

5 July 2016

Dear Complainant

**Complaint against the Financial Conduct Authority
Reference Number: FCA00143**

Thank you for your email of 5th April 2016. I am sorry for the delay in replying. I have completed further inquiries of the Financial Conduct Authority (FCA), have carefully studied the documents which you and the FCA have supplied, have considered the responses from you and the FCA to my preliminary decision, and am able to write to you with this 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.

Your complaint

Your complaint relates to the alleged actions, or inactions, of the FSA and FCA from 2011 to the present in relation to their regulation of the Co-operative Bank plc and alleged failure to protect investors. In essence, your complaint is about the regulators' alleged failure to intervene effectively and promptly.

You first made your complaint in September 2013, since when consideration of it has been delayed because of continuing enforcement action against individuals who were at the Bank.

In its most recent letter to you, dated 22nd March 2016, the FCA told you that it had decided to defer consideration of your complaint for the following reasons:

We are writing in response to your email of 15 March 2016. As explained, we have been liaising with internal colleagues to understand whether or not the FCA is now in a position to investigate the matters you have raised. As stated in the FCA Press Release dated 11 August 2015, investigations into senior individuals at Co-Op Bank during the relevant period are on-going.

In addition to this action, as you may be aware, the HM Treasury has announced that it will be conducting an independent inquiry into the events at the Co-op and the

circumstances surrounding them. For these reasons, we are still of the opinion that it is appropriate to defer your complaint.

It is possible that your concerns will be addressed in the outcome of the independent inquiry, however if, after conclusion of the independent inquiry you would still like us to consider the matters you have raised as a complaint against the FCA, please write to us.

My analysis

My role at this stage is not to determine the merits of your underlying complaint: it is to decide whether or not to uphold the FCA's decision to defer consideration of your complaint. Were I to conclude that the FCA should not have deferred the consideration of some, or all, of your complaint, I could recommend that the FCA undertake an investigation, or I could investigate the matter myself.

The FCA's decision letter gives little explanation for its decision to defer the complaint. Furthermore, the letter makes no reference to the fact that the independent investigation (or inquiry) which the Treasury has ordered has not yet begun because of the continuing FCA enforcement proceedings, nor has it had its terms of reference set. Furthermore, the extent to which that independent investigation will or will not address some or all of your particular concerns remains unclear.

However, it can be inferred that the FCA has relied upon section 3.7 of the complaints scheme, which reads:

3.7 A complaint which is connected with, or which arises from, any form of continuing action by the regulators will not normally be investigated by either the regulators or the Complaints Commissioner until the complainant has exhausted the procedures and remedies under FSMA (or under other legislation which provides for access to the Scheme) which are relevant to that action. The complainant does not have to be the subject of continuing action by the regulators for this provision to be engaged. An investigation may start before those procedures are completed if, in the exceptional circumstances of the case, it would not be reasonable to expect the complainant to await the conclusion of the regulators' action and that action would not be significantly harmed.

It is a matter of fact that there is continuing action which is connected with this complaint, and it is therefore proper for the FCA to consider that paragraph as a potential reason for deferral.

The wording of paragraph 3.7 makes it clear that the default position is that complaint investigations will be deferred in the circumstance of continuing action ("will not normally be investigated"). The crux of my decision whether or not to support the deferral decision must be whether, "in the *exceptional* circumstances of the case, it would not be *reasonable* to expect the complainant to await the conclusion of the regulators' action *and* that action would not be *significantly harmed*" (my emphases).

In effect there are, therefore, three tests to be met if I were to recommend that a decision to defer is to be reversed.

Are there exceptional circumstances?

The circumstances of the crisis of the Co-operative Bank were highly unusual (though not unique); there was exposure of a large number of retail investors; the complexity and range of the problems at the Co-operative Bank were such that the regulatory investigations were inevitably complex and drawn out; and the Treasury took the unusual step of deciding to direct an independent investigation under the Financial Services Act 2012.

Taking all those factors into consideration, including the fact that it is already three years since the crisis materialised, and that it remains uncertain when the FCA's enforcement procedures will conclude or when the independent investigation will begin, it seems to me clear that the exceptional circumstances test is met.

Would it be reasonable to expect the complainants to await the conclusion of the regulators' action?

This is a harder question to answer, and to some extent the reasonableness of expecting the complainants to wait is dependent upon the answer to the third test (action significantly harmed).

The length of time which you have had to wait already, and the likely length of time remaining until completion, are clearly relevant factors in considering reasonableness. This is complicated by the fact that I am not privy to the details of the continuing action by the regulator. Furthermore, complicated regulatory proceedings are notoriously unpredictable.

There must come a point at which the length of the delay begins to outweigh the other considerations, though determining that must be considered in conjunction with the third point -

Would the continuing action be significantly harmed?

As I understand it, the rationale behind paragraph 3.7 is that running a complaints investigation in parallel with continuing enforcement action may be undesirable for two reasons: first, the *decision* in relation to the complaint could be seen as prejudicing the *verdict* in the regulatory action; second, the staff required to address the complaint may be the same as those required to prosecute the continuing action; third, if an investigation proceeded under this Scheme, the Enforcement Team would be required constantly to review the information created or received during the investigation to consider whether or not disclosure was required, and addressing the complaint may therefore impede the prosecution, which would be contrary to the public interest.

If I have understood the FCA's position correctly, it is the diversion of staff which is the principal concern which leads them to argue for a deferral.

From my studying of the FCA's papers, I have not seen evidence that a recent assessment of the extent of the diversion of resources which would be required has been undertaken. If the delays in concluding the enforcement action (and therefore in starting the independent investigation) were to continue for a further significant period, in my view it would cease to be reasonable to expect you to wait longer, and in those circumstances the onus would fall upon the FCA to demonstrate that the continuing action would be significantly harmed by undertaking the complaint investigation in parallel.

I am also concerned that the FCA seems to have decided that there should be no review of the deferral of your complaint until the outcome of the independent investigation is known. My concern arises from the facts that:

- a. The independent investigation is being delayed pending the outcome of the regulatory proceedings, and it is not known when those proceedings will be completed;
- b. The terms of reference of the independent investigation have not yet been set, and it is therefore impossible to know the extent to which the independent investigation will, or will not, address some or all of the issues which you have complained about.

My findings

I recognise that you do not welcome any further delay, but I have concluded, on balance, that the FCA's decision to defer consideration of the complaint should stand *for the time being*, but not on the basis set out in its decision letter. I recommend that:

- a. The deferral of your complaint should be reviewed within six months or when the continuing enforcement action has been concluded, whichever is the sooner;
- b. If, in six months' time, the continuing action has not been concluded, there should be a *new* assessment of whether it remains reasonable to expect you to continue to wait *and* a detailed assessment of whether, *in practice*, investigating the complaint would *significantly* harm the continuing action;
- c. Additionally, at the point that the deferral of the complaint is reviewed, the relationship between this complaint and the forthcoming independent investigation into the crisis at the Co-operative Bank should be considered, as set out below.

The independent investigation

In my view, it is important that early consideration is given to the interaction between your complaint, this Complaints Scheme, and the independent investigation.

My concern here is that there should be clarity for complainants, as early as possible, about the factors which the FCA would take into consideration in deciding whether or not the complaint would more appropriately be dealt with by the independent investigation. The simple fact that there will be an independent investigation is not, of itself, sufficient to justify not dealing with the complaint under this Scheme.

I should add that I have some concerns that there is no clear indication of when the terms of reference of the investigation will be finalised. From the material I have seen, there appears to be an assumption that nothing can be done about preparations for the independent investigation until the enforcement proceedings have been concluded. I query whether that is necessarily the case. I am particularly concerned that, from the perspective of you and other complainants, you may seem caught in an endless loop in which the independent investigation cannot be started because the enforcement proceedings have not been concluded and the Complaints Scheme investigation cannot be started because the terms of the independent investigation have not yet been settled.

When the independent investigation was announced, it was said that it "will...not start until it is clear it will not prejudice any actions the relevant authorities may take, including the potential FCA and PRA enforcement investigations". That is not the same as saying that the investigation could not start until the conclusion of the enforcement action. If the FCA accepts my recommendation to undertake a full review of the deferral within six months, I recommend that it includes this point in its review. This may require discussion between the FCA and HM Treasury.

I invite the FCA to consider (in conjunction with the Treasury, as required), and to explain, what factors it will consider. I suggest that the factors should include:

- a. The terms of reference of the independent investigation – in particular, whether the terms of reference of the independent investigation could not be set (either wholly or largely) in advance of the conclusion of the enforcement proceedings, and in any event whether there could not be early clarity about the extent of overlap between the independent investigation and an investigation under the Complaints Scheme;
- b. In the light of a., the extent to which the complaint cannot be dealt with in the absence of the findings of the independent investigation;
- c. The extent to which there is assurance that the independent investigation will be able to address the complainant's concerns within a reasonable timescale.

It may be that applying these criteria would result in some elements of your complaint being dealt with earlier under the Scheme, and others referred to the independent investigation.

Conclusion

1. I have sympathy with the fact that, after three years, you still have little certainty about when your complaint will be addressed;
2. I am concerned that the complaint may be indefinitely deferred without regular review to establish whether or not continued deferral is necessary and reasonable;
3. While I do not recommend the overturning of the FCA's deferral decision now, I recommend that it is reviewed, taking into account all the factors I have set out above, within six months or at the conclusion of the outstanding enforcement action, whichever is the sooner;
4. This should include consideration of whether it remains necessary to delay preparations for the independent investigation until the enforcement proceedings have been concluded.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner