Complaints Commissioner

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23rd December 2010

Dear Complainant,

Complaint against the Financial Services Authority
Our Reference Number: GE-L01209

I write with reference to your letter and enclosures of 3rd November 2010 in relation to your complaint against the Financial Services Authority (FSA).

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint that comes within the complaints scheme. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. Full details of Complaint Scheme can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF.

Your Complaint

From your correspondence with my office, I understand that your complaint relates to the following:

1. You are unhappy at the length of time (which you described as an excessive amount of time) the FSA took to investigate your complaint and notify you of its findings.

2. You feel that the FSA's explanation of why it rejected your complaint was inadequate. You add that in your letter to the FSA of 22nd April 2010 you explained why you feel the FSA should have acted in this matter and as a result of the FSA's letter you believe your comments have simply been ignored.

3. You have little confidence that the FSA has understood adequately your complaint. You add that your concerns relate to the press release the Firm A made on the 17th May 2009. However, the FSA has indicated that the background to your complaint relates to the issue of PPDS, which was something that you did not raise.

4. You also feel that the FSA, by classifying your complaint as a 'lack of care' avoids it looking at the specific issues you have raised and has therefore arrived at the incorrect conclusion.

You raise in your reply to my Preliminary Decision the issue of hypocrisy on the part of the FSA. I took that to mean that you felt that the FSA was feigning on pretending to be what it was not. I do not consider, and still do not believe, that that is a justifiable issue to raise in the context of your complaint. My reason is simply that given its statutory responsibilities that I have outlined to you and the lack of prioritisation provided by Parliament the fact that in varying circumstances the FSA will pay more heed to one obligation than another does not mean that its judgement thereby attracts the complaint of hypocrisy. As you raised this issue in your response to my Preliminary Decision I thought I should explain my position as I now have done on that particular point.

Coverage and Scope of the Scheme

COAF provides as follows:

(1) The complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions. The complaints scheme covers complaints about the way in which the FSA has acted or omitted to act, including complaints alleging:

(a) mistakes and lack of care;

(b) unreasonable delay;

(c) unprofessional behaviour;

(d) bias; and

(e) lack of integrity.

(2) [deleted]

(3) To be eligible to make a complaint under the complaints scheme, a person (see COAF 1.2.1G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the FSA's actions or inaction.

I should also make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that the FSA is exempt from "liability in damages". It states:

"(1) Neither the Authority nor any person who is, or is acting as, a member , officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.

(2) (Irrelevant to this issue under investigation)

(3) Neither subparagraph (1) nor subparagraph (2) applies

(a) if the act or omission is shown to have been in bad faith; or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998."

COAF nevertheless then goes on to provide in paragraph 1.5.5 that:

> *"Remedying a well founded complaint may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex-gratia basis. If the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."*

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a "compensatory payment on an *ex-gratia* basis".

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

> *"It is unlawful for a public authority to act in a way which is incompatible with a Convention right".*

The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol provides:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".*

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case.

My Position

I have now had the opportunity to review the papers both you and the FSA have presented to me. From these papers, it is clear that you are unhappy with the way in which the FSA has investigated your complaint and communicated its findings to you.

Firstly let me say that I am disappointed at the time it has taken the FSA to investigate this matter and communicate with you. From the papers the FSA has presented to me, it is unclear why it took the FSA around six months to investigate this matter as, although there were clearly delays during its investigation, it is unclear to me why these delays occurred. At times I sensed an inappropriate lack of urgency. Similarly, it is equally disappointing that the FSA's letters contained errors including persistently addressing you as "*Mr*" when your correct title is "*Dr*". I suspect that these kind of casual mistakes have only added to your understandable irritation. However, whilst I accept that the FSA's decision letter, under the heading of background, refers to PPDS (and it is unclear why it does this), the investigation file I have considered in detail does indicate that the FSA did understand the nature of your complaint and did thoroughly investigate the 21 questions you posed to it to answer. Indeed, internally I have been given answers to all your perceptive questions.

I now wish however firstly to turn to what lies at the core of the problem in investigating matters of this kind. I apologise in advance therefore both for the length of this Final Decision as well as the background that I detail but it is right that your complaint and concerns are addressed in depth in order to create the feeling that all the issues you have raised have been adequately considered by me.

The core of your complaint hinges around the particular which I will set out before turning to the generic issue. It is most succinctly expressed by you in what you entitle "*Appendix to FSA letter 22 April 2010*" when at the end of the sixth paragraph of that Appendix you state:

> "*I therefore need to be perfectly clear here – as identified in my 6th July 2009 letter to the FSA, my complaint concerns the truthfulness and accuracy of [Firm A]'s 17th May statement and how that complies with the FSA's regulatory requirements. The truthfulness and accuracy of that statement was relied upon me at the time of issue and was of fundamental importance to me.*"

The generic issue which is so important in the context of your complaint can best be expressed in this way. Ordinary consumers of retail financial products do not always receive adequate regulatory focus because of the combination of consumer protection and market regulation existing side by side in one regulatory authority. Included in that brief synopsis is also the fact that market confidence is an over-arching feature of what any regulator is constantly doing.

I must, however, in fairness to the gravamen of your complaint now go into more detail. My starting point must be the Act itself. Section 2 of the Act sets out the FSA's general duties in the following manner:

(1) In discharging its general functions the Authority must, so far as is reasonably possible, act in a way—

  (a) which is compatible with the regulatory objectives; and

  (b) which the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are -

  (a) market confidence;

  (b) public awareness;

  (c) the protection of consumers; and

  (d) the reduction of financial crime.

(3) In discharging its general functions the Authority must have regard to—

  (a) the need to use its resources in the most efficient and economic way;

  (b) the responsibilities of those who manage the affairs of authorised persons;

  (c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(d) The desirability of facilitating innovation in connection with regulated activities;

(e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;

(f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;

(g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority.

(4) The Authority's general functions are—

(a) its function of making rules under this Act (considered as a whole);

(b) its function of preparing and issuing codes under this Act (considered as a whole);

(c) its functions in relation to the giving of general guidance (considered as a whole); and

(d) its function of determining the general policy and principles by reference to which it performs particular functions.

(5) "General guidance" has the meaning given in section 158(5).

From this you will see that, although the Act requires the FSA to discharge its regulatory objectives, it gives it discretion over how it does this providing that its act in a way which:

(a) is compatible with the regulatory objectives; and

(b) the Authority considers most appropriate for the purpose of meeting those objectives.

The composite effect of these provisions is to create an inevitable and sometimes irreconcilable tension between market confidence, through the exercise of the FSA's regulatory powers and the protection of consumers. In effect the FSA has to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives. Issues like the ones raised in your complaint therefore will inevitably involve a consideration of difficult and differing courses of action for any regulator when seeking to deal both with prudential regulation and consumer protection. That is the generic background to the issues raised by your complaint although I have touched upon it at the beginning of this Final Decision in relation to your suggestion of hypocrisy on the part of the FSA.

Quite reasonably therefore any complainant will then pose the question relevant to this issue "*Well what exactly did the Regulator do to safeguard my interests as a consumer?*" Followed, no doubt equally swiftly, by "*Why did it allow the statement of the 17th May 2009 to be issued by the Board?*" In answering those questions however Parliament has imposed restrictions upon both the FSA and myself by the imposition of section 348 of the Act as to how those questions can be answered in the case of a complainant.

In summary, Parliament by virtue of Section 348 of the Act imposes upon the FSA, as the regulator, a ruling of confidentiality in the context of disclosing its response or position when acting in the discharge of its function as the relevant regulator. This means that, other than in limited circumstances, the FSA is unable to disclose any information about what action it did or did not take against a firm or individual (and the reasons for that decision).

In this instance, while I do not believe that the exceptions apply and I cannot comment further, I do myself have the power to delve more deeply into such matters, in my role as Complaints Commissioner, to enable me to be satisfied as to the propriety of what the FSA has done. I am however limited, in most cases, as to the further disclosure of the details that I am informed about. I am therefore unable, directly, to answer the questions you have posed.

As part of my investigation into your complaint I have asked the FSA to comment on its involvement with Firm A around the time of the press release and to provide me with answers to the 21 questions you raised. Although I am unable to comment on them in any great detail, in my view, I consider that at the time, the FSA took all appropriate steps relevant to the Firm A given the sensitivity of the multiple issues involved.

The position therefore is that I have obtained freely from the FSA the appropriate information to satisfy myself that the FSA exercised and made its judgements on a reasonable basis. I can understand that your view with the benefit of what subsequently transpired is different but the Regulator at that time made what it too considered to be a judgment as to the best way forward in the context of events known to it. I say that having regard to the issue of market confidence in an exceedingly fast moving financial scenario, at a time, whereby statements made one day could be considered suspect even the following day let alone a month later and given the need always to bear in mind the added requirement of consumer protection as well as the need to avoid a breakdown of market confidence.

In this instance, you feel that Firm A's statement of 17th May 2009 was inaccurate and misleading, and you have highlighted three issues which you believe contradict the contents of the statement. Having had the opportunity to consider the three issues you raised and the statement, I am of the view that the statement merely touches upon these issues, leading the reader to draw his own conclusions (which ultimately may have been the wrong conclusions), rather than providing a misleading or inaccurate comment. Whilst this may be an unhelpful way for Firm A to address market concerns at the time, it does not automatically mean that the statement was inaccurate or misleading.

I would add that in any event it was Firm A which issued the statement and not (my emphasis) the FSA. Likewise, I would add that, from the papers present to me by the FSA there is insufficient, if any, evidence to show that the FSA failed to consider adequately the accuracy of the statement Firm A issued on 17th May 2009 or the impact this statement may have upon investors when it subsequently considered the matter (after the statement had been released). It is unfortunate that I cannot provide you with further information to explain how I have arrived at this conclusion, but as I have explained above this is due to the limitations Parliament has placed upon both the FSA and myself when drafting the Act.

I can appreciate that all this is not the kind of answer you will wish to receive but it still represents the position as I see it having regard to what I have established following my investigation and taking into account your further representations which technically raise no new issues for me to consider. I can, however, also add this in the context of the press release of 17th May 2009. Even though my starting point must be the Act itself when considering matters such as this, in relation to what was said, how this may subsequently have been considered by the FSA and how the FSA responded, although I must add that, at that point in time, I feel the Board may have been entitled to express the views it did.

Others might have been more circumspect. Sensitive announcements of this nature can always, in any scenario, let alone a fast moving one as pertained at this time, appear in hindsight as perhaps badly expressed or they allow nuances to be drawn which may turn out not to have been entirely accurate in the way that they were drawn. Hindsight, as always, is a wonderful thing to challenge a later decision made in good faith at the time. That, however, is not an indication in my view of regulatory failure by the FSA and that is the clear view I have come to in this case despite having considerably sympathy for your position. You are of course perfectly entitled to continue to address questions to the Board on the issue of the reasonableness of its judgement in issuing the press release of 17th May 2009.

In your response to my Preliminary Decision, you also comment upon the complaints you have made directly to both Firm A and the Financial Ombudsman Service (FOS). As my jurisdiction only extends to considering complaint about the FSA, I feel it would be inappropriate for me to comment further upon the specific concerns you have raised about the manner in which the FOS and or Firm A are dealing with this aspect of the matter.

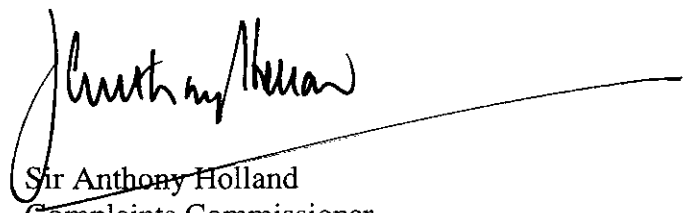
Conclusion

I can appreciate your disappointment that the FSA has refused to assist you with the complaint are also pursuing directly against Firm A, in relation to the release of its 17th May 2009 statement. Clearly the FSA, as the UK's financial services regulator, cannot allow itself to be placed in a position where it assists a consumer with a claim against one of the firm's it regulates. As such I feel that the FSA's stance, although disappointing to you, is the correct one.

I can also understand why you feel that if you were able to argue successfully that the FSA failed to consider adequately Firm A's statement and as a result it has acted inappropriately, that this may be seen as amounting to confirmation that Firm A's statement of 17th May 2009 was incorrect and misleading, and that this could assist your claim against Firm A. As I have explained above, the FSA has satisfied me that, it acted appropriately both prior to and following Firm A's press release and considered the matters you brought to its attention appropriately. Although it is unfortunate that it cannot comment further on the matter, from the information presented to me it is clear that the FSA did consider your comments and took a course of action which appears appropriate and reasonable in all the circumstances at the time.

Similarly, the fact that Section 348 of the Act prevents the FSA (and me) from confirming in detail what action it took, is not by itself evidence that it neither gave your concerns proper consideration nor that it failed to act upon concerns brought to its attention. I am sorry, but in the absence sufficient of evidence to show that the FSA failed to discharge its duty under the Act, I am unable to uphold your complaint.

Yours sincerely



Sir Anthony Holland
Complaints Commissioner