Complaints Commissioner

24th February 2014

Dear Complainant,

Your complaint against the UK Financial Services Regulator
Reference Number: FSA01598

I write with reference to your email of 23rd December 2013 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.

From 1st April 2013, as part of the changes implemented by the Government, the Financial Services Authority (FSA) was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulators of the UK's financial services industry. I would add that although the FSA has been replaced, transitional provisions have been put in place to enable the continued consideration of complaints against the FSA. As your complaint relates to the inactions of the FSA, in relation to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new transitional complaints' scheme.

As set out in the consultation paper (CP12/30 Complaints against the regulators) and confirmed in the policy statement (PS13/7 Complaints against the regulators), any complaints which have not been concluded as of 1st April 2013 will continue to be investigated by the FCA Complaints Team with the cooperation of the PRA if needed and my office. In practice, this means that, although the governing legislation will have changed there will be no change to the manner in which, or the terms under which, your complaint is investigated.

Your complaint

From your recent email, I believe that you are unhappy with the outcome of the Regulator's investigation into your complaint. Although, upon the request of my Senior Investigator, you have provided additional information this does not provide the clarification I had hoped for other than to set out why you did not contact the Regulator before late November or early December 2011. As such, I have based my investigation upon the arguments you placed before the Regulator namely that:

- you allege that you were informed by the FSA Customer Contact Centre, in or around November 2011, that Firm MS "*was genuine*".
- as a result of this clarification, and because you were informed that "*the firm was registered with the FSA and in Milan*", you started to invest what were not insignificant sums of money with the firm.
- by February 2012 you had 'invested' £20,000 with Firm MS. However, whilst you were in the process of making a further investment your bank became concerned over the nature of the transfer you were making and advised you to contact the Regulator.
- having done this, you were informed that, given the nature of the contact, it was likely that Firm MS was a clone of a genuinely authorised Italian firm, Firm M, and as a result you were the victim of what is known as a 'boiler room'.
- you are also concerned that there was a delay between the Regulator being alerted to the existence of a 'boiler room' calling itself Firm MS (as a clone of Firm M) and an alert being posted upon the Regulator's website.

Coverage and scope of the transitional complaints scheme

The transitional complaints scheme provides as follows:

> *9.1 The transitional complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions under FSMA. The transitional complaints scheme covers complaints about the way in which the FSA has acted or omitted to act, including complaints alleging:*
>
> *a) mistakes and lack of care;*
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> *b) unreasonable delay;*
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> *c) unprofessional behaviour;*
>
> *d) bias; and*
>
> *e) lack of integrity.*
>
> *9.2 To be eligible to make a complaint under the transitional complaints 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.*
>
> *9.3 The transitional complaints scheme does not apply to the Bank's functions under Part 5 of the Banking Act 2009 (overseeing inter-bank payment systems) as this was not previously subject to these complaints arrangements.*

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. FSMA (as the relevant legislation in place at the time) stipulated in Schedule One that the FSA is exempt from "liability in damages". It stated:

(1) Neither the Authority nor any person who is, or is acting as, a member , officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.

(2) (Irrelevant to this issue under investigation)

(3) Neither subparagraph (1) nor subparagraph (2) applies

(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 [1998 c.42] Human Rights Act 1998.

I have referred to FSMA here as it was FSMA which was the relevant legislation when the FSA considered your complaint. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. 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 transitional 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 FSA (or indeed by the FCA) which is incompatible with the Human Rights Act 1998 which directly caused you to lose your possessions.

The loss you say you have incurred is the direct result of your decision to deal with or 'invest' a considerable amount of money following 'cold calls' from unauthorised and non-regulated firms, with which you had had no previous dealings nor an on-going business arrangement.

My Position

As part of my investigation into your complaint I requested a full copy of the Regulator's investigation file and recordings of the telephone conversations you had with the Regulator's Consumer Contact Centre (CCC). I have now had the opportunity to review this file which includes a record (both notes and recordings) of all of the calls it received from you which it has been able to locate.

Before I comment further on your specific concerns I feel it may be useful if I comment generally on the manner in which those running 'boiler room' operations operate. As consumers are becoming more aware of potential scams, those running 'boiler rooms' often now look to giving their 'firm' an appearance of authenticity. From the cases I have seen this often results in those running the 'boiler room' operation cloning the details of a genuinely authorised firm (specifically its name and Regulator's registration number albeit it will operate from a different address), which may or may not be based in the United Kingdom, and which has received approval to conduct regulated activity within the United Kingdom.

I also feel that it may be useful if I provide some background on the genuine firm which was *not* (my emphasis) the one which contacted you. Firm M is an Italian firm which is authorised by the Instituto Per La Vigilanza Sulle Assicurazioni Private E Di Inteesse Collettivo (IVSAPIC), which is one of Italy's financial services regulators. As a result of the IVSAPIC issuing Firm M (i.e. not the 'firm' which contacted you) with an '*EEA Inward Services Passport'* ('passport') it was able to conduct regulated activity within the UK.

I would also add that the '*EEA Inward Services Passport*' the IVSAPIC granted to firm M (the genuine firm) was granted under the EU's Insurance Mediation Directive (IMD). As such, it only allowed Firm M to undertake activities which amounted to the arrangement of contracts of insurance (i.e. non-investment arrangements). The '*EEA Inward Services Passport*' the IVSAPIC granted Firm M under the IMD *did not* (my emphasis) allow it to undertake investment contracts or arrange 'deals' involving investments.

For the sake of completeness I must also point out that under the IMD, once a firm's home state regulator (in this case of the genuine Firm M this was the IVSAPIC) has authorised a firm and, if requested by the firm, granted the firm a 'passport' the firm is then allowed to undertake regulated activity (or operate) in another EEA member state (such as the United Kingdom). In granting the 'passport', it is the home state regulator's responsibility to ensure that the firm meets the general fitness and propriety requirements. In the case of the genuine Firm M, as the IVSAPIC was satisfied that Firm M had met all of the necessary criterion, it granted Firm M the 'passport' and notified the host state regulator (which at the time was the FSA) of this and, in doing so, provided the Regulator with the details required under the Luxembourg Protocol. The details IVSAPIC provided to the Regulator included (but are not limited to):

- Firm M's full name;
- The name of the current home state regulator;

- The address of the firm's head office and/or the firm's home state registration number; and
- The type of business Firm M was intending to conduct.

As the genuine Firm M had been granted a 'passport' by the IVSAPIC the Regulator was required to authorise Firm M and to allow it to conduct business/operate in the United Kingdom. I would add that, under the protocols which continue to exist (and which form part of EU Law) regulators are *unable* (my emphasis) to 'gold plate' or increase their individual requirements above those set out under the protocol. As such, no matter how much the Regulator, may have wished to require additional information, such as a telephone number for an overseas firm operating in the United Kingdom on a 'passport', under the law it simply is unable to do this.

Following notification that Firm M (the genuine entity) had been granted a 'passport' by the IVSAPIC, the Regulator granted it Part IV permissions and added Firm M's details to it register of authorised firms. The information the Regulator had set out on its register accurately reflected the information which had been given to it by the IVSAPIC.

It must be remembered that, although I have set out the authorisation process and why Firm M was authorised by the Regulator and included on the Regulator's Register of authorised firms you were not contacted by Firm M. You were contacted by Firm MS which quoted Firm M's Regulator's authorisation number and used a name which was sufficiently similar to that of the genuine Firm M to give the appearance of being the genuine firm to an unsuspecting consumer.

I appreciate that you are unhappy with the situation and, without the specific clarification I requested, I can only assume that this stems from two issues:

i) the Regulator's inability to locate the call that you say you made to it in November 2011 which was, I believe, before you made your first 'investment'; and

ii) the Regulator's delay in posting the 'alert' about Firm MS on its website.

I appreciate that say that you contacted the Regulator in November 2011, to ascertain whether the firm with whom you were dealing was genuine and believe that you were given an assurance that it was. Although you have indicated that you made this call, the Regulator has been unable to locate any record of this call.

As part of its investigation the Regulator asked its CCC to clarify whether any calls could have been missed and whether there were any 'logging' or 'recording' issues during November 2011. The CCC has confirmed that there were not any 'logging' or 'recording' issues during November 2011 and that *all calls* (my emphasis) are recorded as a matter of course.

This recording takes two forms, both a recording of the conversation and notes which are entered by the operative who took the call. The Regulator has also confirmed that although it only keeps recordings of calls for a period of approximately 18 months, notes are made for each call which is taken and these notes are retained for approximately three years. As such, due to the time period involved, even if the Regulator was unable to provide a recording of the any telephone conversation which took place it would still be able to provide contemporaneous notes of any call which took place.

Having undertaken a search of *both recording systems* (my emphasis) the Regulator has indicated that as it does not have any record of a call being made in November 2011. The Regulator has also confirmed that the first record it has of you contacting it is the call you made to it is the call you made to it on 17th February 2012. The Regulator holds a recording of this call and has provided me with a copy. Having listened to this call I understand that when the CCC operator asked you whether you had been in contact with the Regulator previously, you answered "*no never*" indicating that you had not had any previous contact with the Regulator. With this in mind, whilst I do not dispute that you believe you contacted somebody in November/December 2011, it is regrettably unclear from the information available to me whether you had been in contact with the Regulator prior to 'investing' with Firm MS.

I am also aware that in your response to my Preliminary Decision that you say that:

> "*The main area of disagreement is the phone call I made to the FSA at the end of Nov/Dec2011. Firstly may I again advise that the delay in contacting the FSA was because Hampshire police asked me not to as both they and Interpol were investigating-so (sic) I did as they asked*".

From this it is clear that you were aware that something was not right with Firm MS *before* (my emphasis) you say that you first made contact with the Regulator. Given this comment it is even more unclear why you still felt it prudent to 'invest' with Firm MS despite the clear concerns that had been raised.

Whilst I do not doubt that you received assurance upon the authenticity of Firm M and/or Firm MS in November 2011 it remains unclear whether this reassurance was provided by the Regulator. Given what you have stated such reassurance may possibly have been given by those running the 'boiler room' operation when they indicated that it was registered with the UK's financial services Regulator and by providing the 'cloned' the Registration number of Firm M (the genuinely authorised firm).

I also appreciate that you have indicated that you are unhappy with the Regulator's actions in posting the alert about Firm MS on its website. The Regulator has apologised for this delay and explained why it occurred. In its decision letter the Regulator has set out that it has:

> "*found that the FSA did not act in a timely manner on receiving intelligence relating to [Firm MS]. That was because the department responsible for processing the intelligence experienced staff shortages at the relevant time*".

I would add that, although the Regulator may receive intelligence which makes it aware of a belief that a 'boiler room' operation is targeting UK consumers, where the 'boiler room' operation has cloned the details of a genuinely authorised firm the Regulator has to undertake a number of checks into the conduct of the genuine firm (in this case Firm M) before contacting the genuine firm and clarifying the nature of the alert it intends to publish. Unfortunately, undertaking the necessary checks and obtaining the genuine firm's agreement to the 'alert' also delays the publication of the alert especially when the genuinely authorised firm is based in another European Country or where the involvement of the home state regulator is required.

In this case, the Regulator has identified that there were delays in the investigation of the intelligence it received. Although it is unfortunate that there was a short delay there is nothing to indicate that this delay *directly* (my emphasis) led to the loss you say you have incurred.

From the information presented to me it appears that you were contacted by those running the 'boiler room' operation (purporting to be from Firm MS) in or around November 2011. You then indicate that, based upon the information you were given you proceeded to transfer a total of £20,000 to the 'boiler room' operation's overseas bank account during December 2011 (with £15,000 being transferred) and January 2012 (with a further £5,000 being transferred). It was only in February 2012 when you were in the process of making a further transfer and your bank raised concerns is there any evidence that you contacted the Regulator.

As you only appear to have contacted the Regulator after you had made your first two transfers to the 'boiler room' operation's overseas bank account (and in the knowledge that things with Firm MS were 'not right' given that both the Hampshire Police and Interpol were investigating Firm MS) there is nothing to suggest that the Regulator's delay in posting the alert had any impact upon your situation. This view is supported by the discussions which took place during your telephone conversation with the CCC operative on 17th February 2012 where you indicated that this was your first call to the Regulator and that you were unaware of the information contained on the Regulator's website (specifically pertaining to the Regulator's Register of authorised firms and the alerts concerning known 'boiler room' operations).

From this I believe that, effectively what caused your loss was relying, what are for you considerable and important investments, entirely on unsolicited telephone calls from someone with whom you had had no previous contact and were totally unknown to you and which involved the transfer of considerable amounts of money to overseas bank accounts which, from the contents of the telephone calls you made to the Regulator in February 2012, *do not appear* (my emphasis) to have been in the name of the firm with which you believed you were 'investing' (i.e. Firm MS).

For the sake of completeness I would also add that, even if the FSA (as the Regulator at the time) had been negligent in failing to post the alert in a timely manner, which is *not* (my emphasis) something I believe it had been, the Regulator would not be liable for damages *unless* (my emphasis) it had acted in bad faith or its actions amounted to a breach of Article 1 of the Human Rights Act 1998. As I have indicated above there is nothing to indicate that the Regulator acted in bad faith or breached Article 1 of the Human Rights Act 1998 as the loss you incurred was caused *solely by your decision* (my emphasis) to deal with the boiler room operation which purported to be a Regulated firm calling itself Firm MS.

Conclusion

When arriving at my decision I have to consider the facts identified by the Regulator during its own investigation together with the arguments and further evidence submitted by the complainant, together with the possible outcome or recommendations I could make.

It is unfortunate that you were contacted by a 'boiler room' operation and believed that you were dealing with a legitimate firm. However, the information presented to me indicates that, although you were aware that there were potential issues with Firm MS (given that you have stated that you were aware both Hampshire Police and Interpol were investigating it) you chose to invest around £20,000 with it before contacting the Regulator (the FSA). It was *this action* (my emphasis) which resulted in you incurring the losses that you say you have sustained.

Although one of the Regulator's statutory obligations is consumer protection, the Regulator is only able to offer consumers a certain amount of protection. Consumers must *also* (my emphasis) look to protect themselves as well by acting sensibly at all times. Whilst the Regulators (the FSA and the FCA) have tried to make consumers aware that certain groups and individuals will try to steal money from unsuspecting consumers by acting fraudulently (i.e. by running 'boiler room' schemes or other such scams), the Regulator is unable to 'monitor' each and every telephone call a consumer may receive and/or financial transaction a consumer may undertake.

It is my experience from reviewing these kinds of complaints, that increasingly those running 'boiler room' scams are frequently producing literature and websites which look authentic and professional to give an air of legitimacy to their operation and to further convince their potential victims. I am also aware that those running the boiler rooms in question can be persuasive and 'clone' the details of legitimate firms. Despite that careful consideration would indicate that making any investment decision based on a 'cold call' approach is highly dangerous and more likely than not to lead to a loss caused by fraud as happened in your case. The CCC operators raised clear and significant concerns with you during your telephone conversations which I believe prevented you from transferring further funds. Given this and that ultimately *consumers must take some responsibility for their own actions* (my emphasis) I cannot look to pass direct blame upon the Regulator when, despite the Regulator's best endeavours, an 'investment' decision does not result in the outcome the consumer desired or expected.

Although I do have a degree of sympathy for the position you find yourself in, as you have clearly lost a considerable amount of money, ultimately, from the information presented to me by both you and the Regulator, there is nothing to suggest that the Regulator acted inappropriately, provided you with incorrect and/or misleading information or that its actions directly resulted in you incurring the losses that you say that you have. Given my views it is my Final Decision that I am unable to make a recommendation to the Regulator that it should offer you any form of redress.

Yours sincerely

Sir Anthony Holland
Complaints Commissioner