Complaints Commissioner

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3rd September 2015

Dear Complainant

Complaint against the Financial Conduct Authority
Reference Number: FCA00092

Thank you for your email of 17th July 2015. I have completed further inquiries of the Financial Conduct Authority (FCA), and am able to write to you with my final 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 your shares in Aviva Plc. You sold 1041 Aviva shares at 8.08am on 28th March 2014 for £4,888.40.

You had previously sold 5,989 Aviva plc ordinary shares on 24th March 2014 at 8:49am, prior to the Telegraph article which was published at 10 pm on 27th March 2015.

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

> 'The loss I have occurred as a result of the sale of these shares I believe totals £4,720.00 – This is made up from the loss of dividends I would have been entitled to over 2014-2015 from my holding of 7,030 shares and the loss I have incurred in share price growth since I no longer hold any Aviva shares. The share price on 18th Feb 2015 (the date of your letter) was 551p'

As a result of its Stage 1 investigation into your complaint, the FCA rejected your claim for the 5,989 Aviva shares sold on 24th March 2014, as that sale preceded the publication of the Telegraph article. It offered you an ex-gratia payment of £18.33 inclusive of brokerage fees of £11.95. You do not feel this is sufficient and are seeking to recover £4,720.

You have also complained that the FCA would not engage with the Sunday Times acting on your behalf.

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 10.00pm 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 purchased 7030 shares in Aviva between 2011 and 2013.

On 24th March 2014 at 8.49am (i.e. before the Telegraph's publication) you sold 5,898 Aviva shares.

On 28th March 2014 at 8.08am on you sold 1,041 Aviva shares for £4,888.40.

You complained to the FCA who accepted your complaint within the Complaints Scheme and offered you an ex-gratia payment of £18.33 inclusive of brokerage fees for the 1,041 shares sold on 28th March 2014, 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, reimburse you £4,720 for loss of future dividends and share growth of the entirety of your portfolio of 7,030 Aviva shares.

My findings

In reviewing your complaint, I have focussed on what I believe are the two main issues: namely, is it reasonable for you to claim reimbursement for the entirety of your portfolio losses in Aviva (7,030 shares), and is the FCA's methodology for calculating ex-gratia payments based on the closing price of the relevant shares on 28th March 2014 reasonable? I will examine these two issues in turn.

(i) Eligibility of your portfolio losses for an ex gratia payment

It is a matter of fact that the Telegraph article published at 10.00pm 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 8.00am 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. However, sales which took place before the Telegraph article was published on 27th March 2014 would not have been affected by the FCA briefing and therefore it is reasonable to exclude such sales for the purposes of redress.

(ii) The reasonableness of the FCA methodology for calculating ex gratia payments

Share prices are volatile and fluctuate according to a large number of underlying factors. It can be difficult to isolate the impact that 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 they have 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.

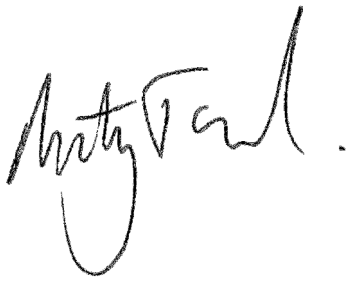
In the circumstances above, choosing a benchmark for the purposes of calculating losses within a short range of the FCA clarification announcement at 2.30 pm on 28th March 2014 is a decision which the regulator reasonably took. Compensating you for future dividend losses and share price fluctuations 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, I consider that you have received a reasonable offer.

Finally, I note that you have complained that the FCA would not deal with the Sunday Times acting on your behalf. As far as I can see, the FCA has engaged properly with you, even though you are dissatisfied with the outcome of the matter. I see no grounds for criticising the FCA for not dealing with the Sunday Times in relation to your complaint, as I understand that the FCA did advise the Sunday Times that, whilst it was unable to comment upon an individual case, you did have the option to refer your complaint to my office.

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