

08 June 2023

**Final report by the Complaints Commissioner****Complaint number 202201713***The complaint*

1. On 1 February 2023 you asked me to investigate a complaint about the FCA.

*What the complaint is about*

2. The FCA summarised your complaint as follows:

You are unhappy that the FCA appears to be ignoring a “regulatory loop-hole” that allows directors of unlisted UK public companies to engender false markets in the shares of companies under their stewardship.

*What the regulator decided*

3. The FCA did not uphold your complaint.

*Preliminary points (if any)*

4. The FCA also investigated a complaint from you that when you first raised your concerns to the FCA about the substantive matter of your complaint, the service you received from the FCA was unsatisfactory. The FCA upheld this complaint. You have not referred it to me so I will not review it.

*My analysis*

5. The crux of your complaint is that Firm X (a corporate finance firm authorised and regulated by the FCA and a provider of liquidity in unlisted shares), is allowing private companies such as Firm Y of which you are a shareholder, to list their shares for quarterly auction on X’s platform whilst only disclosing their company and insider information annually. You feel this allows firms such as Y to create a false market in their shares, and the FCA ought to step in and close

this 'loophole'. At the moment you feel the FCA is failing in its duty to provide appropriate regulation and protect consumers.

6. The FCA did not uphold your complaint. It explained that:

'The activities we regulate are primarily set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order.

The UK Regulatory Framework that governs the buying, selling and organised trading of financial instruments, and which includes the trading venue perimeter, is spread across legislation and rules in our Handbook.

We can only act based on the regulatory perimeter set out in primary legislation in relation to trading venues. We can provide guidance in our rules to interpret those requirements but we can only clarify aspects of the perimeter and cannot change where it is set in legislation.....

Although the issue of perimeter in respect of trading venues has not been raised in previous perimeter reports we have published, we have discussed it with the Treasury as part of the Wholesale Markets Review.

Based on the current regulations, rules and guidance Y is not subject to regulatory requirements under UK MAR (Market Abuse Regulation) to more frequently disclose information (e.g. inside information) as their shares are not admitted to trading on a trading venue. This is because X does not hold a regulatory permission to operate a trading venue.

The FCA is aware of ambiguities and potential uncertainties of the trading venue perimeter.

The Government and the FCA have recently consulted the market as part of the Wholesale Markets Reform Review on the trading venue perimeter. The Government recognised the need for greater clarity about what firms need to be authorised as a multilateral trading facility (MTF) and said that the FCA had agreed to consult on new guidance. The FCA has subsequently published a consultation paper on guidance to the trading venue perimeter.

The FCA intends to finalise the guidance and publish a policy statement in Q2 2023. Relevant firms will then need to consider how the guidance applies to their models, whether those models constitute the activity of operating a multi-

lateral system, and if so, apply for the relevant trading venue permission. This further clarity should more clearly identify what firms should be authorised as MTFs and consequently determine whether issuers on those trading platforms should be disclosing inside information in line with their regulatory obligations under UK MAR’.

7. You have commented to both the FCA and me that the FCA’s position is a ‘cop out’ and that the FCA is hiding ‘behind the excuse that my point is not within your legal remit, and you and the Treasury have not yet got round to doing the right thing’.

8. I should begin by saying the FCA has no oversight of unauthorised companies such as Y in which you are invested. Neither the FCA nor I can investigate your concerns about Firm Y.

9. On the other hand, Firm X is an FCA authorised firm, and because of this, I can look at the FCA’s oversight of it in relation to your complaint. Firm X describes its activities as follows:

‘[x] is the online marketplace to buy and sell shares in UK private companies. Private companies can now create liquidity in their shares’....

10. However, despite undertaking these activities, the Firm is not authorised as a trading venue. This is relevant because, according to the FCA, ‘The requirement for companies to make public inside information on an ongoing basis is included in the Market Abuse Regulation. The obligation in MAR applies to companies who have made a request to admit their shares to a UK trading venue or have had their shares admitting to trading on a UK trading venue. Firm Y is not required by MAR to disclose inside information on an ongoing basis because it has not made a request for its shares to be admitted to trading on a UK trading venue and has not had its shares admitted to trading on a UK trading venue. Firms who are authorised by the FCA do not have to disclose inside information on a continuous basis unless they have requested that their shares be admitted to trading on a UK trading venue or have had their shares admitted to trading on a UK trading venue. Therefore, the fact that Firm Y is not authorised by the FCA plays no role in determining whether it has an obligation to disclose inside information on an ongoing basis under the Market Abuse Regulation’.

11. The FCA has said that 'The definition of a trading venue is that a firm is a recognised investment exchange or has permission to operate an MTF or OTF. None of these apply to Firm X and therefore it is not a trading venue as defined in the FCA Glossary. The language Firm X is using in the above is a description of its business that does not directly relate to regulatory categories or obligations'.
12. Your response to the FCA dated 1 February 2023 has been that 'If Firm X, whose team I like and respect and whose model I approve of, are not operating "a trading venue" then respectfully, the Moon must, as is often rumoured in fairy tales, be made of Stilton Cheese! I find it difficult to believe you can have written those words while keeping a straight face!
13. I have some sympathy for your frustration expressed above. It appears to me, as it has appeared to you, that Firm X is operating a de facto trading venue. The FCA is right to say that Firm X's description is that of its business, and not of a regulatory category or obligation, but that is only because the firm is not authorised as an MTF. The question is, should it, and firms like it, be authorised? Because, if it were, then firms such as Y which listed shares with it would have to comply with the regulatory requirements for information disclosure that MTFs have, and your complaint would de facto fall away.
14. You have said to me that you will complain in three months' time 'if the FCA fails to close this glaring legal loophole when they publish their new guidance policy during Q2 2023'.
15. The FCA has explained it is undertaking work to finalise guidance for relevant firms which will then need to consider how the guidance applies to their models, whether those models constitute the activity of operating a multi-lateral system, and if so, apply for the relevant trading venue permission. Whether or not this will directly affect the set up of firms such as X remains to be seen. I ask that I am kept informed by the FCA on how the work in this area progresses every six months, given the very evident ambiguities in this area.
16. I appreciate your frustration in the meantime; however, I do not think it is realistic for you to expect more than what the FCA has said it will do; issue guidance in the next quarter to firms on this matter. To alleviate your concerns, I

ask the FCA to update you when it issues its guidance to firms on this matter.  
The FCA has accepted this recommendation.

*My decision*

17. Like the FCA, I do not uphold your complaint that the FCA 'is failing in its duty to provide adequate and appropriate regulation and to protect consumers'. This is because the FCA is aware of the ambiguities surrounding trading venues and has taken steps to address these. I recommend the FCA keeps me updated every six months of progress in the work it does in this area and that it also updates you when it issues its guidance to firm in the second quarter of 2023.

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Complaints Commissioner  
08 June 2023