

3<sup>rd</sup> February 2014

Dear Complainant,

**Your complaint against the Financial Services Authority**  
**Reference Number: FCA00002**

I write with reference to your letter of 14<sup>th</sup> January 2014 addressed to the Office of the Complaints Commissioner.

I need to explain my role and powers. Part 6 of the Financial Services Act (the 2012 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. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner charged with the task of investigating those complaints made about the way the regulators have themselves carried out their own investigation of a complaint that comes within that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role.

**Your complaint**

From your recent letter, I understand that you are unhappy with the FCA's actions as you say that:

- “[you] *have operated as a Licenced Debt Collector for over 25 years and received notice that from 1<sup>st</sup> April 2014 Financial Conduct Authority (FCA) will take over regulation of Consumer Credit, [your] current licence will expire on 31<sup>st</sup> March 2014 by which date [you] must register with FCA*”.
- you add that the "*OFT informed [you that you] cannot register with FCA unless [you] hold a valid e-mail address, and [you] do not*".
- although you have written “*to FCA (sic) and requested that [you] be permitted to make a written application but their response is that whilst they offer a facility to file a written application it is only extended to those who cannot operate a computer and, since I am not disabled, they will only accept from me an application made online*”.

## Coverage and scope of the transitional complaints scheme

The Complaints Scheme provides as follows:

### 3 Coverage and scope of Scheme

- 3.1 The Scheme covers complaints about the way in which the regulators have acted or omitted to act, including complaints alleging:
  - a) mistakes and lack of care;
  - b) unreasonable delay;
  - c) unprofessional behaviour;
  - d) bias; and
  - e) lack of integrity.
- 3.2 Complaints can be made by anyone who is directly affected by the way in which the regulators have carried out their functions, or anyone acting directly on such a person's behalf, provided that the complaint meets the requirements of the Scheme. To be eligible to make a complaint under the Scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.
- 3.3 Complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. Complaints made later than this will be investigated under the Scheme only if the complainant can show reasonable grounds for the delay.

I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. I would specifically draw your attention to Section 25 of Part 4 of Schedule 3 of the 2012 Act where it states:

*“Exemption from liability in damages*

- (1) *None of the following is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the FCA's functions—*
  - (a) *the FCA;*
  - (b) *any person (“P”) who is, or is acting as, a member, officer or member of staff of the FCA;*
  - (c) *any person who could be held vicariously liable for things done or omitted by P, but only in so far as the liability relates to P's conduct.*
- (2) *Anything done or omitted by a person mentioned in subparagraph (1)(a) or (b) while acting, or purporting to act, as a result of an appointment under any of sections 166 to 169 is to be taken for the purposes of sub-paragraph (1) to have been done or omitted in the discharge, or as the case may be purported discharge, of the FCA's functions.*

(3) *Sub-paragraph (1) does not apply—*

- (a) *if the act or omission is shown to have been in bad faith, or*
- (b) *so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998”.*

You have not adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The Complaints Scheme nevertheless then goes on to provide in paragraph 6.6 that:

*Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis.*

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a “*compensatory payment on an ex-gratia basis*”.

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

*It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol provides:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the FCA which is incompatible with the Human Rights Act 1998. My rationale for arriving at this decision is set out below.

### **My Position**

As part of my investigation into your complaint I requested a full copy of the FCA’s complaint investigation file. From the papers presented to me I understand that the regulation of debt collection agency is transferring from the OFT to the FCA. As a result of this, all debt collection agencies have to register with FCA and it is the general position of the FCA that it requires an online application together with a valid email address to process your registration. It is that position with which you are unhappy.

When assessing any complaint which is referred to my office I have to be mindful of the rules of the Complaints Scheme (Complaints against the Regulators) which I have referred to earlier. These rules set out how the Complaints Scheme operates and sets out what complaints can and cannot be investigated. In this case, your complaint amounts to dissatisfaction with a general policy which the FCA, as the UK's financial services regulator, has adopted. Given this, I believe that the provisions of paragraph 3.5 of the rules of the Complaints Scheme apply and which regrettably prevents me from considering your complaint. Paragraph 3.5 of the rules of the Complaints Scheme states:

*“3.5 Circumstances where the regulators will not investigate*

*The regulators will not investigate a complaint under the Scheme which they reasonably consider amounts to no more than dissatisfaction with the regulators' general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged”.*

However, although paragraph 3.5 of the rules of the Complaints Scheme prevents me from considering your complaint, I would make the following observations. When considering your complaint, the FCA informed you, in its letter of 26<sup>th</sup> November 2013, that

*“As was stated in the FCA's letter of 10 October 2013, all firms that want to continue with Consumer Credit activities after April 2014 need to apply for authorisation through the FCA's online system. This applies both for interim permission running up to April 2014 and full authorisation after 1 April 2014. You would furthermore have to comply with ongoing obligations to submit your future returns online if you decided to continue with authorisation after April 2014.*

*For interim permission registration, the FCA will consider exceptional circumstances where you are unable to submit an online application due to, for example, a disability that prevents you from making use of a computer. You have not provided the FCA with any information to say whether you would fall into this category.*

*The information that you have submitted to the FCA indicates that the only reason you do not want to register online is personal preference due to your previous experience of having an email address”.*

Whilst I can understand why you are unhappy with this decision, the approach the FCA has adopted is consistent with the manner it treats all firms in respect of application for registration, communications and indeed how it expects firms to submit reports. I would also add that it is consistent with the approach adopted by the previous Financial Services Regulator, the Financial Services Authority (FSA).

In March 2004, the FSA released details of the responses it had received to a consultation paper (CP198) it had issued regarding electronic communications and reporting. This document (PS04/8) showed that 79 firms responded to the consultation paper, and the vast majority of respondents were in favour of the implementation of Mandatory Electronic Reporting regime. Whilst this consultation paper does not directly relate to a consultation on electronic registration and communications, it sets out, that a consequence of the Mandatory Electronic Reporting regime is, that the Regulator will move to sending correspondence (particularly automated reminders and acknowledgements) to firms in an electronic format (i.e. by email) and firms will therefore be required to provide it with an email address.

The FSA (as the Regulator which preceded the FCA) sought views from the industry on this proposal, and the majority of the industry were in favour of its introduction. In my opinion, I do not believe that the FSA has acted unlawfully or unreasonably in this matter. Likewise, I would add that it is reasonable for the current Regulator, the FCA, to adopt a similar approach to that of the FSA as the previous Regulator.

I know that this view will be disappointing, but I would also add that given the new responsibilities which are being placed upon the FCA as the Financial Services Regulator, it has to be mindful and economical of how it utilises its resources. Adopting this approach, where all firms are required to submit electronic applications together with a valid email address so that the FCA can correspond with firms (together with a requirement that all required reports are submitted electronically), allows the FCA to *achieve this statutory objective* (my emphasis).

My personal view is that, as we are now in the electronic age, it is not unreasonable for the FCA to impose a requirement, especially *upon a firm* (my emphasis), to intend to use this medium for communicating with firms. Likewise, it is also not unreasonable for the FCA to expect firms also to communicate with and report to it by this method.

## **Conclusion**

When arriving at my decision I have to consider the FCA's procedures and position together with the rules of the Complaints Scheme. In this situation, the FCA is complying with the procedures its predecessor implemented in 2004 following a consultation exercise. It is unfortunate that you do not wish to provide an email address, but from the documentation provided to me this appears to be a personal choice rather (my emphasis) than as the result of what could be described as exceptional circumstances.

As I have indicated above, the FCA has a statutory objective of utilising its resources economically. Adopting a standardised approach where communications are sent in electronic form is consistent with this methodology as it reduces the Regulator's costs and allows issues to be resolved in a more timely fashion than relying on the postal service. As such I believe that the position adopted by the FCA is reasonable.

Whilst I believe that paragraph 3.5 of the rules of the Complaints Scheme prevents me from considering your complaint, I would also specifically draw your attention to paragraphs 6.14 and 6.8 of the Complaints Scheme which states:

- 6.14 The Complaints Commissioner will not investigate any complaint which is outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with the Complaints Commissioner.

In my view, your complaint relates to your displeasure that the FCA has adopted a policy with which you do not wish to comply and, as a result, you cannot register your firm with the FCA. As I have explained the fact that you are unhappy with a position adopted by the FCA *does not* (my emphasis) bring the issue into the Complaints Scheme.


I should also point out that whether a complaint is within the Complaints Scheme is at my sole discretion. For the reasons explained above, I do not believe that this case justifies an investigation by me.

- 6.8 Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the relevant regulator(s)' progress in investigating a complaint, may refer the matter to the Complaints Commissioner, who will consider whether to carry out his own investigation.

This is a relevant provision as, although I can appreciate your position, it gives me an unfettered discretion as to whether or not I carry out an investigation. In this case it is *your decision not to complete an online application and supply an email address* (my emphasis), in accordance with the FCA's standard policy, which is preventing your registration. I would add that the FCA has indicated that, if there are extenuating circumstances it would consider an application being provided without an email address. The FCA has explained that *a personal decision* (my emphasis) not to complete an electronic application or supply an email address for whatever reason does not in its view amount to "extenuating circumstances". This is a view with which I concur given my understanding of the term extenuating circumstances.

It is my Decision that I am unable to reach a conclusion that the Regulator has acted inappropriately or, as a result, that it should allow you to register with it without providing an email address.

Yours sincerely



Sir Anthony Holland  
Complaints Commissioner