



4<sup>th</sup> September 2012

Dear Complainant

**Complaint against the Financial Services Authority**  
**Reference Number: GE-L01433**

I refer to your email of 31<sup>st</sup> May 2012 in connection with the above. I am now writing to advise you that I have now completed my investigation into your complaint.

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 your complaint relates to the following issues:

You are a small firm which offers “e-money services” and became registered with the FSA under the Payment Services Directive which were implemented in the UK under the Payment Services Regulations 2009 (the Regulations).

You have set out to the FSA that when you applied for your “e-money issuer’s certificate” you were not made aware that, as a result of this application you would be expected to pay annual fees to the FSA. The FSA has accepted that you were not made aware of this and, as a result, when it issued you with its decision letter on 5<sup>th</sup> August 2011, agreed to waive the invoice (which it issued to you on 18<sup>th</sup> February 2011 in respect of your firm’s the 2010/11 fees).

You are unhappy that, although the FSA waived its 2010/11 fees it maintains that your firm's 2011/12 will remain payable. You have set out in your complaint to my office that, had you known that your firm was expected to pay fees to the FSA you would either not have applied for an "e-money issuer's certificate" or would have cancelled/not renewed the certificate.

### 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 clear limitations in the important area of liability in damages. 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. There is no act taken by the FSA which is incompatible with the Human Rights Act 1998 which caused your firm to lose its possessions as the FSA expects all authorised firms to pay fees to it.

### **My Position**

As part of my investigation into your concerns I have obtained and reviewed the FSA’s investigation file. In reviewing your complaint I have considered the comments you have made when corresponding both with the FSA and my office.

Whilst it is clear that you remain unhappy with the outcome of FSA’s investigation into your complaint, I believe that your displeasure primarily surrounds the fact that your firm is required to pay annual fees to it and, although the FSA has waived one of the two invoices your firm has received, maintains that the other remains due and is payable in full. The FSA, as the UK’s financial services regulator, is not funded by central government but is funded purely by the financial services industry. As such, the FSA imposes a levy on *all* (my emphasis) firms which wish to conduct activity which is regulated by either the Act or the Regulations within the UK.

Given that your firm applied for and was granted permission (by way of an “e-money issuer’s certificate”) to carry out an activity regulated under the Regulations, the FSA correctly issued your firm with an invoice for its periodic fees. I have noted that you say that, when applying for your firm’s “e-money issuer’s certificate” you were not made aware that it would be required to pay any fees to the FSA. The correspondence I have seen indicates that, when investigating your complaint, the FSA has accepted this point and, as a result, agreed to waive the fees you were expected to pay for the period covered by the disputed invoice but stated, in its decision letter, that future invoices would be payable by your firm.

I appreciate that you say that whilst the FSA has waived the fees due for the period 1<sup>st</sup> April 2010 to 31<sup>st</sup> March 2011, you feel that the FSA should also waive the fees for the period 1<sup>st</sup> April 2011 to 31<sup>st</sup> March 2012 as you say you were unaware that you would be expected to pay fees for this period. When considering this there are two arguments which I must consider.

The first argument is that, although you say that you were unaware that you would be expected to pay fees to the FSA, the correspondence you received indicates that you should have been aware *before* (my emphasis) the 2011/12 charging period commenced (on 1<sup>st</sup> April 2011) that your firm would be expected to pay fees on an ongoing basis. This is evidenced by the fact that you received the disputed invoice dated 18<sup>th</sup> February 2011 which referred to a periodic fee. Additionally, the FSA’s first decision letter (dated 22<sup>nd</sup> March 2011) also confirms that all firms conducting regulated activity are required to pay annual fees to the FSA.

The second argument is that when you challenge the FSA’s initial decision (which was issued on 22<sup>nd</sup> March 2011) the FSA took sometime to investigate fully the additional arguments you raised. This resulted in the FSA not being in a position to issue you with its revised decision until a date when you would not have been able to cancel your “e-money issuer’s certificate” and avoid incurring fees for the 2011/12 charging period.

When considering this matter I hold the view that you *should* (my emphasis) have been aware from both the invoice you received (on 18<sup>th</sup> February 2011) and the contents of the FSA’s letter of 22<sup>nd</sup> March 2011 that you would be expected to pay periodic/annual fees to the FSA. However, whilst I, like the FSA feel you should have been aware that you were required to pay periodic fees to the FSA, I also have to be mindful that you challenged the FSA’s initial complaint decision and highlighted to it that it may not have considered adequately some of the documentation upon which you relied when applying for an “e-money issuer’s certificate” and that the FSA’s consideration of these documents resulted in your firm being unable to cancel its “e-money issuer’s certificate” *before* (my emphasis) it had incurred a liability for the FSA’s 2011/12 fees.

I am also mindful that the FSA accepted, in its decision letter of 5<sup>th</sup> August 2011, that its Senior Advisor “*did not believe that the information provided on whether or not there were fees to be paid [to the FSA] was sufficiently clear and has upheld your complaint*”. Although the FSA agreed to waive the fees your firm incurred for the 2010/11 charging period, it must be noted that these comments were not made until 5<sup>th</sup> August 2011 which, as I have commented previously, was after the date upon which your firm became liable for the FSA’s fees for the 2011/12 charging period.

Given this, I hold the view that the FSA should also have waived the fees which your firm was required to pay for the 2011/12 charging period as it was, in my opinion, not "*sufficiently clear*" to you that your firm was expected to pay annual/periodic fees to the FSA on an ongoing basis as result of it holding a "e-money issuer's certificate" and conducting what amounts to regulated activity in this area.

### Conclusion

In view of the comments I have made above, I believe that you should have been aware, before the 2011/12 charging period commenced, that your firm was likely be subject to regulatory fees on an ongoing as a result of holding an "e-money issuer's certificate". However, I am also aware that the FSA has accepted that the information you had received at the time of your application did not make this "*sufficiently clear*". As a result of this finding, the FSA has waived the fees your firm incurred for the 2010/11 charging period but did this *after* (my emphasis) the start of its 2011/12 charging period and therefore after your firm became liable for its 2011/12 fees. Given that the FSA has accepted that your firm was not made aware that it would be required to pay fees on an ongoing basis to the FSA at the time it applied for an "e-money issuer's certificate", and only accepted this during the 2011/12 charging period (i.e. after your firm had already become liable for the 2011/12 fees) I am recommending to the FSA that it should also waive the fees your firm has incurred for the 2011/12 charging period and understand that, very fairly, it accepts that recommendation and will implement it.

Yours sincerely,



Sir Anthony Holland  
Complaints Commissioner