

15th July 2015

Dear Complainant,

Your client's complaint against the Financial Conduct Authority
Reference Number: FCA00048

Thank you for your emails of 16th February and 9th March 2015 which set out your complaint and your response to my preliminary decision of 27th May 2015. I am sorry for the delay in responding to you but my office has been in contact with the Financial Conduct Authority (FCA) about this matter and unfortunately it has taken longer than we had hoped to obtain the information we had requested; and given the complexity of the issues, I have needed to spend some time studying the papers.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

You can find full details of how I deal with complaints at www.fsc.gov.uk. If you need further information, or information in a special format, please contact my office at complaintscommissioner@fsc.gov.uk, or telephone 020 7562 5530, and we will do our best to help.

What we have done since receiving your complaint

We have now reviewed all the records you and the regulator have sent us. I have also carefully considered the representations you made in your letter of 27th May 2015. My final decision on your complaint is explained below.

As the rules of the scheme under which I consider complaints can be found on our website at www.fsc.gov.uk, I do not intend to set them out fully below.

Your complaint

From your email I understand that you are unhappy with the FCA's decision that it would not undertake enforcement action against a number of authorised firms who you believe are responsible for market abuse. You believe that the firms' actions caused a loss of between £1.2 million and £1.5 million to your client, Firm S, through the artificial depression of the share price of your client's assets which were being held by a bank as a security. You add that your client, Firm S, has undertaken a considerable investigation into this matter, at its own cost, and has also used the services of a respected barrister when producing a detailed report which has been presented to the FCA.

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You hold the view that the FCA's position not to undertake enforcement action is unreasonable, irrational and unfair as, in both the opinion of you and your counsel:

- there is strong evidence of serious misconduct contained in the report;
- the firms concerned have concealed a number of regulatory breaches. You add that the concealment of misconduct means that a forward looking and co-operative approach to regulation and supervision is wholly inappropriate in this case; and
- the evidence in the report justifies action under the FCA's own policies, priorities and enforcement criteria;
- the FCA's decision not to take enforcement action is unfair because it has failed to give adequate reasons for its decision.

You accept that the FCA has a discretion on which cases it pursues with enforcement action, but state that you are "are confident that the Complaints Commissioner will agree with us that:

- (a) the FCA should carry out further investigations, and take enforcement action, in response to our client's report; or at the very least
- (b) the FCA should provide adequate reasons for its decision so our client can assess whether it has, in fact, made mistakes in its decision making".

My analysis

Before I comment further I should make it clear that in my view the regulator's approach must be determined by what action it considers will best meet its regulatory objectives: the fact that your client has incurred considerable costs in pursuing litigation, and the possibility that action by the FCA might be useful in further pursuing that litigation, cannot be central either to the regulator's consideration of its options, or to my consideration of your client's complaint, as you have acknowledged.

The existence of the material which your client has obtained and submitted to the FCA is relevant in that it provides information which could be helpful to the FCA in considering further action, but it does not of itself require the FCA to act. Additionally, even if the FCA were to undertake an investigation, the information your client provided would simply act as a starting point for its own investigation: there would inevitably need to be extensive further inquiries in such a case.

The issue for me to consider is whether, in all the circumstances and in the light of the material which your client has made available, the regulator's decision not to pursue enforcement action and a restitution order was within the bounds of a reasonable decision and, if it was not and if your client has suffered as a direct result, whether I should recommend that the regulator should take some further action. As a subsidiary issue, I need to consider what you allege to be a failure by the regulator to give you and your client an adequate justification for its decision.

Was the regulator's decision not to take enforcement action within the bounds of a reasonable one?

In the correspondence your barrister states that “whilst the circumstances are highly suspicious and the responses from the firms involved inconsistent and dubious, there is not quite enough to justify spending an enormous amount of money in taking legal proceedings”. Although – as you have pointed out - the criteria for the FCA to take enforcement action in relation to regulatory breaches will be different from the criteria used by your client in deciding whether or not to pursue further litigation, your barrister’s statement illustrates a dilemma which is not dissimilar to that faced by the regulator.

The FCA cannot pursue all information suggestive of regulatory breaches, nor does it purport to. Its decisions are taken in the light of its published enforcement criteria, which were explained to you at some length (albeit in relatively high-level terms) by an Enforcement Manager by telephone and email on 28th November 2014. Similarly, as is set out the Enforcement Guide Chapter 11, there are published criteria for considering whether to obtain restitution for third parties, and the instances in which these will be used “are likely to be very limited”.

It is regrettable that the FCA cannot provide further explanation as to why it reached its decision but this is because of the provisions of section 348 of the Financial Services and Markets Act 2000¹ (FSMA 2000) and the regulator’s published policy on confidentiality. While clearly the details of the allegations in your report are not themselves subject to section 348 since you and your client are party to them, decisions on enforcement action may entail consideration of material which is not available to the complainant, and knowledge of competing demands upon enforcement resources which is confidential. In those circumstances, I consider that the regulator behaved reasonably in providing you with an explanation of factors which it had taken into consideration – which it was not under a duty to do.

I am, however, permitted to study the confidential papers of the regulator, and I have done so. The papers the FCA has made available to me show that it gave your report significant and serious consideration. This review included not simply the views of your Counsel, but the underlying evidence. Following this assessment it concluded that the case was not one which, for a number of clear reasons, should be prioritised for referral to enforcement, nor was it suitable for a restitution order. As you are aware from your discussions and correspondence with the FCA, its rationale for arriving at this decision included the strength of the evidence provided, the length of time which had passed since the alleged misconduct occurred, and how this situation compared to other cases the FCA was treating as a priority for Enforcement action. Whilst the regulator accepted that the conduct of the firms did raise a number of concerns, it concluded that in the light of the age of the matters, the inconclusive evidence, and other priorities, they were issues which were best addressed by the firms’ FCA Supervisors.

You have highlighted the FCA’s views on potential market abuse and also commented upon two recent cases where the FCA has pursued legal/enforcement action where the ‘gain’ made by the offender has been considerably less than the losses incurred by your client. In the cases you referred to the regulator became involved soon after the offence occurred. In the situation you have raised the alleged misconduct occurred in 2008, with the referral not being made to the FCA until late 2014. Whilst a delay of over 6½ years does not prevent the FCA from taking enforcement action, it is a relevant factor which the FCA must consider when assessing whether enforcement action should be a priority and whether this is the appropriate tool for ensuring appropriate conduct.

¹ Rehearsed within SS16 to 18 of Part 2 of the Financial Services Act 2012

Conclusion

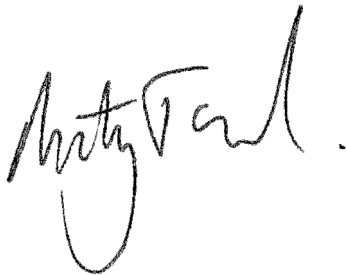
Ultimately the FCA has a discretion on which cases should be referred to enforcement, and whether or not to issue a restitution order. It is not my role to substitute my judgement for that of the regulator, though if I considered it had exercised its discretion in an unreasonable, irrational, or unfair way I would not hesitate to make a recommendation. In this case, it is clear that the FCA assessed in considerable detail the evidence you presented to it and arrived at a decision which to me does not appear unreasonable, irrational or unfair. Your client has received an explanation for this decision and, while I accept that you would have wished for a more detailed rationale, I consider that the explanation was a reasonable one (and indeed, went further than the regulator's normal practice), and I am satisfied from my scrutiny of the confidential papers that the explanation was properly founded.

For these reasons, I do not uphold your client's complaint against the FCA.

If you feel that your client has been adversely affected by the conduct of Bank U, Broker I, Investment Manager C, Investment Manager L and Market Maker W, you retain the option of testing the matter through the Courts, as you have indicated.

I appreciate that you will be disappointed with my decision but hope that you will understand why I have reached it.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner