Complaints Commissioner

Office of the Complaints Commissioner
3rd Floor
48–54 Moorgate
London EC2R 6EJ

Tel: 020 7562 5530
Fax: 020 7256 7559
E-mail: complaintscommissioner@fscc.gov.uk
www.fscc.gov.uk

17th April 2013

Dear Complainant,

Your complaint against the Financial Services Authority
Reference: GE-L01509

I write with reference to your email of 22nd January 2013 addressed to the Office of the Complaints Commissioner.

At this stage, I think it would be worth explaining my role and powers. Under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), provides that an independent person is appointed as Complaints Commissioner 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 that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role.

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.

You will be aware that with effect from 1st April 2013, as part of changes implemented by the Government, the FSA was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulator of the UK's financial services industry. I would add that although the FSA was replaced transitional provisions have been put in place to enable the continued consideration of complaints against the FSA.

As set out in consultation paper CP12/30 (Complaints against the regulators) and confirmed in PS13/7 (Complaints against the regulators), any complaints which have not been concluded as of 1st April 2013 will continue to be investigated by the FCA's Complaints Team with the cooperation of the PRA if needed and my office. In practice, this means that, although the governing legislation has changed there is no change to the manner in which, or the terms under which, your complaint has been investigated by either the FSA or my office.

Your complaint

From your recent letter I understand that you are unhappy with the conduct of the FSA as in your opinion:

- it has not taken sufficient, if any, action to prevent market abuse and/or manipulation on a number of exchanges.

- although you have provided it with considerable information which you believe supports your allegations that the markets are subject to abuse, you feel that the FSA has failed to act upon this information.

- you add that, although you have also raised your concerns with the exchanges themselves, that the exchanges have not taken any action despite that action. For the sake of completeness I should also set out in full the terms of your email of 22nd January 2013 when you first contacted my office:

  "*FSA Complaint Handler A has finally given me your name to carry on our battle against market abuse and manipulation. Despite constant complaining to our exchanges and FSA we have been totally ignored and by passed. I have been involved in futures since 1982 and have have (sic) been on many abuse committees and find it strange how regulators have ignored "abuse" claims from senior traders; strangley we mentioned these during the LIBOR abuse times back in 2007 onwards. Therefore can we now complain to you of the total lack of regulation in keeping our markets fair and orderly? I represent a number of independent traders in London; we have kept our emails to exchanges as we have no trust in them and currently FSA. I am and have an open door policy and still (sic)annoyed with FSA slow and lazy approach to a serious matter of abuse. I hope to hear from you in less than 3 months but have decided to pass FSA Complaint Handler A's last email onto further sources as feel it should speed process up as my patience has run dry (sic)*".

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.

My Position

From your letter to my office you are unhappy that the FSA does not appear to have taken any action as a result of the contact you have had with it. Although you remain unhappy, with the position, you have not provided any indication as to what exactly the FSA should do given the absence of hard evidential information. Mere supposition and assertion is totally inadequate in this important area.

Before the FSA can take action, it must first assess the information it has received and then, if it feels it appropriate, it must conduct its own further enquiries to establish if there have been any breaches of its rules. In this case, before contacting the FSA I understand that you raised the issue with the markets (upon which you allege abuse and/or manipulation was taking place) themselves and that, although the markets considered your comments, they did not take the action you had hoped for. As result you therefore referred your concerns to the FSA in the hope that it would take action to stop the conduct you described as market abuse.

I would add that the file presented to me by the FSA indicates that it has received a considerable amount of correspondence from you in relation to alleged market abuse. I am bound to say that some of what I have read represents emails from you that I consider unwarranted in their tone and approach. It is clear from this file that it considered the information you presented to it. It is also clear that the FSA has engaged with you to establish why you feel that the markets are being abused and manipulated (and how this abuse and/or manipulation was taking (and continues to take) place).

Although it is clear that you have made general comments about how you believe the markets are being manipulated you have not, as far as I can see from the information presented to me, provided specific examples of transactions which you believe are suspicious (and amount to market abuse and/or manipulation). I appreciate that you have indicated that the FSA should simply review 'trading screen' but this does not, in my opinion, indicate clearly that market abuse is taking place nor does it show specific examples of market abuse.

For the FSA to act, it must be able to prove that market abuse is taking place. Whilst I do not dispute that you strongly believe that the markets are being abused and/or manipulated, unfortunately neither an allegation, your belief nor mere assertion at law can amount to evidence that abuse or manipulation is actually taking place. For the FSA to take formal action against those abusing and/or manipulating the markets it must be able to prove *by way of evidence* (my emphasis) that the abuse and/or manipulation is taking/has taken place.

From the papers presented to me it does not appear that you have provided any clear evidence that abuse and/or manipulation is taking place, only that you believe and assert this to be the case from monitoring the trading screens. Likewise, the fact that the FSA has not commented upon what investigations or actions it has undertaken as a result of your referrals to it does not mean that the FSA has not considered adequately your concerns or undertaken enquiries based upon the information you have provided.

I appreciate that you have extended invitations to the FSA to view the trading screens with you and, whilst this may enable you to explain to the FSA why you believe market abuse is taking place, this still would not amount to evidence that market abuse is actually taking place. I would add here that for the Regulator to take action against a firm it must have evidence to prove which firm actually conducted the market abuse, it is unclear from your comments whether simply viewing the trading screens would enable the FSA to identify which firms were conducting market abuse.

I also note that you say the FSA has failed to accept the invitations you have made to it to discuss your concerns. Whilst I have noted these comments and, although I understand that FSA did not actually meet with you, I believe that it has arranged conference calls to discuss your concerns with you and that it remains open to receiving information from you. Given the manner in which the Regulators were, and continue to be, funded this does not appear to be an inappropriate way for the FSA to act when considering your concerns.

I appreciate that you also feel that the FSA has failed to act, but given that it has discussed your concerns with you and continues to consider the information you provide to it, I do not believe that this is the case. As I have indicated above, the FSA can only act when it has significant evidence that a market participant has conduct market abuse. Where there is only a suggestion that the markets are being abused and it is unclear which participant is conducting the abuse then it is difficult for the Regulator to take any action. This however does not mean that the Regulator will not continue to assess the situation. This is a view supported by the Regulator's willingness to continue to receive information from you.

As you are aware the FSA has a number of statutory objectives which include "market confidence" (described as maintaining confidence in the UK financial system) and "the reduction of financial crime" (described as reducing the extent to which it is possible for a regulated business to be used for a purpose connected with financial crime which I believe would include market abuse/manipulation). Although the FSA has these statutory objectives, I must go into more detail. I do that more as a need to give the fullest possible consideration to every aspect of your complaint. My starting point must therefore 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 a 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 in today's world 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 (or those participants who are conducting trading activity on the markets). 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 the protection or market participants (to ensure that they are not adversely affected as a result of market abuse and/or manipulation). That is the generic background to the issues raised by your complaint and I have borne in mind when examining in detail all the many records the FSA presented to me when I examined your complaint.

I turn now to the issue of disclosure of what action the FSA has taken. Quite reasonably any complainant will then pose the question relevant to this issue "*well what exactly did the Regulator do as a result of the disclosures I made and concerns I raised?*" In answering those questions however Parliament has imposed real 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 functions 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).

I do not believe in this instance that the exceptions apply and therefore I cannot comment further. I do myself however 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. Although I can do this, I am nevertheless, limited, in most cases, as to the further disclosure of the details that I am informed about. I am for that reason unable, directly, to answer the questions you have posed.

However, what I can say is that, from the considerable information the FSA has provided to me, it does appear that it has carried out entirely appropriately its duties as the UK's financial services regulator. The FSA has considered the information you provided to it by both you and a number of other individuals and acted upon that information. Although I cannot comment in detailed fashion on what action the FSA took, I can confirm that the information provided to me indicates that the FSA considered the information (and undertook a number of enquiries) before undertaking (and continuing to undertake) what I consider to be reasonable course of action in all the circumstances.

I appreciate that you would like to know exactly what action the FSA took any why and will be disappointed that I simply cannot provide you with any further information. This is not because I wish to be unhelpful but because the provisions of section 348 apply and further details cannot be provided.

I have noted your comments that you feel that "*the level of secrecy seems ridiculous and really should be challenged by the Commissioner*". Whilst I can understand your views on the disclosure restrictions, the disclosure restrictions (under section 348 of the Act) form part of the Act as set out by Parliament. Whilst these may seem "*ridiculous*" to you I have to comply with the requirements of the relevant legislation (namely the Act). Legislation can only be challenged or amended by Parliament and I can only therefore suggest that you raise this with your Member of Parliament as the requirements of Section 348 of the Act have been replicated under the Financial Services Act 2012.

I have also noted your comments regarding the rules and requirements which have been implemented in other jurisdictions to prevent market abuse, and you have made specific reference to the initiative which are being undertaken in the USA (with Consolidated Audit Trail (CAT) requirements), Canada and Australia. However, what I can say is that in the UK, surveillance is currently performed by each platform independently and by certain participants who have an obligation to send the FSA a notification or suspicious transaction report (STR) if they have suspicions of market abuse by any participant or employee. The FSA performs surveillance over and above that performed by the industry. Further, the FSA compels platforms to submit order book data to us when necessary for its own investigations.

From the information presented to me by the FSA I believe that surveillance bodies beyond Europe have differing regimes. Currently within the US, FINRA perform surveillance over 80% of equities and 40% of derivatives but the remainder is elsewhere. The US are indeed considering a CAT and are currently seeking to tender out to industry providers; but it should be remembered that the build cost estimates vary from U$4bn for a real time CAT to U$2bn for a T+1 CAT. Annual running costs will likely be very considerable too. Similarly, ASIC in Australia have recently taken over the real time and T+1 surveillance from ASX and now have a second platform which they also oversee. Their plan currently includes consolidating this surveillance and adding in derivatives ultimately too. IIROC in Canada have 100% equity coverage but are only now considering surveillance of debt trading on its road map.

One step down from the investment required for a full CAT is consideration of whether or not to perform consolidated order book surveillance on a cross market, cross product, cross platform basis, whether on a UK or pan-European basis. This would require significant investment by the body performing the surveillance and significant investment by all platforms and participants who would need to adopt standardized formatting and synchronisation of reliable time clocks. Within the UK there are over 50 MTFs and RIEs, with over 150 in Europe, so the complexity is not to be underestimated. Obviously consultation and a cost benefit analysis would have to be carried in order to evaluate fully the relative merits. I would add here that if this was to be a role undertaken by the FSA then it will be the industry (and traders) who will ultimately have to fund this given that the Regulators are funded by the industry and the significant costs of administering this type of supervision would clearly have to come from that sector of the industry.

Conclusion

As I have explained above, the FSA has satisfied me that, although it has considered in detail your comments that a number of markets (based both in the UK and overseas) are subject to market abuse and/or manipulation it is unable to comment further on the matter. Although this may appear unhelpful, the FSA has to act in accordance with the provision imposed upon it by Parliament through the Act. However, although I cannot comment further from the information presented to me it is clear that the FSA did consider in considerable detail the information you provided to it and took/continues to take a course of action which I feel was reasonable in all the circumstances.

Although it is unfortunate that the FSA is unable to comment further, this does not mean that the FSA did not act appropriately or that it failed to comply with its statutory objectives. As I have explained above the FSA has to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives. It also has to satisfy itself that the information it has received is wholly accurate *before* (my emphasis) it can take formal action. The fact that the FSA has not made any announcements regarding potential action does not mean that it disregarded the information you provided. In fact the file the FSA presented to me indicates quite the opposite position. Indeed that accounted for the delay in responding fully to your complaint.

For the reasons I have set out I am unable to make any further comment upon the FSA's actions other than to say that the papers presented to me indicate that the FSA acted appropriately and in line with its statutory objectives when considering the considerable amount of information you brought to its attention. I appreciate that you will be disappointed that I cannot comment further on what the FSA may or may not have done, but I hope that my independent examination of the FSA's file will reassure you that the FSA has acted in an appropriate manner in the context of this matter.

Finally, I note that the FSA is in its very full and detailed letter of 21st January 2013 apologised further for its delay and also for not supplying you with the details about the complaints scheme. It is therefore my Final Decision that the FSA has acted appropriately throughout these matters.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner