



7<sup>th</sup> February 2011

Dear Complainant,

**Complaint against the Financial Services Authority (FSA)  
Reference Number: GE-L01215**

I write with reference to your correspondence with my office in relation to your further 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**

1. You are unhappy that a courier, sent by the FSA, delivered a package to your husband after 9.00 pm at night. Specifically you feel that the delivery of a package at that time of night is unacceptable particularly as you say the courier, by banging on the door, disturbed both you and your children.
2. Although you have complained to the FSA you are unhappy with the outcome of its investigation and have asked me to review the investigation it has undertaken. As you feel that the FSA has acted in a manner which has not had "*any regard for [your] or [your] family's privacy and Human Rights*" you feel that a "*formal written apology and an ex-gratia payment for the upset and inconvenience caused by [the member of the Enforcement Team] and the FSA would be in order*".

### **Background**

When considering your complaint I should also at this point 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 8 of the Convention and Article 1 of the First Protocol to the Convention both of which are set out in the Human Rights Act of 1998.

Article 8 of the Convention states:

- 1. "Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

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"*.

On 31<sup>st</sup> August 2010 by an email timed at 9.44 pm you complained to a member of the Enforcement Team, at the FSA, in the following terms:

*"May I remind you that although [my husband] is under investigation my children and I are not. This is an invasion of mine and my children's privacy"*.

In the context of Article 8 of the Convention, while it might be considered that the FSA has failed by its actions to respect your private and family life by making a delivery at an hour which many might consider unreasonable, I do not find that a delivery made at 9.11 pm was sufficiently late or intrusive enough, despite that hour, to amount to a “*lack of respect for your private or family life*”. Nevertheless a delivery as late as 9.11pm which involves “banging on the door (to wake up children)” is unsatisfactory and comes close in my judgement to crossing the line set by Article 8. In the context of Article 1 of the First Protocol there is clearly no breach of the provisions of that Article that is relevant to your complaint.

### **My Position**

I have now had the opportunity to consider the issues you have raised and to review the FSA’s investigation file. Following an examination of this I also asked the FSA to provide me with some additional information surrounding its decision to send a package to your husband on the evening of 31<sup>st</sup> August 2010.

Having read the FSA’s file it is not disputed that the FSA dispatched a package to your husband on the evening of 31<sup>st</sup> August 2010. I have asked the FSA to comment upon why it felt that it was necessary to send the package to your husband on the evening of 31<sup>st</sup> August 2010. The FSA, in its response to me stated:

*“The documents sent to [your husband] were extensive (approximately 5,000 pages) and in accordance with its usual practice the FSA asked for him to provide comments on the documents within 28 days of receipt. In the interest of fairness Enforcement thought it appropriate that [your husband] should have both soft and hard copies on the same day so that there were no obstacles to him beginning his review of that material. Because the documents are extensive it took a full day for the FSA to compile them and dispatch them to [your husband]. [Your husband]’s documents had to be sent at the same time as those sent to the other individuals under investigation and so there was more than one bundle of documents which the FSA was preparing for dispatch on the same day. This is why the documents were not ready prior to 18.13pm (sic) when they were ready for dispatch. It was not possible to email [your husband] all of the documentation sent via the courier due to the volume. This was why hard copies were sent (on CDs) to ensure that [your husband] had all of the relevant documentation”.*

In subsequent correspondence, the FSA confirmed that the “*FSA sent the PIR [its Preliminary Investigation Report] to [your husband] on 31<sup>st</sup> August 2010 because [it] wanted him to have a full 28 days to respond to the document and it was the latest [it] could send it bearing in mind the time limits contained in section 66(4) of the Financial Services and Markets Act 2000*”. I would say here that I accept that the FSA, when completing an investigation, needs to comply with the terms (including time limits) set out within the Act. However, I am disappointed that, as is shown in this case, the FSA felt it necessary not to issue the documents to your husband (or the other individuals linked to this investigation) until the last possible moment. In my opinion, leaving the issue of documents to the last possible time is a risky process particularly if due to unforeseen circumstances things do not fall into place or if the individual concerned is unable to accept or to take delivery of packages sent to them.

I would add that, I believe that it would have been clear to the FSA that the documents would have needed to have been issued to all of the individuals who were the subjects of this investigation no later than 31<sup>st</sup> August 2010. As such, it is unclear why the FSA allowed itself to be placed in a position where the documents (either in bundles or electronic format on discs) were not ready for dispatch to all of the individuals before (my emphasis) 4.49 pm (when your husband was notified by email that they were to be dispatched) or 6.23 pm (when they were collected by the courier) on 31<sup>st</sup> August 2010 (which the FSA has confirmed was the “latest [it] could send it bearing in mind the time limits contained in section 66(4) of the [Act]”). This is clearly an unsatisfactory position for the FSA.

As part of my investigation I also asked the FSA to comment upon whether it paid any regard to the potential time of delivery of the package given that the FSA did not book the courier to deliver the package until 6.13 pm and was not picked up/dispatched until 6.23 pm. In its response the “*FSA did not expect the documents to be delivered after 9pm and with dispatch at 18.23hrs the FSA expected them to be delivered in good time given that they were only going from London to Surrey. We have since changed our procedures so that documents are not delivered after 9pm unless agreed by the recipient. In any event, the documents in this particular case arrived at 9.11pm*”.

Having considered the above answers put forward by Enforcement, I can understand its reasoning for sending the documents out to your husband on the evening of 31<sup>st</sup> August 2010. However, upon further consideration of its answers, I have a number of concerns which I will set out below.

- i. Enforcement did not send an email to your husband and issue him with its PIR covering letters and inform him that the discs containing the full reports were to be dispatched to him until 4.49 pm on 31<sup>st</sup> August 2010. Additionally, it is clear that this email did not specify when the documents would be dispatched to him or specifically warn him that the documents would be delivered by courier that evening.
- ii. Enforcement state that the “*documents sent to [your husband] were extensive (approximately 5,000 pages) and in accordance with its usual practice the FSA asked for him to provide comments on the documents within 28 days of receipt*”. However, it sent him two discs containing the information which presumably needed to be printed out in order that he could comment upon it.
- iii. Although the FSA booked the courier it does not appear that it specified a latest delivery time. Whilst I accept that it may well have “*expected them to be delivered in good time*” the fact remains that they were in fact not delivered in good time.

In light of the concerns I have listed above, in my opinion, it remains unclear why the FSA felt it appropriate to issue your husband with its PIR covering letters at 4.49 pm when it was clear that he would be unable to start to consider the documents physically until at least the next day. I appreciate that the FSA has stated “*in accordance with its usual practice the FSA asked [your husband] to provide comments on the documents within 28 days of receipt*” and understand that it did this due to the requirements placed upon it by Section 66(4) of the Act.

I fully understand that the investigation the FSA's Enforcement division undertakes are often complex and can be extremely time consuming. I am also aware that, to reflect this, the time the FSA has to complete its investigations under the Act has now been increased from two to three years. However, I believe the FSA should have been constantly aware of the date by when it needed to issue the documents to your husband. Given that the FSA clarified the address to which the documents should be sent on Thursday 26<sup>th</sup> August 2010, it is unclear to me why the FSA was not in the position to send the documents to your husband 6.22 pm on Tuesday 31<sup>st</sup> August 2010. Although I accept that Monday 30<sup>th</sup> August was a bank holiday, the fact that it was aware that it was going to send documents to him two days before the break appears to me to suggest that the FSA did not send the documents to him until the last possible moment it could but in doing so still allow it to meet its obligations under Section 66(4) of the Act.

Whilst this may allow it to comply with the requirements of Section 66(4) of the Act, in my opinion, the FSA may not be complying with the reasons (nor indeed the spirit) as to why the time limits were put in place. I hold this view as, I do not believe that, it is reasonable to expect your husband to start to print let alone review over 5,000 pages of material after 9.11 pm.

I accept that the FSA needs to issue documents to individuals who are the subject of an investigation in a timely manner. If more than one person is under investigation at the same time that is a complication. However, when dispatching documents to a residential address, I do not believe that the FSA can limit its focus simply to the people who are under investigation but must (my emphasis) also consider the interests of other people who may reside at the relevant address.

In this instance, I can understand, to an extent, why the FSA felt the need to deliver the documents to your husband that evening given that it "wanted him to have a full 28 days to respond to the document and it was the latest [it] could send it bearing in mind the time limits contained in section 66(4) of the Financial Services and Markets Act 2000". I also accept the FSA's comments that the documents were dispatched to the courier at 6.23 pm and that it "expected them to be delivered in good time given that they were only going from London to Surrey". However, the fact remains that when instructing the courier, in my opinion, the FSA does not appear to have considered the interests of the other people who reside at the address as it did not specify a latest time of delivery. It is also clear from the FSA's file that when arranging for the documents to be collected, the staff from Enforcement were unaware of the different delivery standards which were available and specifically that the same day delivery standard requested would not in fact directly result in the package going directly from Canary Wharf to your address. I consider that lack of awareness surprising in the circumstances.

Whilst I would not, and do not, necessarily expect the members of the FSA staff concerned to be intimately aware of how the courier delivers packages, I would have expected (particularly given the time the delivery was requested) that the FSA obtained a clear idea of the time it was believed the package would be delivered to you before selecting the appropriate delivery service (especially in light of the strict requirements of Section 66(4) of the Act which the FSA has referred to). I would also add that I feel that the position taken by the FSA that it simply expected the delivery to go directly to you, and was unaware that the delivery standard requested would result in the package going to the courier's depot and then out to the delivery address, is not an adequate answer or position for the FSA's Enforcement Division to adopt in this situation.

Had the FSA informed your husband in advance that a courier would be calling that evening (my emphasis), or specified a latest delivery time to the courier (and this was disregarded by the courier) my view is likely to have been different.

Whilst I am disappointed with the manner in which the FSA acted at the time, I am aware that since the FSA instructed the courier to deliver the package to your husband, it has changed its procedures. Whilst I welcome this, this is still an area which I feel I must return to and will do so in my recommendations which are shown below.

It is clear from the email that you sent to the member of the Enforcement team on the evening of 31<sup>st</sup> August 2010 (soon after the courier had delivered the package) that you were unhappy at the time of the delivery and that it had upset you considerably. Although acknowledging this, I am disappointed by the manner in which the member of Enforcement has responded to you. When responding the member of Enforcement stated it "*was not our intention to cause you or your children any inconvenience and we apologise if the delivery of confidential material by secure courier inconvenienced you and your family. Unfortunately, we have no control over when our courier service delivers packages*".

Whilst the member from Enforcement has clearly tried to apologise to you, it is unfortunate that, in my opinion, the apology appears to be a conditional one and therefore lacks sincerity "*...we apologise if the delivery...*". Although the member of Enforcement concerned has assured me that this was not her intention and that she was making a sincere apology, I have to take the view that her choice of words was, in my opinion, poor and resulted in her making a conditional apology. I would also add that a conditional apology is something which I have comment upon this previously to the FSA and will do so again in my recommendations.

It is also disappointing that the FSA's Complaint Team's letter of 29<sup>th</sup> October 2010 also makes what appears to be a conditional apology where it states "*we apologise if the delivery caused you and your family any undue stress or inconvenience*". In responding to my questions about its apology, the Complaints Team has drawn my attention to a statement in its "*Conclusion*" which it feels amounts to an apology.

The specific comment the FSA has referred me to can be found in its decision letter of 29th October 2010, where it states that "*it is deeply regrettable that the time of delivery caused you and your family stress and/or inconvenience, we confirm that this was not the intention of the FSA*". I accept in that in isolation, this statement could amount to an apology. However, when the whole sentence is viewed I have reached a different conclusion.

The statement the FSA has made in its decision letter is that "*[w]hilst it is deeply regrettable that the time of delivery caused you and your family stress and/or inconvenience, we confirm that this was not the intention of the FSA and we are therefore unable to uphold your complaint*". In my opinion, this whole statement is a *non sequitur*. On one hand the FSA are offering, what I consider to be an extremely limited apology for a result which it clearly caused (or at least played a considerable part in causing) but it then goes on to say that as it was not intentional it is not responsible and is therefore rejecting your complaint. In my view the FSA should have accepted the validity of your complaint given what happened irrespective of what its intentions were at the time.

Finally in the context of the quotation contained at the end of paragraph 3 about it is not strictly correct to say that "*we have no control over when our courier service delivers packages*" in that a degree of control was available to the FSA had it made enquiries of the courier service concerned as I have identified earlier in this letter.

## Conclusion

I believe that given the nature of your complaint, the comments you made at the time of the delivery and the reason why you asked the FSA to treat your comments as a complaint, it was clear that you were deeply unhappy with the timing of the delivery and with the manner in which the matter had been considered. That is clearly demonstrated by the fact that you emailed the FSA at 9.44 pm on the same evening.

Although I can understand why the FSA felt it necessary to issue the documents to your husband on the evening of 31<sup>st</sup> August 2010, it is clear to me that the FSA did not consider the timings or plan sufficiently in advance to ensure that they were available for dispatch at a reasonable hour. In arriving at my overall decision, I am mindful of the possible outcomes which are available to a successful complaint, and would draw your attention to paragraph 1.5.5 of COAF which states:

**COAF 1.5.5** Remediating 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.

As such I am proposing to uphold your complaint and make the following recommendations to the FSA.

## Recommendations

1. The FSA make an unconditional apology to you for both the timing of the delivery, the concern this caused to you and your family and for the manner in which it considered your complaint (namely making what amount to conditional apologies when it was clear that the issue had caused you and your family concern).

The FSA should also consider the manner in which it writes in letters and in particular pay more attention to the words which are used. Specifically, the FSA should ensure that letters and communications are clear and cannot be incorrectly interpreted or are not likely to be misconstrued.

2. To make an *ex-gratia* payment of £50.00 to you for the manner in which it dealt with your complaint (namely the conditional apologies). I appreciate that the amount may seem small, but in making any financial award to a complainant I have to pay regard to the nature of the FSA's actions both at the time and since and the manner in which the FSA is funded. In this case, it is clear that the FSA could have dealt better with your complaint and issued you with an appropriate apology.
3. Since this unhappy episode, the FSA has changed its procedures regarding the delivery of documents to a person who is under investigation by its Enforcement division. I welcome the fact that the FSA will not now deliver documents to such a person after 9.00 pm without their prior agreement. I understand that the FSA believes that the delivery of items can occur until 9.00 pm as it considers "*that 9.00 pm is reasonable and is respectful of family life, for example, the 9.00 pm watershed for showing TV programmes that may be unsuitable for children has been long established*".

Although I feel that this is a much more appropriate procedure, I am still concerned that this time is still too late when delivery is to be made to a residential address. The “television watershed”, to which the FSA has referred, in my opinion, simply refers to the content and nature of television programmes and in my opinion does not represent in anyway the latest time which an allowable intrusion into family life from outside the home can be made. I accept that there may well be occasional justifiable reasons for allowing deliveries until this time, but in my opinion, allowing deliveries at this time may not have due regard to the rights of other people residing at the address (particularly those not associated with the investigation whatsoever such as young children). Whilst I accept a homeowner cannot regulate the time people may call at their home, in my opinion, the 9.00 pm “television watershed” does not reflect the time many young children are in bed and I remain of the view that encouraging deliveries until this hour is therefore inappropriate.

I would also add that the FSA does not indicate when a delivery will be made (and does not appear to ensure that the subject of the investigation will actually be available to receive the package). I am aware that many people (particularly if they are in a house on their own) refuse to ‘answer the door’ late in the evening, especially to strangers or those not dressed in normal clothes (e.g. motorcycle couriers) unless they are expecting a delivery and as such I do not feel that it is appropriate to encourage deliveries this late in the evening. Had sufficient notification been made that a delivery would be made that evening my view is likely to have been different.

Given the FSA’s comments about the requirements of urgent time requirements of Section 66(4) of the Act and the problems a delayed delivery can cause, I would recommend that the FSA should review the latest time that deliveries should be made to a residential address with a view to placing a ceiling of 8.00 pm unless the subject of the investigation has agreed in advance to allow a later delivery to be made and has also stipulated the latest time which he is willing to receive documents from the FSA.

Yours sincerely,



Sir Anthony Holland  
Complaints Commissioner