Complaints Commissioner

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Dear Complainant,

Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01376

I write further to your letter of 5th January 2012 in connection with 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.

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. 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 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". I formally record at this point given the above statutory provisions that I have found no evidence of bad faith nor have you suggested that the FSA has been guilty of bad faith on its part.

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.

Your Complaint

From your recent letter, I believe that your specific complaint relates to the following issues:

> You are unhappy with the outcome of the FSA's investigation into your complaint regarding the manner in which it shows details of the firms it authorises on its website.
>
> Specifically, you are unhappy that you invested with a 'boiler room operation' which contacted you by telephone, purporting to be a firm authorised operating in the UK on what is known as an 'EEA inward services passport'.
>
> You say that, although you checked the FSA's website, this did not provide you with sufficient information to indicate that the firm in question was a 'boiler room operation'. You also allege that despite contacting the FSA and making it aware that a 'boiler room operation' was contacting consumers purporting to be a FSA authorised firm, the FSA did not take sufficient timely action to alert consumers.

My Position

As part of my investigation into your complaint I requested a full copy of the FSA's investigation file. I have now had the opportunity to review this file and can appreciate why you are unhappy with the situation.

From the papers presented to me it appears that, in March 2011 you received a number of calls from a 'boiler room operation' which called itself Firm A Europe.

You say that you checked the FSA's website and found that there was a genuinely authorised firm called Firm A which had the same authorisation number as the one you were given during the 'cold call'. As such I understand that you believed the 'boiler room operation' calling itself Firm A Europe and the genuine firm, Firm A, to be the same firm. I would add here that Firm A is authorised to conduct regulated activity in the UK on an 'EEA inward services passport' under the FSA authorisation number X. I also understand that, in the belief that you were dealing with the genuine firm (rather than the 'boiler room operation' which had contacted you), you 'invested' £8,000 in the belief that you were purchasing shares in Investment C.

You add that, in May 2011, when it transpired that the firm with which you had invested (or 'bought' shares through) was a 'boiler room operation' and not the genuinely authorised firm you contacted the FSA to bring the 'boiler room operation' to its attention. Although you did this in early May 2011, you have highlighted that the FSA did not post an alert on its website until 29th June 2011. You feel that the delay on the part of the FSA is disappointing.

I can and do understand why you are unhappy with both the information the FSA displays on its website and the FSA's delay in posting an alert about the 'boiler room operation' which was purporting to be Firm A. In addressing these concerns, I feel it may be useful if I provide you with some information about the process by which the FSA 'authorises' firms which wish to undertake regulated activity on an 'EEA inward services passport'.

In this instance, the genuine firm (which was not the one which contacted you), Firm A, was created in Austria, under Austrian Law. As such it is regulated by the Bundesministerium Für Wirtschaft, Familie Und Jugend (which is an Austrian financial services regulator). Under the EU Investment Services Directive (ISD)[1], a firm's home regulator authorises a firm.

Once a firm has received authorisation from its home state regulator, providing that certain criteria are met, it can request what is called an 'EEA inward services passport' from its home state regulator will allow it to undertake regulated activity (or operate) in another EEA member state (such as the United Kingdom).

Once a firm has been granted with an 'EEA inward services passport' by its home state (in this case the Austrian) regulator and the home state regulator has passed the required documentation to the host state regulator (in this case the FSA), the host state regulator is compelled to authorise the firm and to allow it to operate under its jurisdiction. In this case, once the Bundesministerium Für Wirtschaft, Familie Und Jugend had passed Firm A's details to the FSA, the FSA was compelled to authorise it to conduct regulated activity in the UK. In doing so the FSA provided Firm A with the authorisation number of X and authorised the firm with effect from 6th December 2005.

[1] Markets in Financial Instruments Directive (MiFID) replaced the ISD. MiFID came into force on 1st November 2007.

I would add here for the sake of completeness that when the FSA receives details of a firm which wished to operate within the United Kingdom on an 'EEA inward services passport', the FSA is *unable* (my emphasis) to request additional information before it allows an overseas firm to conduct business in the United Kingdom. Under the protocol which exists (and which forms part of EU law) regulators are *unable* (my emphasis) to 'gold plate' or increase their individual requirements above those set out under the protocol.

I appreciate that you feel that the FSA's website does not provide sufficient information to enable consumers to establish if they are being contacted by the genuine firm, but as I have set out above, no matter how much the FSA may wish to require additional information, such as a telephone number for an overseas firm operating in the United Kingdom on an 'EEA inward services passport', under the law it is simply unable to do this.

I would add that the website also provides details of the specific activities firms operating within the UK on an 'EEA inward services passport' can undertake and therefore sets out details of those activities which the firm cannot undertake. In relation to Firm A, on the basic details webpage for the firm, it clearly sets out, that the firm is called Firm A, and not Firm A Europe. I would also draw your attention to the section entitled notices, where it says that

> "*For an incoming EEA firm, the home state regulator decides whether or not it is authorised to hold client money and/or client assets in respect of its passported activities. If it is so authorised, the home state client money and/or client assets rules apply to those activities*".

Similarly, under the heading of other information:

> "*Consumers considering or currently doing business with passported EEA firms ('EEA Authorised'), may wish to ask for further information from the firm or its UK branch about its complaints and compensation arrangements. This is because the position may differ compared to a UK authorised firm*".

Additionally, by clicking the "*passport*" link on the FSA's register of authorised firms (which details the activities the firm can undertake under its 'EEA inward services passport') it indicates that the firm is only authorised to conduct "*Insurance Mediation or Reinsurance Mediation*" activities and is not authorised to conduct what could be described as investment activities.

I appreciate that you say that you contacted the FSA in early May 2011 and that you believed that you were one of, if not the first, people to raise concerns over Firm A Europe, however you have now discovered that the FSA were first notified about Firm A Europe on 5th April 2011 and are perplexed over why the FSA did not post a warning on its website until 29th June 2011. I have noted your comments that you believe that this is an excessive period in light of the fact that the FSA has stated that it believed that generally a 'boiler room operation' will only stay in existence for a period of two months. Given the comments it made in its decision letter (dated 17th October 2011) and the questions you raised in your letter of 5th January 2012, I have asked the FSA to comment more fully on the reason for the delay in publishing the warning and why it publishes notices after a 'boiler room operation' may well have closed down.

Before I comment further, I would say that relying *solely* on 'cold-call' sales tactics is *always* (my emphasis) a dangerous and risky practice. Frankly it should never be done. This is particularly true when the firm concerned is or purports to be based overseas and is (allegedly) operating in the UK on an 'EEA inward services passport', and/or where it involves money being transferred to a bank account which is either overseas or is in a different name or territory to the firm from which the 'cold call' originated.

I appreciate that you are unhappy with the 'protection' you feel you have received from the FSA. However, before the FSA can post an alert, it must satisfy itself that a firm in question either is a 'boiler room' or is acting in breach of the Act before it can posts any warnings on its website (as this may be to the detriment of a legitimate firm).

Before I comment further, it may be useful if I provide you with some background on the role and responsibilities of the FSA, as set out within the Act. Under the Act, the FSA has four statutory objectives which are:

- market confidence – maintaining confidence in the UK financial system;
- financial stability - contributing to the protection and enhancement of stability of the UK financial system
- consumer protection - securing the appropriate degree of protection for consumers; and
- the reduction of financial crime - reducing the extent to which it is possible for a regulated business to be used for a purpose connected with financial crime.

Whilst the Act states these it does not provide any guidance with regard to the priority these should be given. As such the FSA is given a wide discretion on how it carries out its statutory responsibilities providing that they are consistent with the manner in which it carries out its general duties under the Act. I also feel that it may be useful if I refer you to Section 2 of the Act which 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 tension between market confidence and the reduction of financial crime, 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.

Whilst it clear that the FSA first became aware of Firm A Europe on 5th April 2011 the FSA did not feel that at this stage it had sufficient evidence to post a warning on its website. The FSA has confirmed that although it was alerted to the existence of a 'boiler room operation' calling itself Firm A Europe on 5th April 2011, and commenced an investigation on 6th April 2012 it was unable to post a warning on its website until 29th June 2011 as it was monitoring bank accounts which it believed may be being used by this (and another 'boiler room operation'). Given this, it decided, correctly in my opinion, that it should not publish a warning immediately as it was attempting to trace and, if it deemed appropriate, recover money which was being deposited in the account. I would add that the FSA have informed me that, by posting a warning immediately, it would have potentially 'tipped off' those orchestrating the 'boiler room operation' and thereby hindered the FSA's investigation. I would add here for the sake of completeness that this appears, on balance, to be a reasonable position for the FSA to take. Particularly as, although it was 'monitoring' the bank accounts it believed were being used, the FSA also had to confirm that the calls consumers had received from Firm A Europe did not originate from the genuinely authorised firm Firm A (albeit if they had the firm would have been operating outside of the authorisation given to it by its 'EEA inward services passport').

The FSA has also confirmed to me that, although generally 'boiler room operations' only operate for a period of around two months, some operate for a longer period of time. Given this, I understand that the FSA feels that it is appropriate that it should publish a list of unauthorised firms which may or may not have conducted activity in breach of the of the Act. Often the FSA only becomes aware of the existence of a 'boiler room operation' sometime after a consumer has been contacted by it. In these cases, it is often unclear whether the firm has been 'closed' by its operatives or is simply dormant. The FSA, by publishing a list of firms with which consumers should not deal, prevents those who have run 'boiler room operations' (and defrauded consumers) from reopening closed or dormant 'boiler room operations' in the future. This, in my opinion, goes some way towards helping the FSA fulfil its statutory objective of protecting consumers.

I would also add that, as the 'boiler room operation' was purporting to be a genuine firm (albeit one operating in the UK on an 'EEA inward services passport') the FSA had to confirm with the Austrian Regulator (and the firm) that the firm which had contacted you *was not* (my emphasis) the genuine firm but was in fact a 'boiler room operation' which was simply purporting (and believed by you) to be Firm A. Inevitably, liaising with an overseas regulator does take time. As such, whilst there was a delay in 'posting' the alert, this does not, on its own, mean that the FSA has been negligent or failed it is statutory duties.

Although I do sympathise with your position, I have to base my decision on the information I have to hand. In my opinion, having considered the information provided by both you and the FSA, I do not believe that you have provided sufficient, if any, evidence to show that the actions of the FSA *directly* (my emphasis) led to the loss you say you have incurred. In this case the FSA has, in my opinion, acted appropriately in acting upon a referral made to it and, in doing so, had to be mindful of the possible implications that this could have for a genuinely authorised firm (albeit one which could have been exceeding its permissions and permitted activities).

Conclusion

When considering whether I should conduct further investigations into your complaint, I have to consider the investigation and decisions taken by the FSA, the arguments and further evidence submitted by the complainant, together with the possible outcome or recommendations I could make.

Although you feel that the FSA has failed to provide consumers with sufficient information to enable them to assess whether they are being contacted by a genuine firm has led to your loss, failure of the FSA to provide sufficient information on its website to I disagree. As I have explained above, the FSA simply is not able to 'gold plate' or request additional information from a firm which wished to conduct regulated activity in the UK and which has been provided with an 'EEA inward services passport' by its home state regulator (which in this case would have been the Austrian regulator).

I appreciate that you say you checked on the FSA's website (specifically its register firms which were authorised to conduct regulated activity in the UK) and found the details of Firm A, which although having the same registration number had a different name. It is unfortunate that the 'boiler room operation' had 'cloned' the basic details of a genuine firm and this led you to believe that you were actually dealing with genuine firm, but this is not the fault of the FSA.

When receiving a 'cold call' there is nothing to show that the individual with whom you are dealing was approved by the FSA or that they are simply claiming to be somebody who was approved or simply share the same name as somebody who is approved. Whilst they provided you with the 'cloned' details of a genuinely authorised firm, albeit one which was operating in the UK on an 'EEA inward services passport', the fact that the name of the firm which contacted you was different to that shown on the FSA's website should have alerted you to the fact that the firm may not be genuine.

I am also satisfied that the FSA had acted appropriately with regard to the speed of its investigation and the timing of the publication of its warning on its website. Whilst it I can understand your comments that the FSA appears to have taken a considerable (and inappropriate) amount of time in posting the warning that it did, I am satisfied that the FSA acted appropriately and there were not unexplained or unreasonable delays in the publication of the warning.

I have noted your understandable comments on the reasons why the FSA publishes a list of unauthorised firms (which includes 'boiler room operations') a time when many of the firms may no longer be in operation. Given the information the FSA has provided (which I have set out above), I am satisfied that the FSA acts in a reasonable period of time and does so with a view to ensuring that consumers are protected.

I am sorry that I am therefore not able to help further in this matter.

Yours sincerely

Sir Anthony Holland
Complaints Commissioner