Complaints Commissioner

Office of the Complaints Commissioner
3rd Floor
48–54 Moorgate
London EC2R 6EJ

Tel: 020 7562 5530
Fax: 020 7256 7559
E-mail: complaintscommissioner@fscc.gov.uk
www.fscc.gov.uk

4th November 2015

Dear Complainant

Complaint against the Financial Conduct Authority
Reference Number: FCA00090

Thank you for your email of 26th October 2015. I have completed further inquiries of the Financial Conduct Authority (FCA), and am able to write to you. In finalising this decision, I have also considered the points which you made in response to my provisional decision.

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.

As you can find full details of how I deal with complaints at www.fscc.gov.uk I do not intend to set them out fully below. If you need further information, or information in a special format, please contact my office at complaintscommissioner@fscc.gov.uk, or telephone 020 7562 5530, and we will do our best to help.

What we have done since receiving your complaint

I have now reviewed all the papers you and the regulator have sent us. My decision on your complaint is explained below.

Your complaint

Your complaint is that the FCA's mishandling of the briefing on its business plan which it gave to the Daily Telegraph in March 2014 caused you to lose money. The Telegraph article reported that the FCA's business plan for 2014/2015 would include an inquiry into 30 million insurance policies colloquially known as 'zombie funds'. The rapid reduction in share values of companies which specialise in potentially affected insurance policies following publication led you to sell 1,500 Aviva Plc shares at 11:41 am on 28th March 2014 for a total consideration of £6,693.75

You subsequently submitted a complaint to the FCA seeking redress as follows:

'**Current value** of the (1,500) Aviva shares that were sold ,circa	£8,190.00
Final 2013 dividend of 9.4ppps paid 16/5/2014 foregone	£ 141.00
Interim 2014 dividend of 5.85pps paid17/11/2014 foregone	£ 87.75
Total	**£8,418.75**
Less – Net receipt from sale as per contract note	£6,681.25
Loss due to transaction	**£1,737.50**
Furthermore, to become reinvested as before would cost:	
Based on current price of Aviva (circa £7,920.00)	
Commission payable	£ 12.50
Ad Valorem stamp duty	£ 40.95
Sub total	**£ 53.45**
Revised Total Loss of Claim	**£1,790.95'**

As a result of its stage 1 investigation into your complaint, the FCA offered you an ex gratia payment of £371.75 inclusive of brokerage fees of £12.50. You do not feel this is sufficient and are seeking to recover £1,790.95 as calculated above, subsequently amended to £1,703.35 when you submitted your complaint to me, and further revised to £1,028.24 in your response to my Preliminary Decision.

Background to the complaint

In considering this case, I have carefully reviewed both your complaint and the regulator's arguments for not offering you an ex gratia payment of the full sum which you are seeking.

By way of general background, following an FCA briefing the Telegraph newspaper ran an article on its website at or around 10 pm on 27th March 2014 and again in the morning of 28th March 2014 which indicated that the FCA would conduct a review of 30 million policies sold between 1970 and 2000, colloquially known as zombie funds, as part of an inquiry into the possible mistreatment of customers.

The effect of this article was to depress the share prices of some companies trading in such policies when the market opened on the following day, 28th March 2014.

At 2.30pm on 28th March 2014 the FCA issued clarification of its plans, and this announcement led to a recovery in the affected shares during the course of the day, though not to the levels seen at the end of the preceding day.

Subsequently, the FCA Board acknowledged the concerns of the market and appointed an external law firm, Clifford Chance, to undertake an independent inquiry into the FCA's handling of the briefing and its aftermath. Simon Davis of Clifford Chance conducted the inquiry, and concluded that a 'false market' and possibly a disorderly market existed for the shares of affected companies on 28th March until 2.30pm, when the FCA issued its clarification statement, following which the relevant shares prices recovered. The FCA has accepted that its mishandling of the briefing, and the delays in correcting the matter, caused disruption to the market and losses, and it has offered ex gratia payments to a number of individuals, including you.

The particulars of your case are that you had a long-term holding of 2,674 Aviva shares in an ISA.

On 28 March 2014 at 11:41 am you sold 1500 Aviva shares for £6,693.75.

You complained to the FCA who accepted your complaint within the Complaints Scheme and offered you an ex gratia payment of £371.75 inclusive of brokerage fees, using the share price of Aviva at close of business on 28th March 2014 as a benchmark against which to calculate investor losses.

You feel that the FCA ought not to have used the closing price on 28th March 2014 as a bench mark and should, instead, re-imburse you £1703.35 for loss of future dividends, share growth and reinvestment costs as you calculated above.

You have emphasised, in your response to my preliminary decision, the serious criticisms which have been made of the FCA's handling of this whole matter. It is a matter of record that the Davis Report, commissioned by the FCA, was very critical of the FCA's performance; that these criticisms have been echoed by many others, including Parliamentarians; and that the FCA has accepted its serious failings in this matter. It is against this background that I have considered your complaint.

My findings

In reviewing your complaint, I have focussed on what I believe is the main issue: namely, is the FCA methodology for calculating ex gratia payments based on the closing price of the relevant shares on 28th March 2014 reasonable?

It is a matter of fact that the Telegraph article published at 10pm on 27th March 2014 and featuring again on the front page of the Telegraph on the morning of 28th March 2014 led to investor panic both immediately before and after the markets opened at 8am that morning. This was reflected in the share price of the insurance companies affected by the statement. It follows therefore that any sale of shares of affected companies on 28th March 2014 and associated losses would be eligible for compensation from the FCA.

Share prices are volatile and fluctuate according to a large number of underlying factors. It can be difficult to isolate the impact of one particular factor, in this case the contribution the press coverage of the FCA business plan, made to the market price of Aviva, although it is clear from the Davis Report that the effect was significant for some of the affected companies. For that reason, the FCA needed to choose a benchmark time close to the Daily Telegraph publication and the release of the FCA's clarification statement as the basis for calculating reasonable compensation.

From the papers I have seen, the FCA considered the merits of a number of options in setting the benchmark according to which losses would be assessed. Their final decision was to use the share prices of the affected companies at close of business on 28th March 2014, and this is the basis upon which it has assessed your, and others', losses. The reasoning behind this decision was that share prices in affected companies, including Aviva, responded favourably to the FCA announcement at 2.30pm, and recovered significantly by close of business on 28th March 2014. Using later dates would have entailed benchmarking prices which may have factored in other subsequent market events, and not represent as 'pure' a benchmark as the closing price on 28th March 2014. I do not consider that this decision was unreasonable, even though the adoption of the closing price on 27th March or 31st March 2014 might have resulted in a higher offer.

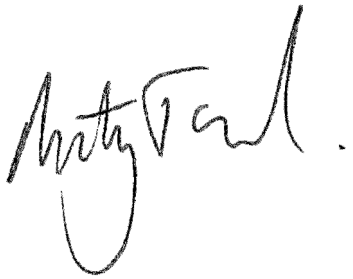
I should make it clear at this point that my role is not to say what I would have decided had I been the regulator. My task is to assess whether or not the decision is one which the regulator could reasonably have taken, in light of its statutory duties and policies, and bearing in mind that – save in very limited circumstances – the FCA is immune in law from actions for damages.

In the circumstances above, choosing a benchmark for the purposes of calculating losses within a short range of the FCA clarification announcement at 2.30 pm on 28th March 2014 is a decision which the regulator reasonably took. Compensating you for future dividend losses and share price fluctuations beyond the short window of dates discussed above would not, in my opinion, represent a reasonable course of action.

For the reasons I have explained, and while I recognise the distress and inconvenience which has been caused to you, I consider that you have received a reasonable offer. You have asked me whether others have accepted offers made on the same basis: my understanding is that they have, but that goes beyond the consideration of your complaint and you may therefore wish to address that question to the FCA.

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

Yours sincerely



Antony Townsend
Complaints Commissioner