



16<sup>th</sup> October 2013

Dear Complainant,

## **Your complaint against the Financial Conduct Authority**

**Reference: GE-L01574**

I write with reference to your email of 3<sup>rd</sup> September 2013 in connection with your complaint about the actions of and the action of the Financial Conduct Authority (FCA) in relation to this.

Part 6 of the Financial Services Act 2012 (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 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. From 1<sup>st</sup> April 2013, as part of the changes implemented by the Government, the Financial Services Authority (FSA) was replaced by the FCA, the Prudential Regulation Authority (PRA) and the Bank of England as regulators of the UK's financial services industry. The appointment has to be approved by H.M. Treasury. I currently hold that role.

## **Your Complaint**

From your correspondence with both the FCA and my office I understand that your complaint relates to the following:

- you run a FSA (now FCA) licensed and regulated money services business (MSB).
- however, you say that, although you *“have one UK bank account through which we operate our services, for FCA mandated reasons (disaster recovery, resilience, security, etc.) as our successful company grows we require an additional basic bank account with other UK high-street banks”* but *“every UK high-street bank has refused our request to open a basic, basic (sic) business bank account (we have evidence to believe that our existing high-street bank would not have opened a basic bank account for us if we applied now). And it has been confirmed to us by the high-street banks that the fee level is not a factor in the decision”*.

- given that your firm only requires a “*new basic, basic business bank account, [you] require no credit, all transactions will be under £100, no cash will be handled, no cheques, no electronic money, no credit cards, no debit cards, and all payments received by bank transfer from a named and verified UK bank account and made by bank transfer to a UK named and verified bank account*” you feel that the decisions of the banks not to offer you an account means that they are acting in what you feel is an “anti-competitive” manner. As the FCA has a statutory objective of ensuring that the markets work well, you believe that the FCA should take action against the banks concerned.
- although you have referred your concerns to the FCA, you are unhappy that it has refused to investigate your concerns. You believe that the FCA made an error in rejecting your complaint and, in your opinion, its refusal to take action against the banks indicates that the FCA is failing to “*remedy one of its core mandates*”. You are therefore looking “*to [me] to make good the error*”.

### **My Position**

Having viewed the papers both you and the FCA have presented to me it is clear that the gravamen of your complaint is the fact that a number of banks have refused to provide your business with additional banking facilities. I appreciate that you are disappointed that, despite your business being what you describe as “*a successful UK company*” where “*there is no risk whatsoever to a bank opening that bank account*” you cannot obtain additional banking facilities. Whilst I can understand why you are unhappy with this situation, ultimately the issuing of banking facilities is a matter for the bank concerned alone following its own ‘underwriting’ and ‘risk assessment’ criteria. Although unfortunate this ultimately makes the matter a commercial dispute between you and the bank or banks concerned.

Whilst the FCA has noted your concerns, it felt that the matter was not something which could be considered under the rules of the Complaint Scheme. In arriving at this decision the FCA has relied upon paragraph 3.5 of the rules of the Complaint Scheme which 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.

Although I can understand why you are unhappy with the FCA’s decision, I must advise you that, upon consideration, it is a decision with which I concur. Whilst a consumer (either as an individual or a firm) may apply for banking facilities, the submission of the application does not mean that the bank will automatically grant the applicant with the requested banking facilities.

In this case, whilst you have an existing banking arrangement it is ultimately a matter for each bank to assess the risk the applicant or applicant company poses to it. Whilst your business may, in your words, be “*a successful UK company*” where “*there is no risk whatsoever to a bank opening that bank account*”, whether banking facilities should be granted *is a decision for the bank concerned* (my emphasis). Any decision the banks concerned made will be based on a number of factors including whether your firm met the bank’s own criteria to allow it to offer you banking facilities.

I appreciate that you say that the FCA is failing one of its own mandates by not ensuring that the markets work well and feel that the FCA must take action to remedy this situation. However, it is unclear what how you feel that FCA can do this, particularly as you appear to accept that the decision on whether a bank should offer banking facilities is a commercial decision for the bank concerned. Whilst the FCA can indicate to banks that they must consider reasonably (and, to an extent, favourably) an application from a small business (particularly those which are established), the FCA *cannot* (my emphasis) instruct a bank to offer banking facilities to a specific company or a certain type of company.

I hold this view as, if the FCA instructed a bank to offer banking facilities to a firm and that firm subsequently failed it could place the FCA in a position where it (and, given the manner in which the industry is funded, the industry as a whole) was liable for the losses the bank incurred as a result of offering the firm banking facilities. This is not a position which any Regulator can allow itself to be placed.

I appreciate that you will be disappointed that I concur with the FCA’s decision that it cannot intervene. The FCA has noted your concerns and referred the matter to the relevant teams which are responsible for considering the conduct and competitive behaviour of the banks. I would add that, whilst you believe that the banks are hiding behind commercial decisions, the banks are commercial organisations which are free to undertake their own assessments of the risk a business may pose and, providing that they act within the boundaries of the legal and regulatory landscape in which they operate, they are free to make their own business and commercial decisions.

In your correspondence with my office you have also stated that the failure by the FCA to ensure that banks offer banking facilities to small businesses (particularly those operating in the MSB sector) amounts to the FCA failing to “*remedy one of its core mandates*”. I accept that the FCA does have a core objective of ensuring that there is sufficient competition and that the markets work well.

The FCA set out in the correspondence it has exchanged with you, that although it has a statutory objective of encouraging competition, providing the banks act within the FCA’s rules, it is unable to intervene in specific business or commercial decisions a bank may make. For the avoidance of doubt, a bank’s decision whether or not to grant a consumer or organisation banking facilities amounts to a *business or commercial decision for that bank* (my emphasis). However, if you feel that the bank has acted inappropriately in its dealings with you, by incorrectly declining to offer your firm banking facilities then, as the FCA indicated in its letter of 2<sup>nd</sup> August 2013, you may be able to make a formal complaint to it and if you remain unhappy refer the matter to the Financial Ombudsman Service.

I appreciate that you feel that this amounts to a failing of its statutory objective of ensuring that the markets function well. However, although I have noted your views in this regard I would say this. The role of “strategic” objective is not to impose an obligation on the FCA but rather, when discharging its general functions, the FCA must so far as is reasonably possible act in a way which is compatible with the strategic objective (i.e. ensuring markets function well). The FCA’s general functions include making rules and determining its policy and practices for exercising particular functions under the FSMA or the 2012 Act.

The FCA’s powers in this regard are limited to ensuring that the appropriate type of account (i.e. a business account for a small business) is available from a number of banks although they do extend to ensuring that there is no-collusion over the pricing of the provision of this service. I do not believe that the FCA’s objectives could, or indeed should, extend to ensuring that banks offer a service to a specific type of business or firms operating in a specific business sector as this would amount to the FCA overruling a bank’s business plans, together with its ‘underwriting’ and ‘client/business assessment’ criteria.

Whilst I can understand why you feel that MSBs are being denied access to bank accounts, as I have indicated above this is a business decision for the banks concerned and is not something which the Regulator can directly (my emphasis) become involved. One of the key factors for banks in deciding whether to provide current accounts to firms in this sector has been the risk of anti-money-laundering, which is a valid consideration for a bank when it decides who to do business with. However, I understand that the FCA has discussed the issue generally with the Office of Fair Trading (OFT). Ultimately, it is for the OFT to take this matter forward if it feels that the competition laws have been breached. I would also add that, should the FCA instruct a bank to offer accounts to a certain type of client then it would amount to intervening in a bank’s business decision (and could also impact adversely upon risk decisions made by other regulators).

As I have indicated above, although the FCA cannot force banks to provide banking services to your firm, if you feel that banks are acting in, what could be described as, an “anti-competitive” manner, it is for the OFT to challenge the actions of banks under the powers which it has under the Competition Act 1998. If you feel that this is the case, as the FCA explained in its letter of 2<sup>nd</sup> August 2013, you should therefore consider making a direct referral to the OFT for alleged breaches of the Competition Act 1998.

I have also noted your comments regarding the larger banks’ decisions not to offer banking facilities to MSBs and your belief that this is directly attributable to pressure being applied by the US Government. Although you have made this comment, and allege that you have evidence to support your claims, it does not appear that this evidence has ever been presented to the FCA. Indeed, the FCA has informed me that it not been presented with any evidence to indicate that the business decisions the UK banks made were driven by pressure applied the US Government rather than commercial decisions driven by anti-money laundering concerns and/or concerns about their ability to manage the risks posed by MSBs. This includes concerns that they would be considered not to comply with global anti-money laundering standards by regulators in all the countries they operate in including the US and UK. It has clearly been informed by US and UK regulatory action against other banks and is in line therefore with the banks current policy of reducing risk.

Given that there is nothing to indicate that you have suffered any “*inconvenience, distress or loss*” resulting *directly* (my emphasis) from the regulators’ actions (as the inconvenience you have suffered was caused by the banks), as I have pointed out above, I concur with the FCA’s view that your complaint is not something which I can consider under the rules of the complaints scheme. In addition, I would also draw your attention to paragraphs 6.14 and 6.8 of the rules of the complaints scheme which state:

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 is essentially your displeasure that a number of banks have, for whatever reason, refused to provide your business with new and additional banking arrangements.

I should point out that whether a complaint is within the complaints scheme is at my sole discretion. Currently, for the reasons explained above, I do not believe that this case justifies an investigation by me. It may be that this view may change in the future but on the evidence currently available, that remains my view.

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 it gives me an unfettered discretion as to whether or not I carry out an investigation. On what I have read that there is no evidence of any wrong doing by the regulator, the firm or indeed the reviewer. Whilst you remain unhappy with the position, the FCA, as the Regulator, has considered your comments and set out its position and also provided you with details of how you could take the matter forward. If you remain unhappy with the position, I would urge you either to contact the FOS or the OFT.

I am sorry, but there is nothing to indicate that the FCA has failed to investigate adequately your complaint or that it has failed to act appropriately upon the concerns you have raised. With this in mind, I do not feel that further investigation or comment by me is necessary and I am therefore filing my papers.

Yours sincerely,



Sir Anthony Holland  
Complaints Commissioner