brief note to explain what steps have been taken as a result of this case to strengthen these processes.

174. Element Three: *False and unlawful marketing*: I do not uphold this element in the very narrow form it is made. However, there is a broad issue of the FCA's overall regulation of PFX, and the fact that it did not have a 'holistic' approach to regulation of the firm, which led to missed opportunities to connect numerous alerts and intelligence which pointed to concerns about the firm.

175. Element Four: *Failure by the FCA to appropriately supervise Barclays*: I do not uphold this element in the very narrow form it is made.

176. Element Five: *Failure by the FCA to "seek the prosecution of their authorised firm's directors…or the Barclays Bank senior officer*. I do not uphold this complaint.

177. Element Six: *Request for ex gratia compensation for consequential losses at 8% compounded interest*. I do not agree with the FCA not to award ex gratia compensatory payment and I recommend it does so applying the formula I have described above.

178. Further recommendation: I offer £100 ex gratia payment for the delay in reviewing the complaint per complaint (of which there are 33). Although this delay was due to my continued work to develop thinking on ex gratia payments and liaison with the FCA, I recognise the trouble and upset this will have caused complainants who have waited patiently through the time it has taken.

Amerdeep Somal
Complaints Commissioner
14 December 2023

Appendix 1

From FCA Decision Letter dated 18 August 2022

Part Three – upheld

You allege that the FCA failed to conduct a robust re-authorisation process of Premier FX in 2018. You provide a quote attributed to Andrew Bailey and [employee x] that said that payment institutions were asked only one question as part of their re-authorisations, and that was “Has anything changed?.” You quote an extract from the PSR’s to demonstrate that this was an inadequate re-authorisation process. You allege that the FCA failed to ensure that Premier FX had insurance, had capital assets protection, and properly segregated client money in separate accounts. You say that the re-authorisation of Premier FX in May 2018 should not have happened because the FCA was in possession of adverse information relating to Premier FX, including that they had been subject to fines imposed by the Portuguese authorities. You allege that the FCA was also told of concerns relating to Premier FX prior to re-authorisation, by a customer, an employee, and other FX firms operating in Portugal. You also allege that staff at Premier FX had no formal financial services qualifications, contrary to the PSR’s 2017.

Context

The payment services regulatory regime originates from European Community law: the Payment Services Directive (PSD) and then latterly the Payment Services Directive 2 (PSD2). The aim of PSD was to foster a single market in retail payment services across the European Economic Area (EEA) by:

• removing barriers to entry and ensuring fair market access to enhance competition in payment services; and

• establishing the same set of rules across the EEA on information requirements and other rights and obligations that will be applicable to many payment services transactions in the EEA.

The PSRs 2009, and parts of the FCA’s Handbook, implemented the PSD and the PSRs 2017, again with parts of the FCA’s Handbook, implemented the PSD2 in the UK.

The Payment Services Regulations (PSRs) 2017 and Electronic Money Regulations (EMRs) were amended and supplemented by statutory instruments made under the European Union (Withdrawal) Act 2018, including the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (the Exit SI), ensuring that they continue to operate effectively in the UK following the UK’s withdrawal from the EU.

The PSRs 2017 govern the authorisation and associated requirements for authorised or registered payment institutions (PIs). They also set the conduct of business rules for providing payment services. Most payment service providers (PSPs) are required to be either authorised or registered by us under the PSRs 2017 and to comply with certain rules about providing payment services, including specific requirements for payment transactions.

The PSRs set out, amongst other things:

• the payment services in scope of the PSRs and a list of exclusions

• the persons that must be authorised or registered under the PSRs when they provide payment services

• standards that must be met by PIs for authorisation or registration to be granted

• capital requirements and safeguarding requirements

• conduct of business requirements applicable to payment services

• the FCA's powers and functions in relation to supervision and enforcement in this area.

Your complaint allegation

In January 2018, the FCA received Premier FX's application for reauthorisation under the PSRs 2017. The application was submitted together with the accompanying fee, seeking re-authorisation as a money remitter.

Premier FX was authorised by the FCA as an authorised payment institution under the PSRs 2017 with effect from 23 May 2018.

In order to investigate your allegation, I have:

• reviewed the internal records that we hold relating to the reauthorisation of Premier FX in 2018;

• considered the actions that we took, and did not take, in the context of the legislation and our internal policies and procedures, including those relating to the re-authorisation which were consulted upon (see details below);

• liaised with the area of the FCA that holds expertise in relation to authorisations under the PSRs; and

• investigated a number of internal records regarding information that the FCA held regarding Premier FX, prior to its reauthorisation.

This has been an important part of the investigation of this allegation because it frames whether our actions, and inactions, were reasonable in the context of the information that the FCA held at the material time regarding Premier FX.

Firstly, I should highlight that the process which would be followed by the FCA when reauthorising firms under PSD2 was consulted on in two consultation papers (CP17/11 and CP17/22) and was formalised in the PS17/19 policy statement. In the

FCA's policy statement, the FCA made it clear that firms did not need to resubmit information which they had previously supplied to us but that they would need to submit the additional information required to meet the new conditions for authorisation under the PSRs 2017.2 However, where the FCA held concerns about a firm during reauthorisation under the PSRs, it was expected these would be assessed.

Whilst I am not able to share the precise nature of the concerns that the FCA held about Premier FX, owing to confidentiality obligations imposed under s348 in relation to the information we receive about firms and individuals, as well as our own confidentiality policies (please see opening section of this letter), I am able to confirm that the FCA was in possession of a number of concerns regarding Premier FX at the time of the firm's reauthorisation in 2018. These concerns, when taken together, should have caused the FCA to further investigate and consider closely whether Premier FX should be reauthorised under the PSRs 2017.

I have seen evidence that the Authorisations Division, when assessing Premier FX's application, did take some steps to probe the information provided and statements made by the firm. However, when taken together with all of the concerns held by the FCA (not just the Authorisations Division) at the time that Premier FX were granted reauthorisation, it is my view that the FCA did not go far enough to explore the concerns that were held.

Therefore, I am of the view that, because we did not adequately resolve the concerns that we held, it was not reasonable of the FCA to have granted reauthorisation on 23 May 2018.

To be clear and for the avoidance of doubt, I am not able to say what would have happened had the FCA explored the concerns in further detail. However, I do consider that it would have been reasonable to have explored the concerns in greater detail than we did prior to reauthorisation, and for this reason it is my finding that this allegation should be upheld.

On behalf of the FCA, I apologise unreservedly for the distress, and inconvenience, that our actions, and inactions, caused.

…….

Part Five – upheld

You allege that the FCA failed to properly supervise Premier FX. You allege that in November 2017, a new task force was established by the FCA to address known associated risks with FX companies. You say that this new task force, and the FCA, failed to act on intelligence provided by the Portuguese authorities, information provided by a customer of Premier FX and information provided by a former employee of Premier FX. You allege that Premier FX had not filed company accounts at Companies House since 2016, but this was not detected by the FCA.

You quote Nikhil Rathi, at a November 2020 Treasury Select Committee meeting, as describing the FCA's supervision of payment institutions as being "light touch". You would like to understand exactly what that means and complain that the consumer is not to know what firms are being supervised on a "light touch" basis and what firms are not. That a firm's authorised status means exactly the same thing to the consumer, irrespective of the type of supervision the FCA deploys on a firm.

You say that because Premier FX had no professional indemnity insurance, they must not have been submitting their annual reports. That the FCA allowed this to occur.

In order to investigate this allegation, I've considered our supervision of Premier FX through several different perspectives in view of the allegation that has been made. I set out my

findings in respect of each part of my investigation into this allegation below, under separate headings.

Did the FCA appropriately deal with concerns it was passed regarding Premier FX?

During the time that Premier FX was regulated by the FCA it was supervised on a risk-based approach. Today, the Supervision Division refer to this type of firm as being 'portfolio-based' which means that the supervisory work that is undertaken is mainly reactive i.e. in response to third party reports, external notifications and firm returns, as well as thematic work across multiple firms.

In order to investigate this complaint allegation, I have considered what adverse information we held about the firm, those involved, and whether we acted appropriately in response to the concerns that were shared with the FCA.

Having reviewed the information that is held on our systems, it is clear that the FCA held considerable adverse information regarding Premier FX (in addition to the one financial promotions related matter previously outlined). Whilst, for confidentiality reasons, I am not able to comment on the exact information held, nor the provenance of it, some of the information held related to concerns that the firm might be acting outside of their permissions and also information which, on the face of it, should have caused the FCA to question whether Premier FX were in financial difficulty.

I have assessed the actions, and inactions, that the FCA took in respect of each of the concerns raised to the FCA. Whilst it is accepted that the FCA has to supervise firms on a portfolio (reactive) basis (coupled with more proactive thematic type work), this approach does require the FCA to then react appropriately to any concerns that are shared about firms in line with a risk-based approach. That is not to say that the FCA can act on every piece of information, nor that the FCA can deploy every regulatory tool in every case where a concern is raised, but the FCA does need to react according to the circumstances it is presented with, operating in an appropriate risk-based manner.

In the case of Premier FX, based on the information I have reviewed, the FCA did not respond reasonably to concerns raised in the circumstances. For this reason, I consider that this complaint allegation should be upheld.

Please accept my sincere apologies on behalf of the FCA for this.

Appendix 2

From the FCA's response to my preliminary report recommendation that the FCA make an ex-gratia compensatory payment

You recommend the FCA makes an ex-gratia compensatory payment of 4% simple interest in total of the amount of capital recovered from the Liquidator and Barclays to each of the 33 complainants party to this Stage 2 complaint. You set out that this is subject to the money lost and recovered having been paid to PFX after 25 February 2011.

As set out at paragraph 7.14 of the Complaints Scheme (in force at the time these complaints were made), in deciding how to respond to a report from the Complaints Commissioner, we would normally consider 4 factors. We have considered your recommendation in light of these factors individually and cumulatively. We have also considered whether, more generally, the circumstances relating to PFX and your recommendations mean that it is appropriate to make an ex gratia compensatory payment. On balance we still consider that it is not appropriate to make such a payment in addition to that previously offered by the FCA for complaint handling delays. Our assessment of the 4 relevant considerations is set out below for you to consider in preparing your Final Report.

Factor (a) the gravity of the misconduct which the Complaints Commissioner has identified and its consequences for the complainant.

In your PR you say 'The FCA failed to appropriately supervise and re-authorise PFX. PFX acted in breach of their permissions and the rules. As a result of these two elements (and failure on the part of Barclays), consumers lost access to their money for three years and eight months.'

You go on to say …..that 'I am mindful as set out above, the FCA, whilst a significant factor, was not the only party as fault in you losing access to your funds.'

First and foremost, it is important to recognise that the direct cause of customer losses and therefore the distress and inconvenience caused by not having access to funds was the actions of the firm and its sole director. As explained in the FCA's Final Notice about PFX, the firm seriously misled its customers.

When we responded to complaints about our actions or inactions in relation to PFX at stage 1, we upheld or partially upheld 5 allegations (of the overall 31 allegations raised). These allegations related to concerns over how information was handled and not actioned and the reauthorisation of PFX just prior to its collapse in 2018. We accept we made mistakes prior to the collapse of PFX and it does not appear from your PR that you disagree with our findings about our actions or inactions.

Therefore, turning to the consequences of our actions or inactions for complainants, we think it is important to consider the timeline of events. We say this because PFX was first authorised by the Financial Services Authority (FSA) as an authorised payment institution and given permission to provide the payment service of money remittance on 25 February 2011, the date you use as the starting point in your recommendation to pay compensation. Neither our investigation nor your PR have identified any failings by the FCA when PFX was first authorised, and we had no intelligence in 2011 to suggest that PFX was acting outside of its permissions. If your recommendation reflects a finding on your part that our actions or inactions have caused distress, inconvenience or consequential loss to all of PFX's customers who may have provided funds to the firm from 25 February 2011 and whose money was still held by the firm when it became insolvent, we disagree with that conclusion.

In our Stage 1 investigation report, we set out when we started to receive information regarding PFX acting outside of its permissions. Materially, this is from March 2017 onwards, approximately 16 months before PFX's collapse.

By this time, we believe it is highly likely that many customers had already 'deposited' funds with PFX and those funds had highly likely been dissipated by the firm shortly after deposit, as we have highlighted previously. Given the money for many customers was likely already gone, it does not automatically follow that swifter action would have prevented losses for all complainants. It is possible that some customers may not have made payments to PFX had we intervened more quickly after we received specific intelligence in March 2017. However, it is difficult to determine the time it would have taken to achieve a successful intervention as we would need to investigate to establish the facts prior to such intervention. Nevertheless, we accept that we could have intervened sooner and in not doing so we may have contributed to the distress and inconvenience for some complainants who subsequently 'deposited' money.

In addition, we consider it likely that it would have taken a similar period (i.e. 3 years and 8 months) to conclude our Enforcement investigations into PFX and Barclays irrespective of the date they commenced. Therefore if we had acted earlier, customer losses would have crystalised earlier, but the period without access to their funds would have remained the same.

We therefore disagree with the premise of your argument that our mistakes were a significant contributory factor to the detriment suffered by all customers of PFX who paid money to PFX after 25 February 2011.

For clarity, as outlined above, we do not accept that the Register failed to display clear and accurate information at the relevant time. The Register contained accurate information regarding the permission held by PFX. The absence of the definition of 'money remittance' is not in itself misleading or inaccurate. It may prompt users to conduct further investigations of their own, but the information on the Register was not misleading or inaccurate. The Register did not indicate that FSCS cover would be applicable, rather that FSCS cover could not be determined.

We would also highlight that 42% of complainants party to this complaint, had claims accepted by PFX's Liquidator in excess of the FSCS limit of £85,000 for deposits, with some paying significantly in excess of this limit. Where consumers are willing to deposit/invest more than the FSCS limit applicable at the time, it may suggest that for these customers the protection offered by the FSCS was not an important factor in their decision to use PFX.

Finally, in considering the consequences for complainants, we think it is highly relevant that because of the FCA's Enforcement action, all PFX customers with accepted claims recovered the principal sum they paid to PFX. The voluntary payment made by Barclays totalled £10,076,943.75 represented the difference between the distribution made by the liquidator and accepted claims. Enforcement proceedings are complex and often lengthy but, in this case, FCA Enforcement action ensured PFX customers did not suffer any loss of their initial capital.

Factor (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).

We are not aware of any complainants who are party to this complaint having direct dealings with the FCA prior to using PFX, for example by contacting the Supervision Hub. Our understanding is that the relationship with the FCA was an indirect one, in that they were customers of a firm whom the FCA authorised and supervised.

The FSCS limit for deposits also varied during the period PFX operated, with £85,000 being the maximum. We note that the maximum limit for investments for the date when PFX failed was only £50,000.

The LC says that complainants followed FCA guidance from the ScamSmart campaign7, which included checking if PFX was registered with the FCA via the Register. We would highlight that Scamsmart was first launched in October 2014 and related to investment fraud. Further, we do not consider that interaction with the Register constitutes 'direct dealings' with us. Whilst checking the Register will confirm if a firm is authorised and what permissions it has, it is part of a number of steps that can be taken to reduce risk as outlined on our ScamSmart pages. The list of steps is not exhaustive and checking the Register does not act as a guarantee against fraud.

PFX customers had direct dealings with PFX, who according to the FCA's Final Notice, 'seriously misled customers by informing them that it was able to hold their funds indefinitely without the need for a payment order for onward transfer; their funds would be held in secure, segregated client accounts; and their funds would be protected by the Financial Services Compensation Scheme ("FSCS").'

However, we do recognise the Register could have been more helpful in making clear where FSCS cover does not apply, a change we have now made, as outlined above.

Factor (c) whether what has gone wrong is at the operational or administrative level.

The original consultation in November 2000 (CP73) on the Complaints Scheme expanded on the meaning of this factor to refer to 'whether what has gone wrong is at the operational or administrative level (rather than in relation to matters of policy or where the FSA's actions have necessarily had to reflect a balancing of conflicting interests and complex issues)'. In our view the purpose of this factor is to distinguish between cases where there were operational or administrative failures (where compensatory payments may be more appropriate) and cases where we have exercised our discretion to balance conflicting interests and complex issues.

ScamSmart was launched in October 2014: https://www.fca.org.uk/news/press-releases/national-campaign-will-target-those-most-risk-investment-fraud-says-fca. The campaign was to warn people about investment fraud and how to spot a potential scam.

https://www.fca.org.uk/scamsmart

https://www.fca.org.uk/publication/final-notices/premier-fx.pdf

In this case, we accept that the mistakes we made were at an operational level.

Factor (d) the impact of the cost of compensatory payments on firms, issuers of listed securities and indirectly, consumers.

The FCA is funded by the firms we regulate, and ultimately consumers, so we need to consider the costs of compensatory payments, not solely in this case, but more broadly.

In this case, the cost of accepting the recommendation for the 33 complainants party to this complaint would amount to around £133,000. However, we believe we would, as a matter of fairness, need to consider providing the same level of payment to all 167 customers of PFX, who 'deposited'/invested funds with the firm after 25 February 2011. Whilst we do not have the exact figure, we note that making the recommended compensatory payment to all 167 customers of PFX would cost over £400,000.

This cost would fall on regulated firms, the vast majority of which are legitimately carrying out activities and also contributing to the FSCS levy to protect consumers when a regulated firm undertaking relevant regulated activity fails.

We also need to consider the implications in this particular case. The firm was undertaking unauthorised activity and through this dissipated the funds 'deposited'/invested with the firm, probably shortly after they were paid to it (in effect the firm was operating a 'Ponzi Scheme'). As such, swifter action by us, which could only reasonably have been made on the basis of material, relevant information and detailed investigation, (noting that our resources do not enable us to investigate every piece of information we receive on a firm), would likely not have prevented the losses, distress and inconvenience caused for most complainants. We also note the considerable resources we expended in enforcing against the firm and Barclays,

which resulted in all consumers with accepted claims getting their principal sum returned. Further, this would also call into question the legislative framework, which sets out that the FSCS, not the FCA, provides protection in certain circumstances for customers of financial services firms that have failed.

Other considerations

In addition to the factors raised above, we consider the following is relevant to our consideration about an ex-gratia compensatory payment to complainants:

It is unclear how you have reached the compensation methodology and concluded that we should make a compensatory payment of 4% simple interest in total on the capital recovered from the Liquidator and Barclays, provided the complainant sent the funds to PFX after 25 February 2011. The rationale behind your recommendation for a percentage figure of the capital sum paid to PFX as opposed to the more usual approach of a fixed-sum payment for distress and inconvenience is also not clear.

Further, it is the responsibility of a customer to carry out their own due diligence, as you recognise, and to make sure that the firm they are using is authorised to carry on the regulated activity they intend to use…. you acknowledge “I am mindful that investors should perform their own due diligence in dealing with firms and they have to accept that the FCA does not operate a zero- failure regime.” In this case, customers used PFX as a deposit taker notwithstanding the Register entry which indicated its permissions were limited to money remittance. Consumers were also directed to the firm for further information. Although we recognise the Register could have been more helpful in making clear where FSCS cover does not apply, which change we have now made, you have agreed that consumers were not misled by the Register.

We have also considered the FCA’s statutory immunity against damages; Parliament has tasked the FCA with making judgements in good faith regarding our oversight and regulation of firms, and for which it has specifically excluded liability for paying damages for acts or omissions in the course of carrying out its functions. We note, however, that the statutory regime for the Complaints Scheme also envisages that the regulators will make compensatory payments in some circumstances.

Conclusion

Taking all of these factors into account both individually and cumulatively and having considered your recommendation more generally, our view remains that an apology and payment to recognise the complaint handling delays is the most appropriate remedy under the Complaints Scheme. We have apologised to all PFX customers for the mistakes we made prior to the collapse of Premier FX and offered an ex-gratia payment to recognise our complaint handling delays

Appendix 3

From the PFX Liquidation Committee Response to my Preliminary Report

Element Six - Request for ex gratia compensation for consequential losses at 8% compounded interest. Refer to Conclusion.

Argument

To this end the FCA have acknowledged their failings (on 2 accounts) and evidenced by your (the Commissioner's) report you also acknowledge serious failings that go beyond the two acknowledged by the FCA and the listed below.

Whilst it may have been the opinion of the FCA that it was a 'collective' failing of PFX, FCA, Barclays and the consumers the Liquidation Committee argue that the primary responsibility for the PFX victim's loss lies with the FCA who's primary role and function is to combat such theft and fraudulent activity and protect the consumer. A level of failure within a regulator's systems and processes can and will occur but, not so spectacularly as it has with PFX which simply confirmed they were neither regulated nor supervised.

It cannot be denied that had the FCA undertaken their legal regulatory duties PFX would not have been authorised and such losses to the consumer would not have occurred. It could even be argued that had the FCA carried out any two of the following failings, in accordance with regulatory requirements, such losses would have been avoided.

This level of failure is unacceptable as is the fact that the consumer should always be the ones to blame and suffer.

• Failed to adequately supervise PFX (Upheld).

• Failed to apply the required 'legal' rigour to the re-authorisation of PFX (Upheld).

• Failed to ensure PFX accounts were adequately segregated (Upheld).

• Mis-informed the consumer regarding FSCS cover (Upheld).

The following extracts confirm the FRCC recognition of where fault lies:

FCA Register not fit for purpose – "The Register was however, inadequate and potentially unfit for purpose" (Reference section 105).

Definition of Money Remittance - "The [Committee] find it totally unreasonable for a member of the public to be expected to trawl through a detailed finance policy

document, such as the FCA's PSR Handbook of 290 pages, to interpret the meaning of 'money remittance', as suggested they should by the FCA's Decision letter. Reference section 87, I agree with this position".

False and misleading information about FSCS cover – (Reference section 90). "Again, I disagree with the FCA's conclusion that "In the circumstances, I consider that the entry in place on the Register at the time was accurate". It was known to the FCA that this firm only had permission to carry out one regulated activity, for which there was no FSCS cover available. The assertion that FSCS cover may be available and that it was not possible to determine if protections were available to the clients of the firm are simply not correct. The Register was however, inadequate and potentially unfit for purpose" (Reference section 105).

FCA failed to conduct a robust re-authorisation process of Premier FX in 2018 – "Your complaints were upheld with a detailed enough explanation and an apology" (Reference section 110).

FCA's authorisation and supervision of PFX – "The FCA has accepted that it failed to appropriately regulate and supervise the firm, which then ultimately collapsed, and this caused its clients, many of whom are members of the committee's group, financial loss, hardship and lost opportunities over several years" (Reference section 109).

This complaint raises serious concerns about the actions and inactions of the FCA in connection to PFX and sets out clearly the impact of lengthy proceedings on individuals, some of whom did not live to see the situation and the complaint resolved" (Reference section 79).

FCA's contributory role to consumer detriment (which we think is high) (Reference section 106).

The LC recognise that PFX were not blameless however, it cannot be denied that there is a litany of serious and significant failings by the regulator that, had the FCA simply undertaken their legal duties to protect the consumer such life changing losses would never have occurred.

As stated above had the FCA carried out any two of the failings, in accordance with regulatory requirements, such losses would have been avoided.

Conclusion

Your evaluation of our complaint has been greatly appreciated, clearly time consuming and undertaken with considerable thought. Based on your comments and

investigation we, the LC, are of the view that you support our complaint and more specifically recognising the root cause of failure to lie with the FCA.

It must not be forgotten that a Regulator is the ‘gate keeper’ for the consumer, the first port of call by any consumer looking for secure knowledge and guidance which the FCA fell well short of. Even the Register, a legal requirement, had not been maintained.

(Reference Element 6) Whilst the LC appreciate your proposed compensation level of 4% (in total) we feel it falls well short of our expectations considering the time, the monies remained lost and the impact the loss had on the vast majority of claimants.