Complaints Commissioner

Office of the Complaints Commissioner
23 Austin Friars
London EC2N 2QP

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

19 June 2017

Dear Mr Iksil

Complaint against the Financial Conduct Authority
Our reference: FCA00106

Thank you for your email of 8 March 2017. I have completed further enquiries of the FCA, and can now write to you. Before finalising my decision, I invited comments from you and the FCA on my preliminary decision issued on 26 May 2017. I did not receive comments from you. The FCA did comment on my preliminary decision: they pointed out that they had already apologised to you for the delay in responding to your complaint, and that payment for distress and inconvenience was not appropriate. I have accepted the FCA's points, as set out below, given that you have not responded otherwise.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA 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.

Your complaint

You first complained to the FCA on 5 August 2015. Your original complaint comprised 26 pages with a number of additional attachments as supporting evidence. On the 28 August, 2015, the FCA wrote to you and summarised your complaints as follows:

> *Element One*
>
> You allege that in JP Morgan's Final Notice there were several allegations against individuals who were identified by their position within the Firm and you were one of these people. You are unhappy that the Enforcement Division (Enforcement) did not provide you with an opportunity to make representations to the draft warning notice nor any disclosure prior to issuing the Final Notice. You state that; *"The Final Notice caused further irreparable damage to* [your] *reputation."*
>
> You are also unhappy that Enforcement refused to say whether or not you were identifiable in JP Morgan's Financial Notice.

We believe this element of your complaint is an allegation of 'lack of care' on the part of the FCA.

Element Two

You believe that the Enforcement made mistakes and acted without due care in advance of and during your compulsory interview on 3 July 2013. You believe that Enforcement's investigation into your actions stems from breaches of Principle 2 and 5 by JP Morgan Chase Bank N.A. (JP Morgan) and what they believed was your involvement was in those breaches.

We believe this element of your complaint is an allegation of 'a mistake, lack of care, bias and lack of integrity' on the part of the FCA.

Element Three

You believe that Enforcement demonstrated a lack of care, integrity and bias in the way it conducted interviews of the relevant witnesses in the Enforcement action against you. You believe an example of this is the fact that Enforcement interviewed witness on a number of occasions and you only once.

You also believe that Enforcement tried to make a case of attempted market misconduct, compiled in the Final Notice against JP Morgan, without considering or adequately listening to your explanations to the contrary. You believe that this shows a lack of care and integrity and bias on behalf of Enforcement.

We believe this element of your complaint is an allegation of 'lack of care, bias and lack of integrity' on the part of the FCA.

Element Four

You allege that Enforcement unreasonably delayed the investigation into your actions and specifically in relation to serving you with the Preliminary Investigation Report (PIR). You also believe that Enforcement gave preference to other witnesses' testimony over your own.

We believe this element of your complaint is an allegation of 'lack of care' on the part of the FCA.

The FCA asked you if you agreed with this summary, and also informed you that it would not investigate element one of your complaint as it could have been better dealt with in another way, specifically by you making an application for third party rights under s.393 of the Financial Services and Markets Act 2000.

You responded to that letter on 10 September 2015. In your response you did not dispute the elements of complaint, although you disagreed with the FCA's decision not to investigate element one of your complaint and informed it you would be contacting the Complaints Commissioner.

You contacted me on 22 October 2015 submitting the same complaint letter you had submitted to the FCA on 5 August 2015. At the time, I wrote to you to defer investigation into this element of your complaint and explained why, namely that in light of the fact that the complaint you made to the FCA is, as a whole, was still being investigated I thought it desirable to defer our consideration of the part of your complaint that the FCA has excluded and which you have referred to us until such time as the FCA has completed its ongoing investigation into the remaining issues. I took this course of action as, although I accept that it will inevitably delay our consideration of this issue, I believe that it will allow us to consider any complaints you may have within a single investigation. This approach will also avoid any 'cross over' into elements of your complaint that the FCA is still investigating.

The FCA issued its final decision on the remaining elements of your complaint as summarised above on 3 March 2017 and you referred your complaint to me on 8 March 2017 as follows:

> *'I follow up on my initial request of late 2015. The FCA Complaints team sent on Friday March the 3rd 2017 its response to the complaint that I had addressed them by the 8th August 2015. I wanted to inform you that I maintain my complaint. I believe you have already the files and the complaint including element 1. Notwithstanding the complaint I sent you at the time in late 2015, I regard the FCA's investigation as cursory and superficial. I expect your office to start a more vigourous investigation in the detailed submissions that I have already made.'*

My investigation, therefore, will concentrate on the same four elements of complaint summarised (by the FCA) above, and will focus on whether the FCA's review of your complaint and the conclusions it reached was reasonable.

My findings

Element One

On 18 September 2013 the FCA issued a Final Notice against JP Morgan, your former employer. Your complaint first to the FCA, and then to me, is that you were not given an opportunity to make representations to the FCA on the terms of the Final notice, despite the fact that, as you allege, it identifies you and implicates you in misconduct.

My understanding of your complaint here is that it centres on two main points: first, that the Final Notice identifies you personally, and second, that you do not agree with certain paragraphs in the Final Notice, particularly 4.76. You state that you made the FCA aware in an interview on 3 July 2013 that you do not agree that you

- 'Had traded large size on the IG9 10 year index in order to move the spread lower;
- The reference to "limit the damage" meant that the trading was done in order to attempt to move the spread lower; and
- That my trading evidenced an objective to move the spread lower.'

The FCA excluded this element of your complaint on 28 August 2015 because it could have been better dealt with in another way, specifically by you making an application for third party rights under s393 of the Financial Services and Markets Act 2000.

It is clear that you could have pursued the matter using s393 – indeed, others involved in this case did so. You have explained to me that you did not do so because you considered that it might have been counter-productive, and that the prospect of pursuing an out-of-time application "remains deeply unattractive to me". While I sympathise with your reluctance to embark upon such proceedings, it does not change my view that the FCA were right to conclude that the matter would more appropriately be dealt with such proceedings. As the recently published Supreme Court judgment in FCA v Macris shows, the issues raised in relation to third party rights are complex and contentious, and better dealt with through formal proceedings. I therefore agree with the FCA's decision not to investigate element one of your complaint under this Scheme.

Elements Two and Three

Before I comment upon the remaining elements of your complaint, I should make it clear that it is not my role to say whether the FCA could have handled its investigation into these matters better, or to second guess its regulatory judgement. In the course of an investigation as complex as the one in which you were involved, a large number of decisions will have been made about priorities and resources. My role is to consider whether the FCA's handling of the matter showed such significant failures as to merit some form of remedy.

You allege that a team in the FCA's Enforcement and Market Oversight Division (the Enforcement team) made mistakes and acted without due care before and during its interview of you on 3 July 2013. This element of your complaint is an allegation of 'a mistake, lack of care, bias and lack of integrity' on the part of the FCA.

You base your allegations above on an assertion that you were 'singled out' by the FCA Enforcement team before the interview, and on the following points (as summarised by your solicitors) regarding the interview itself.:

1. *Detailed questions concerning alleged market misconduct at the end of February 2012 were "sprung" on Mr Iksil, despite the fact that a written outline of topics circulated by the FCA prior to the interview had made no mention of this issue (which now forms one of two key allegations in the PIR).*

2. *Mr Iksil was not asked any questions about his interactions with Mr X in May 2012, despite the fact that allegations about these interactions now occupy two pages of the PIR (pp. 70, 97).*

Prior to interview, the FCA was informed that Mr Iksil objected to numerous "translations" that the FCA had produced of conversations between himself and Mr Y in French. Revised translations were provided by Mr Iksil's legal team. The FCA has failed to acknowledge the importance of these disputes, both in interview and in the PIR. By way of example, paragraph 5.62 of the PIR states that "Mr Iksil could not recall in interview what the system was that he was advocating keeping to" (emphasis added). This misrepresents Mr Iksil's evidence. In fact, Mr Iksil denied ever using the word "system"

and subsequently confirmed that, to the best of his belief, the word used was in fact "assiette" and was said in a completely different context. The FCA, without any explanation, has simply ignored Mr Iksil's position and characterised his evidence in a wholly misleading manner."

You also question why the FCA interviewed other individuals connected with the case for much lengthier periods of time, and you allege that this led the FCA to reach erroneous conclusions based on a distorted version of events.

I can see that the FCA has investigated and addressed each of your allegations at length in its decision letter. I do not propose to repeat what the FCA has already said, but I find it a reasonable explanation of the events that took place, and, having reviewed information in the files available to me, I have not found any evidence of impropriety taking place either before or during the interview you had with the FCA on the 3 July 2013.

It is important to bear in mind that the interview was at an early stage of the FCA's investigations. As subsequent events demonstrated, the procedures provided further opportunities to test and challenge the FCA's case. I have some sympathy with your point that the FCA's agenda in advance of the interview did not fully reflect the questioning which took place, omitting some matters: however, the FCA are not under an obligation to provide such an agenda, and the FCA have pointed out that the memorandum of appointment of investigators clearly identified market misconduct as a focus of its concerns. Nonetheless, given that the FCA did choose to present a list of agenda items and disclosed a number of documents before the meeting which they expected to discuss, it would have been better if they had listed market misconduct if it was their intention to concentrate on that area. This was, however, a preliminary interview, and I do not consider that it ultimately prejudiced your position.

In all the circumstances, I consider that the FCA's decision not to uphold your complaint in relation to elements two and three was reasonable.

Element Four

You allege that Enforcement unreasonably delayed the investigation into your actions and specifically in relation to serving you with the Preliminary Investigation Report (PIR). You also believe that Enforcement gave preference to other witnesses' testimony over your own.

Having reviewed this matter, it appears that the investigators were carrying out work on your investigation throughout the period, with different resource levels at different times and for different reasons, including the complicating factor of proceedings on other related cases. Having reviewed the material, I do not consider that the regulator's decisions were unreasonable, although I recognise that the lengthy process must have been stressful and difficult for you.

The FCA decision letter does conclude that the delays should have been explained to you more clearly:

> 'A particular opportunity arose when your case was reviewed on 18 December 2013 and a plan was put in place to begin preparation of the PIR between May and

September 2014, subject to developments in litigation by other individuals connected to the investigation.'

I agree with that view.

You raise a particular point about the FCA's refusal to grant you an extension to the 28-day period for commenting upon the PIR. The FCA decision letter commented upon this as follows:

> *The Enforcement team wrote on 11 February 2015 to say that timetable constraints did not permit any extension of time and that, in any case, it did not consider the reasons given by your legal team to be exceptional such that an extension ought to be granted. Given my observations above regarding the Enforcement team's failure to meet, or to revise, its 30 January timetable for service of the PIR, the language of the 11 February 2015 letter was unnecessarily abrupt. Nevertheless, I do not believe the failure to meet or revise that timetable was a relevant factor in the decision. If the PIR had been served on 30 January 2015, the Enforcement team has said the time to reply would still have been 28 days. This is consistent with its published policy and with the reasons it gave you for not granting the request. In any event, the case against you did not proceed so I do not believe this decision resulted in any unfairness.*

I agree with the FCA that the letter was unnecessarily abrupt, and I agree that it did not ultimately result in any unfairness. Nonetheless, it is unsatisfactory that the result of delays in the regulator's finalising of the report led to a squeezing of the time available for you to comment. Furthermore, I query the conclusion that the four-day delay in issuing the report had no effect upon the time available for comment. It seems to me unlikely that, in a case of this significance, a request for a four-day extension to the period for comment would have been dismissed out of hand.

Conclusion

I can appreciate that from your point of view, the FCA investigation took a long time, and at the end of a prolonged stressful process the result was that the Regulatory Decisions Committee rejected the FCA's proposal that you should be issued with a warning notice. That inevitably raises the question, should the case have been pursued differently and/or concluded earlier?

The FCA covered this point in its decision letter to you as follows:

> *'It is not uncommon in contested Enforcement cases for the subject of the investigation or action to disagree with findings of the investigation. However, as discussed above, the FCA has a system of approvals in place to ensure that only appropriate Enforcement investigations commence, and they are subject to ongoing review. Ultimately, the RDC did not agree with the Enforcement team's recommendation to issue a Warning Notice against you. That evidences only that the independent scrutiny and decision making of the RDC worked as it should. It does not mean that Enforcement's investigation was inappropriate or indeed that the continuation of the case to that stage was unreasonable. As I have said above, I have found no evidence to suggest any impropriety or other failing in the continuation of the investigation into your conduct.'*

Having considered the matter carefully, I agree with that conclusion.

Finally, I should comment on the handling of your complaint. You have said to me that *'I regard the FCA's investigation as cursory and superficial'*. I do not agree. It is very clear from the decision letter, and from the background documents which I have had access to, that the FCA considered your complaint carefully.

I do, however, agree with the FCA that it did not manage your expectations regarding the PIR during the Enforcement Investigation, and that the Complaints Team itself took far too long to issue a decision on your complaint. The result was that, having endured a long period during which you were being investigated and your expectations were not properly managed, you then had a further long period while your complaint was dealt with. As the FCA has acknowledged, that should not have happened. The FCA has already apologised to you for this. In my preliminary decision I raised the possibility of a small ex gratia payment for the delay, if you wished to receive it, but you have not responded to that suggestion.

Yours sincerely

Antony Townsend
Complaints Commissioner