Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number 202300585

The complaint

1. On 12 November 2023, you asked my office to review a complaint about the FCA.

Your FCA complaint

2. The FCA set out in its decision letter dated 10 November 2023, that Part One of your complaint was that:

> "You are unhappy that the FCA failed to answer the firm's query regarding the definition of a debt solution."

3. Part Two of your complaint to the FCA was that:

> "You are unhappy the FCA threatened the firm with court action. You feel the FCA is acting tyrannically towards the firm and that the FCA is not there to help firms comply or help. You believe the FCA feels the firm should simply do as it is told without question or hesitation.
>
> To resolve your complaint, you would like an apology from the department or person responsible."

What the regulator decided

4. With regards to Part One of your complaint to the FCA, it did not uphold your complaint. It set out that, in its view, "it had correctly exercised their statutory role in attempting to understand the firm's business model…" It also set out that

it did not agree "with your assertion that the FCA had failed to answer the firm's query regarding the definition of a Debt Solution."

5. The FCA did not uphold Part Two of your complaint. It said out that it found that "the FCA had followed the required processes, all queries raised were addressed and the evidence suggests that it attempted to work constructively with yourself and the firm."

6. The FCA noted that its supervision department "initially sought an informal approach in requesting the call scripts and only resorted to more formal measures via a s165 notice, when the informal request was refused by the firm." It recognised that you had been upset that the wording of the notices had caused you and the firm distress.

Why you are unhappy with the regulator's decision

7. In your complaint to my office, you set out the following:

> In part two of the complaint, the investigator seems to misunderstand the grievance, we are complaining about the fact the authority thought it was reasonable, to issue the firm with a section 165 notice, when they had been told in a telephone call that the script can be amended, not that it had and the firm never stated it had been amended, in light of the referral fee ban. How is issuing a section 165 notice, which carries a contempt of court penalty amongst other things, in relation to something the firm is not legally bound to amend and is completely up to the firm to do in the first place. So in not providing something to which the firm did not have to, it could have been held in contempt? Dealing with potentially the director of the companies liberty, the authority is throwing around section 165 notices without any regard to whether it should be used, proportionality, reasonableness, good faith. The complaints investigator makes reference to documents sent to the authority on 6th October, those documents are about a new way of working post 6th October, they are not in relation to the scripts issue at hand in this complaint.

8. The FCA refers to Part One and Part Two of your complaint. To differentiate between the FCA's analysis and my own analysis I will refer to these as Elements One and Two.

Preliminary points (if any)

9. The complaint stems from the new guidance, in the FCA handbook (PERG 17.7G(13A)), which was consulted on and published in Consultation Paper CP23/5 and Policy Statement PS23/5. These relate to the FCA's debt packager referral fee ban.

10. On 3 October 2023, the new rules came into force. The effect of the new rules is to ban debt packager firms from receiving remuneration from debt solution providers (referral fees).

My analysis

Element One - Query regarding the definition of a debt solution.

11. You have not set out in your complaint to my office that you are unhappy with the FCA's response to Part One of your complaint. As such I consider that whilst it is not the outcome you had hoped for that you have accepted the FCA's explanation provided with respect to the information and explanation it provided to you around the definition you sought over this period. In any event, I have reviewed the FCA's response to this complaint point alongside the information contained in the FCA files and I consider that the decision letter was accurate about the events, and I agree with the FCA's decision not to uphold your complaint in relation to Part One. As you have not set out that you disagree with this part of the decision letter, I have not addressed it any further in this report.

Element Two – Issuance of a section 165 Notice

12. Having reviewed all the information available to me, I have agreed with the FCA's position set out in its decision letter, being that it was reasonable for it to issue the section 165 notice to the Firm and consequently I also **do not uphold** your complaint. I will explain my reasoning below.

13. As a regulated firm, the Firm is required to deal with the FCA in an open and co-operative manner include this providing with information which it seeks in a

reasonable time. This expectation is set out under Principle 11 of the FCA's Principles for Businesses. The FCA has a wide range of powers to collect information under the Financial Services and Markets Act 2000 including the issuance of a section 165 Notice. Whilst the FCA will usually seek to obtain information from authorised firms through informal channels in the first instance, when these channels fail it can, and is entitled to, formalise the requests through such methods as issuing a section 165 Notice. As such where it is clear that the FCA has attempted to collect information through the use of informal channels and this approach has not been met with open and co-operative responses, it would be reasonable for the FCA to then use the more formal approaches including issuing a section 165 notice.

14. Following its multi-firm work within the debt packaging sector that took place in 2020 and 2022, the FCA decided to implement new rules to mitigate the conflict of interest between acting in the interest of customers and the commercial interest of debt packaging firms.

15. The new rules were due to come into effect on 4 October 2023, and the FCA first contacted your firm, along with all other debt packager firms, in June 2023 to ascertain future business model intentions in light of the introduction of the new rules. This was part of its supervisory role, to ensure that any businesses that would be undertaking work falling under the new rules, were prepared in advance. It was entirely reasonable and appropriate for the FCA to start to seek the relevant information from all debt packaging businesses prior to new rules that would be commencing 4 months later.

16. Your key complaint is that you do not feel that it was reasonable for the FCA to issue a section 165 Notice, (not least because, as you have set out, it can carry a contempt of court penalty for failure to comply), requiring your firm to provide copies of call scripts, which you did not consider the firm were legally bound to amend. In your correspondence you noted that your existing call scripts could be amended to meet the non-advice requirement, but it is my understanding that the Firm had not made the amendments at that time as you were intending to challenge the new rules.

17. I have seen that the FCA contacted your firm on multiple occasions from June 2023 onwards to seek clarification about the Firm's business model and how it intended to operate a non-advised business model when the new rules came in. From your interaction with the FCA it appeared that you felt that it was within the regulations to operate both a regulated and unregulated business running alongside each other, so long as the difference was made clear. It seems reasonable to me that the FCA wanted you to provide information to enable them to understand how this would work in practice and to ensure that consumers would be protected. This required your firm to be transparent and open about how it would communicate the separation of the regulated and unregulated businesses to consumers.

18. I appreciate that you felt that your firm was not obliged to alter its business model, as you had submitted an application for leave for judicial review of the new debt packaging referral fee rules and felt that until the judicial review court process had been completed, you were not obliged to do so. I have noted that you felt that to do so, including providing adjusted call scripts, would be prejudicial to the firms right to a fair trial. However, I do consider, that regardless of the court action you were taking, the facts were that the new rules were coming into effect on 3 October 2023 and the FCA as the regulator was entitled to ensure that your firm (and all other debt packager firms) would be operating within the relevant regulatory provisions from the commencement date.

19. Whether or not your judicial review proceedings might lead to a change in processes based on how the courts determined your issue relating to the validity of the rules, it was not for you to determine that you are not subject to the relevant rules in the meantime. The FCA, as the regulator, had to be satisfied that all debt packaging firms would be compliant with the new rules prior to their commencement and your firm, as an authorised firm, who could potentially fall within the requirements of the new rules, had an obligation to provide relevant information to either confirm or support an assertion that you would not be captured. Your assertion that your Firm would not be captured was not sufficient and the regulator was entitled to request what it considered to be relevant information and to take its own view.

20. In my view the FCA provided you with many informal opportunities to provide relevant information between June 2023 to August 2023. I note that on 12 September 2023 you set out to the FCA that:

> "As far as we see it, we are not obliged to alter our business model until that process [the Judicial Review proceedings] has been completed at court, as to do that would be prejudicial to the firms right to a fair trial, under article 6, depleting the firms resources risking equality of arms to actually prosecute the case at court."

21. In addition to this, I can see that the correspondence from the FCA's external solicitor to you, on 19 September 2023, clearly set out that its position was that the judicial review proceedings did not suspend the application of the rules. The letter set out the following:

> "the commencing of Judicial Review proceedings does not automatically suspend the application of the Rules to Firm X and, in the absence of any order being made by the court, the Rules will come into effect for Firm X on 3 October 2023. We note that this position has previously been explained to you in an email from the FCA's Supervision team dated 14 June 2023, which remains correct notwithstanding that Judicial Review proceedings have now been commenced.
>
> We wish to draw this to your attention as if Firm X fails to comply with the Rules from 3 October 2023, it will be considered in breach by the FCA, in respect of which the FCA reserves the right to pursue such enforcement action as appropriate."

22. I have reviewed the correspondence between your Firm and the FCA in the lead up to the implementation of the new rules and despite the many informal opportunities provided to you to voluntarily provide the information it was clear that you did not agree that you needed to provide the information, and it was also clear that you did not intend to do so prior to the implementation of the new rules. As such, I do think that the FCA exercised reasonable steps and followed the relevant processes prior to deciding to exercise its powers as the regulator to the section 165 Notice.

23. In your complaint you have set out that you consider that the FCA is being 'tyrannical' towards the firm by issuing it with a notice stating that a consequence of non-compliance could be for the FCA to write to the courts to hold you in contempt of court. In view of this I have reviewed the wording of the notice and I have confirmed with the FCA that the wording used in the section 165 Notice is template wording, including the details of the consequences of not complying with the notice. The template does provide a section that the FCA can list the details of the missing requested information which can be tailored in each notice to a firm.

24. I do not consider that the wording of the notice was intended to by tyrannical towards the Firm nor that it was used directly to cause distress to you and the firm. Rather, it is the format that the FCA uses to emphasise the importance and necessity for a firm to comply with the notice as required under the Act and outlines the possible consequences should a firm continue to choose to not comply.

25. In addition to this, as part of my investigation into this complaint, I have sought additional information from the FCA, to better understand the issues in this complaint. As part of these enquiries, I asked the FCA about its interactions with other debt packaging firms in the same period as your interaction. In its response to me the FCA has confirmed that all firms were contacted initially in June 2023 to ascertain their future business models in light of the new rules. Where firms did not provide sufficient information to the FCA and following repeated informal requests, the FCA issued s.165 Notices to those firms as well. This again leads me to conclude that this action was not taken to cause you or your firm distress, rather it was done as part of the FCA's wider preparations to ensure that all firms, not just Firm X, were acting within the debt packaging sector were compliant by 3 October 2023.

26. I understand that the issuance of the section 165 Notice alongside the other interactions that the Firm has recently had with the FCA may have left you with the cumulative impression that it was a 'tyrannical' act, but I do think the FCA was entitled to seek more information from you and all debt packaging firms in the lead up to the commencement of the new Rules on 3 October 2023, and that it was reasonable for the FCA to issue a section 165 Notice to evidence

that your call scripts would be compliant when those rules came into effect. This is unaffected by your court case.

27. Finally, I note that your application for judicial review of the new Debt Packaging referral fee rules has now been dismissed by the administrative court.

    Consequently, the rules that came into effect on 3 October 2023 and the definitions set out by the FCA remain unchanged.

My decision

28. This is my final report about your complaint and concludes my investigation.

Rachel Kent
Complaints Commissioner
15 April 2024