Complaints Commissioner

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11 April 2024

Final report by the Complaints Commissioner

Complaint number 202300566

The complaint

1. On 02 November 2023, you asked my office to review a complaint about the FCA.

Your FCA complaint

2. In its letter of 12 October 2023 the FCA referred to your complaint as follows:

   "Part One

   You are unhappy with a CFD provider's interpretation of FCA guidelines and why the status of professional client has been withdrawn."

What the regulator decided

3. In its letter of 23 October 2023 the FCA informed you of the following,

   "Thank you for your response of 21 October 2023, whereby the contents of this email have been duly noted and considered.

   However, as our previous emails to you have conclusively stipulated, the FCA cannot intervene between yourself or force the firm to override their decision. Consequently, and in the interests of providing substantive clarity, we are unable to consider yourself as a special case.

   In our email of 20 October 2023, we outlined our suggestion on how you could potentially resolve this issue with the firm and highlighted the aforementioned remit of the FCA in this situation. In addition, the Complaints Scheme cannot be used as an appeals mechanism, nor would it provide any type of advantageous benefit in this situation."

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4. The FCA concluded that it was unable to consider you as a "special case". It highlighted its remit and the previous email it sent to you on 20 October 2023. The FCA also said the Complaints Scheme could not be used to help you in your situation.

Why you are unhappy with the regulator's decision

Element One

5. You lost your professional status in April 2023 and have questioned the reasons the CFD provider gave for withdrawing the status. Given your work history and your own experience with buying and selling shares on your account, you feel you completely understand how both leverage and derivatives worked. As such, you believe you should be treated as a special case and your professional status be reinstated.

Element Two

6. You have asked for clarity to "para (3)" i.e. regarding whether the FCA has withdrawn their powers of discretion or ''wriggle room''.

Element Three

7. You mention you find it bizarre that with the criteria for CFD trading, one can qualify by having 500,000 Euros but no real financial experience.

Element Four

8. You feel the FCA demonstrated obfuscation and procrastination throughout the entire complaint procedure.

My analysis

Element One

9. In Element One of your complaint to me, even though you have not provided evidence that you meet the requirements, you feel that because of your work history and your own subsequent experience of buying and selling securities, you understand how leverage and derivates work and therefore should be treated as a special case to get your professional status back.

10. When the FCA investigated this, it concluded that it could not force the Firm to override its decision. In its letter dated 12 October 2023 the FCA explained that

this part of your complaint was not within its remit because it was not arising in connection with the exercise of the FCA's relevant functions. Rather, your complaint was about the Firm and it referred you to the Financial Ombudsman Service (FOS) should you wish to raise a dispute. The FCA also informed you of the same in its emails to you on 19 and 20 October 2023.

11. On the evidence available to the Firm you do not satisfy the requirements. Indeed on the face of it you have not submitted evidence to satisfy the requirements and I agree with the FCA that it is not appropriate of them to override the decision the Firm made and get involved in this individual dispute. Consideration of whether the firm made a mistake is the role of the FOS which is the independent body to investigate disputes concerning a Firm.

12. Similarly, this is not an area that I can investigate for you. This is because the previous Complaints Scheme which is relevant here provide the following,

> "Part 6 of the Financial Services Act 2012 (the Act) requires the regulators to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions."

13. The above remains the case with the Revised Scheme. If it is helpful, the link to the Complaints Scheme (previous and revised) is here [Complaints against the Regulators (The FCA, PRA and the Bank of England) November 2023]. You will find the previous Complaints Scheme under Appendix C.

14. Complaints about Firms are not within the relevant functions. Further [2.10 of the Complaints Scheme] explains this as follows,

> "2.10 Under this Scheme, we also cannot investigate complaints about the firms we regulate. If you have a complaint about a regulated firm, you should complain directly to the firm involved in the first instance. The Financial Ombudsman Service may be able to help if you are dissatisfied with the response you have received from the firm"

15. The FCA were, therefore, right to not investigate it for the reasons it gave. So I am sorry to say that I too cannot investigate this Element of your complaint. Disputes about individual Firms are for the FOS.

Element Two

16. You have asked for clarity concerning "para 3". By ''para 3'' as I understand from your complaint you mean as follows, "(3) The CFD provider used both common sense and discretion to grant the aforementioned status and the reason it has been withdrawn is because they state that the FCA has withdrawn their powers of discretion or 'wriggle room'. Is this true, as there is always the possibility they are not being totally transparent?"

17. As the FCA explained to you previously there are restrictions on the information that it can provide. This is because Section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds about firms as confidential and restricts how that information is dealt with. Equally any information that is not restricted by s.348 FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals who also have legal protections. Under these arrangements the FCA will not normally disclose the fact of continuing action without the agreement of the firm concerned. There is a good explanation of the statutory and FCA policy restrictions on information sharing here https://www.fca.org.uk/freedom-information/information-we-can-share Like the FCA, I am required to respect confidentiality. This means that I am also unable to share any information about the contact the FCA may have with a Firm.

Element Three

18. You mention you find it bizarre that with the criteria for CFD trading, one can qualify by having 500,000 Euros but no real financial experience. It is not within the Complaints Scheme for me to investigate the FCA's rule making functions. This is expressly excluded by section 85 (2) of the Financial Services Act 2012 as rule making is a legislative function not a relevant function. This is further outlined in section 85 (4) (a) as follows,

    For the purposes of subsection (2), the following are the FCA's legislative functions—

    (a)making rules under FSMA 2000;

19. However I can see that the FCA helpfully explained that under the requirements one area where the Firm may not have been satisfied with you, was COBS 3.5.3R (2) which provides,

    "(2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:

    (a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;

    (b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;

    (c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;"

20. The FCA stated that whilst you may have met the test for 2 (a), they were not able to see that you also qualified under 2 (c). As the FCA explained to you, to qualify under 2 (c) you would need to provide the firm with information about your past financial services employment. The FCA explained that this was to ensure that you had an appropriate knowledge of the product.

21. As to 2 (b) the FCA said in its letter to you,

    While we fully understand your unwillingness to disclose your personal wealth, qualification under 2 (b), the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000, the firm may consider qualifying investments immediately exceeding EUR 500,000, rather than your total assets.

    If you were comfortable doing this it might resolve matters, but this is of course a matter for you to decide. If provided, the firm can consider whether you meet the relevant criteria.

    You have also asked the relevance of the having a financial instrument portfolio that exceeds EUR 500,000. The wealth criteria are in place so that if a consumer gives up some of the protections given to a retail consumer, that any potential losses are affordable"

22. You have also said in your letter to me that you believe “personal finances are primarily a private matter for HM Inland Revenue” which indicates you are still of the view that you should not disclose the information set out in 2 (b). Whilst I understand you have personal feelings regarding this requirement, the FCA did give you the correct information regarding the requirements and suggested other information the Firm may consider, as opposed to you disclosing your total assets. The FCA also provided clarification regarding your query centred upon 2 (b) - the relevance of having a financial instrument portfolio that exceeds 500,000 Euros. I can see from the correspondence in the case file the FCA answered this question.

23. So whilst you may not agree with some of the requirements, these are in effect the rules and regulations which I cannot comment on any further. I think the FCA did well by explaining these in detail including suggestions on how you could resolve the issue with the Firm.

Element Four

24. You also feel the FCA demonstrated obfuscation and procrastination throughout the entire complaint procedure.

25. I have considered all the information that you have provided to me. I have also considered the information the FCA have provided to me concerning your case including the FCA case file in investigating this matter.

26. I want to assure you that I have assessed all of the information the FCA have provided to me and I did not see any areas where the FCA demonstrated obfuscation and procrastination. In fact the FCA were proactive in getting meaningful answers and information to you. And I think the FCA explained elements from the FCA Handbook such as COBS 3.5.3R as referred to earlier in my report, very clearly. So I am sorry to disagree with you on this point.

My decision

27. I appreciate this was not the outcome that you were hoping for and I am sorry to disagree with you regarding your complaint.

28. In Element One of your complaint, I agree with the FCA that this cannot be investigated as this is out of scope. Individual disputes about Firms such as

Firm A, cannot be investigated under the Complaints Scheme, this is a matter for the FOS.

29. In Element Two of your complaint the FCA gave you the correct information. The FCA nor I can share information about the contact it has with Firms due to confidentiality restrictions.

30. In Element Three of your complaint I am sorry but I cannot investigate the FCA rules and regulations.

31. In Element Four of your complaint I did not see any areas where the FCA demonstrated obfuscation and procrastination. The FCA were proactive and professional in getting meaningful answers and information to you.

Rachel Kent
Complaints Commissioner
11 April 2024