

27 June 2019

Final report by the Complaints Commissioner**Complaint number FCA00525***The complaint*

1. You complained to the FCA about statements made by Andrew Bailey about Bitcoin.

What the complaint is about

2. In its decision letter to you, the FCA described your complaint as follows:

Part One

Your complaint is in relation to comments made by Andrew Bailey on a BBC Newsnight programme, which aired on 14 December 2017. The comments are on the subject of cryptocurrencies (“cryptoassets”), specifically, Bitcoin.

You feel it was false and misleading for Mr Bailey to make these comments, which you allege amounts to giving investment advice and market manipulation. You explain that, as a Bitcoin miner, this has affected your current and potential income prospects. You would like to see Mr Bailey publicly retract the comments made on the programme.

Part Two

You state that Mr Bailey’s comments created a conflict of interest in that he made discouraging remarks about Bitcoin while the FCA is currently running a global sandbox to encourage innovation in financial technology. You allege the FCA is providing incorrect information when it states anyone who participates in the Global Sandbox retains all Intellectual Property.

In relation to this part of your complaint, you made the following additional points –

When you previously contacted the FCA’s Sandbox team, you enquired about intellectual property rights. You told me that the FCA’s response was that the FCA does not retain intellectual property, and this wouldn’t affect any patent application. However, you are concerned that the FCA is providing misleading information about this and that the FCA’s response seems to be different depending on the way the question is asked. You believe the FCA does retain intellectual property and that further transparency is warranted on this issue.

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You explained that you are concerned about patent applications for Sandbox participants and you are concerned about the FCA's refusal to sign a Non-Disclosure Agreement (NDA). You say this is a conflict of interest and could potentially disrupt the patent approval. You would like to know why the FCA does not sign NDAs.

You expect that the FCA should be more transparent on its policy about intellectual property. You believe the information currently on the FCA's website is insufficient and simply providing a telephone number is not satisfactory. In relation to this, you suggest the FCA should publish its terms of service for the Sandbox.

You also raise a point about the actions of the EU, who you explain are actively making a legal claim over all intellectual property. You feel this should be raised with the relevant area within the FCA and further considered for the Sandbox.

Part Three

You claim that the FCA's Customer Contact Centre (CCC) uses software which captures the personal data from the mobile phones of those who call the CCC without obtaining prior explicit consent from the caller. You explain that this stems from a telephone call you had with a female Associate when you called the CCC "last year" to discuss a separate issue. You recall the Associate admitted that the FCA uses "data capture" software.

In relation to this, you allege that the FCA remotely captured your data when you called the CCC and this has left a digital footprint within the logs of your mobile phone. You are requesting a reasonable explanation of why the FCA carries out this practice.

What the regulator decided

3. The FCA did not uphold Parts 1 and 3 of your complaint but it partially upheld part 2 as there was no call recording to check whether you were given incorrect information on the phone line set up for firms to ask for assistance with GINF. It did, however, state that in its view Mr Bailey's comments about Bitcoin did not contradict the aims of the GFIN exercise, and that it is correct that those participating in GFIN would retain all intellectual property.

Why you are unhappy with the regulator's decision

4. Your complaint is centred on an interview given by Andrew Bailey, the Chief Executive of the FCA, to Newsnight about Bitcoin and the effect you allege this had on the value of Bitcoin, which you mine, leading to a drop in the value of Bitcoin and you suffering a financial loss. You continue to believe his words amounted to market manipulation in breach of the Market Abuse Regulations (MAR) (*Element one*). You also complain about what in your view is the FCA's

lack of understanding about Bitcoin and its inability to keep up with the times and changes in financial services and its unwillingness to regulate the market
(*Element two*).

5. Furthermore, you maintain your complaint that the FCA's stance on Bitcoin goes against its stated aim in creating financial innovation through GFIN, and its refusal to sign non-disclosure agreements restricts incentives for entrepreneurs to innovate. (*Element three*).
6. Generally, you believe the FCA issued its decision without fully understanding your complaint and wrongly dismissed the issues you have raised. You have also complained that the FCA issued its decision letter without waiting for the further material which you had told it you would send.

Additional points raised by you

7. In essence, you consider that the FCA described your complaint too narrowly. You wished to complain about what you consider to be the FCA's failure to protect consumers. You argue that activities linked to the sale and purchase of Bitcoin on various platforms do fall under the remit of the FCA, that it has failed to understand its own remit, and that it has been 'asleep at the wheel' while people have exploited the opportunities which cryptoassets have offered.
8. You also raise a number of other points such as the FCA's alleged failure to deal with banks which do not allow their accounts to be used in connection with Bitcoin sales and purchases, causing illiquidity and volatility in the market, as well as the FCA's alleged failure to act in relation to firms registered in different countries but targeting UK consumers engaged with the Bitcoin market.
9. Finally, you raise concerns about a number of specific firms involved in Bitcoin trading but not in any way authorised or regulated by the FCA, as well as one particular firm, Firm Y, which is authorised to carry out regulated activities but whose website implies that its main area of trading is in cryptoassets.
10. Linked to that you are also complaining that the FCA failed to issue warnings about specific Bitcoin trading platforms / firms and you lost money as a result.

Preliminary points

11. I should start by setting out a number of points. Bitcoin is a cryptoasset (formerly referred to as a cryptocurrency), which only exists in virtual form and is not backed or supported by any government or central bank. This makes it very different from what is traditionally known as a fiat currency (such as the Euro or GBP), the value of which can be controlled and therefore managed by Central Banks. I recognise your argument that fiat currencies can be subject to extreme volatility, and that holders of fiat currency are not immune from loss, but there is nonetheless a fundamental difference.
12. Bitcoin is not a specified investment or a regulated financial instrument under the Regulated Activities Order (RAO) and the FCA therefore has no oversight or power over it, the platforms it is traded on or the manner in which it is marketed and traded.
13. The FCA can only act in relation to investments and financial services activities that fall within its remit, as set by Parliament. This remit can only be changed by Parliament passing new legislation to either expand it (for instance by bringing a certain type of investment within the perimeter of the FCA) or by taking them out of the perimeter.
14. Legislation passed through the European Parliament as a Directive could also expand the remit of the FCA. For example, the EU's Mortgage Credit Directive was implemented on 21 March 2016 and it brought second charge mortgages within the remit of the FCA.
15. Under current legislation, EU or UK, Bitcoin and other cryptoassets are not a specified investment. MiFID financial instruments, such as a contract for difference, which reference a cryptoasset may fall within the FCA's perimeter, but this would need to be determined on a case by case basis.

My analysis

Element one

16. In his interview with Newsnight, Mr Bailey gave a warning to consumers about the nature of Bitcoin and the dangers of investing in this cryptoasset.

17. You allege that the value of Bitcoin fell as a result of Mr Bailey's statements in this interview. It is a fact that the value of Bitcoin did fall following the airing of the Newsnight programme, although it cannot be known to what (if any) extent this was as a result of the interview or due to other factors.
18. Andrew Bailey's statement - *If you want to invest in Bitcoin, be prepared to lose all your money that would be my serious warning.* - is a rather stark warning. However, this reflects the fact that Bitcoin is not a regulated investment, and should anything go wrong, consumers would not have recourse to the Financial Ombudsman Service (FOS) or the Financial Services Compensation Scheme (FSCS) or any other authority to recover even a portion of their losses.
19. In my view, Mr Bailey was factually correct in stating that there is no protection available for those investing in Bitcoin, and his statement seems to me to be consistent with the FCA's consumer protection objective.
20. In terms of elements of Mr Bailey's statements amounting to market manipulation and breaching the Market Abuse Regulation (MAR), the FCA explained to you in its final response that *Bitcoin itself is not a regulated financial instrument nor is it linked to any of the kinds of regulated financial instruments that are subject to the provisions of the Market Abuse Regulation (MAR).* Therefore, what Mr Bailey said cannot and does not amount to market manipulation, which has a specified meaning in law.
21. I was provided with copies of internal communications and information which supported this view, confirming that there are currently no Bitcoin-linked products on the UK market that would be subject to MAR.
22. However, based on your comments, I asked the FCA a number of questions to ensure that I had the correct information.
23. The FCA has now confirmed that there was at least one cryptoasset-linked instrument on an EU exchange that was available to UK consumers and this instrument might have brought the statement within the scope of MAR.
24. The FCA should have considered this point more carefully and ensured it gave an accurate and full response to you and to my office in the first instance, rather than as a result of some further questioning by me.

25. The FCA has explained why, in its view, Mr Bailey's statement still does not fall within the scope of MAR. Article 12 (1) (c) of MAR, states *that disseminating information through the media is an activity that comprises market manipulation where it gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument*. The FCA's view is that Mr Bailey's statement does not amount to such market manipulation because it was a factual statement based upon the lack of any protection (such as FSCS cover) for investors.
26. The FCA's explanation appears to me to be a reasonable one, although whether or not something amounts to market manipulation under MAR is not a matter that falls under my remit, and is for the courts to decide.

Element two

27. It is not within the FCA's powers to change the regulatory perimeter: that can only be changed by Parliament or by EU Directives. If Parliament decided to legislate about Bitcoin, the FCA would have to comply with any new legislation. Until such a time, the FCA does not have cryptoassets within its remit.
28. In your responses to my preliminary report, you have argued that the FCA has been inconsistent in its position on cryptoassets, has focussed too much on the risks of cryptoassets rather than the benefits, has supported the banks' 'obstructive stance' thus undermining competition, and failed to act against firms which are 'actively undermining the underlying integrity of the crypto asset market'. You say:

Rather than focusing my complaint around a few cherry picked comments chosen by the FCA, please try and view the bigger picture here. My complaint is about the FCA's overall conduct and approach as I feel the FCA has acted in bad faith with a clear bias whilst utilizing the media as a platform to spread false and misleading information.

29. I recognise that you have wide-ranging concerns about the FCA's whole approach to cryptocurrencies, which go beyond the particular matters addressed in the FCA's decision letter. The FCA gave you an opportunity to comment on the scoping of your complaint, and amended it, but you wished the FCA's investigation to go further. I understand your concern, but I think that the FCA

were trying to address the particular complaints you were making within the constraints of the Complaints Scheme.

30. You would like the FCA to do more in this area. In its responses to my preliminary report and further queries, the FCA has drawn my attention to initiatives it has taken in this area. These include the 'Dear CEO letter, sent at the beginning of the year, warning financial services organisations not to use FCA authorised status to imply that unregulated products are regulated, and a variety of publications warning about unregulated products, including one on cryptoassets - <https://www.fca.org.uk/scamsmart/cryptoasset-investment-scams>. The FCA has also confirmed that in response to a concern which you raised about the promotion of Bitcoin by a particular firm, the FCA took action, and the promotion was altered.
31. However, in my view, the debate about the adequacy of the FCA's response to this issue, and the adequacy of the regulatory legislation falls outside the area of this Complaints Scheme. You have drawn attention to the activities of the Treasury Committee in this area: the matter is fundamentally one for Parliament and Government to resolve, with the FCA.
32. For those reasons, I do not uphold this element of your complaint.

Element three

33. I have considered the information provided to you and available on the FCA's website about the FCA's Sandbox/GFIN initiative, and I cannot find any evidence to suggest that the intellectual property rights of its participants would be affected.
34. Furthermore, warning consumers about potential risks to their investments in relation to Bitcoin and other cryptoassets does not seem to me to contradict the clearly stated objective of the FCA and other participating regulators of allowing the development of new technological innovations in a safe regulatory environment spanning a number of jurisdictions.
35. Not signing Non-Disclosure Agreements (NDA) with third parties the FCA deals with is a general policy operated by the regulator. Under paragraph 3.5 of the Complaints Scheme, the FCA and I do not usually investigate complaints about its general policies, but I note it has taken time to provide you with some

background information about why signing NDAs would be inappropriate for the FCA.

36. In light of the above, I cannot uphold this element of your complaint.

37. Finally, it is my view that the most appropriate way of dealing with any remaining complaints not already investigated by the FCA would be to refer them to the FCA in the first instance, in line with the rules of the Complaints Scheme.

My decision

38. While I appreciate that this is not the outcome you were hoping for, I hope the information set out above demonstrates why I am unable to uphold your complaint.

Antony Townsend

Complaints Commissioner

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

Tel: 020 7562 5530
E-mail: complaints@frccommissioner.org.uk
www.frccommissioner.org.uk