



6th June 2013

Dear Complainant,

**Complaint against the Financial Services Authority
Reference Number: GE-L01537**

I write with reference to your letter of 2nd May 2013 and your telephone conversation with my Senior Investigator of 3rd June 2013 in connection with your complaint against the Financial Services Authority. I have now completed my investigation and issue you with my decision in respect of your complaint.

Before I do this, I need to explain my role and powers. Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner with the task of investigating those complaints made about the way the regulators have themselves carried out their 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.

From 1st April 2013, as part of the changes implemented by the Government, the Financial Services Authority (FSA) was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulators of the UK's financial services industry. I would add that although the FSA has been replaced, transitional provisions have been put in place to enable the continued consideration of complaints against the FSA. As your complaint relates to the inactions of the FSA, in relations to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new transitional complaints scheme.

As set out in the consultation paper (CP12/30 Complaints against the regulators) and confirmed in the policy statement (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 Complaints Team with the cooperation of the PRA if needed and my office. In practice, this means that, although the governing legislation will have changed there will be no change to the manner in which, or the terms under which, your complaint is investigated.

Your complaint

From your correspondence with my office, I take the view that your complaint relates to the following issues:

- you are unhappy with a product brochure issued by a regulated firm which you believe mis-represented the AER rate payable on the product.
- you have referred the matter to the Financial Ombudsman Service (FOS) which has rejected your complaint and referred you to the FSA as the FOS has indicated to you that it is the FSA which is responsible for ensuring that marketing material is accurate.
- As you did not feel that the FSA took the appropriate action as a result of your referral to it, you complained to the FSA. Although the FSA has considered your complaint you feel that it has not addressed adequately all of the concerns raised as it has not commented specifically on the following:
 - whether the bank concerned had incorrectly stated the AER interest rate.
 - whether by simply acknowledging your letter (rather than challenging the specific contents) of 20th March 2010, it accepts your views on the bank's conduct.
 - whether the FSA holds a recording of the telephone call you had with a member of its Financial Promotions Team on 13th July 2010 in which you claim that you were told that the bank concerned has incorrectly quoted the AER interest rate.
- you would like the FSA to tell you "*clearly and categorically whether [the member of the Financial Promotions Team] accepts or rejects [your] claims about his involvement*" in the matter.
- you would also like my office to confirm whether action was taken against the bank concerned and whether I believe the action was appropriate and clarify whether "*it is really the case that the FSA is not empowered to tell me whether the Bank was right or wrong?*"
- you are disappointed that the FSA will not confirm whether the AER calculation you completed for a nine-month savings bond was correct. Given that your calculation made no reference to a specific bank or building society you dispute the FSA's view that by confirming whether your calculation was correct or incorrect would amount involving itself in a dispute between a consumer and regulated firm is incorrect and unacceptable.

Coverage and scope of the transitional complaints scheme

The transitional complaints scheme provides as follows:

- 9.1 *The transitional 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 under FSMA. The transitional 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.*

9.2 *To be eligible to make a complaint under the transitional complaints scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.*

9.3 *The transitional complaints scheme does not apply to the Bank's functions under Part 5 of the Banking Act 2009 (overseeing inter-bank payment systems) as this was not previously subject to these complaints arrangements.*

I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. FSMA (as the relevant legislation in place at the time) stipulated in Schedule One that the FSA is exempt from "liability in damages". It stated:

"(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."

I have referred to FSMA here as it was FSMA which was the relevant legislation when the FSA considered your complaint. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. You have not adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The transitional complaints scheme nevertheless then goes on to provide in paragraph 6.6 that:

"Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This 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 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 conclusions 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 or which has caused you any loss.

My Position

From your letter to my office you are dis-satisfied with the manner in which the bank concerned completed and showed the AER interest rate calculation in its marketing documentation. However, whilst you are unhappy with this calculation, from your correspondence with both the bank concerned, the FSA and my office it appears that you *did not* (my emphasis) invest in the bond concerned but were simply considering doing so.

This would indicate to me that, although you are concerned with the manner in which the documentation was produced, you did not suffer any financial loss. I also note that, ultimately although you have not been adversely affected by the actions of either the bank or the FSA, the FSA did consider your complaint and has undertaken a review of how it has corresponded with you in relation to this matter.

Before I comment further I feel I should explain the role and responsibility of the FSA as set out by the Act. Under the Act the role of the FSA was to regulate the UK's financial services industry. The FSA was unable to involve itself in individual disputes between regulated firms (such as the bank concerned) and consumers (such as you). Under the Act, responsibility for this role was specifically passed to the FOS.

I appreciate that you are disappointed that the FSA will not confirm whether the AER calculation you completed is correct. However, as the FSA has indicated, this was not its role. The FSA has set out in its correspondence with you that, should it comment on the accuracy of the calculation you have produced, this would, in effect, be commenting on whether the bank's calculation was or was not correct. I appreciate that you have indicated that you do not wish it to include any names of the financial institutions involved and simply require it to comment upon your calculation. Whilst I can understand your views that the FSA would be commenting upon a hypothetical situation, rather than be commenting upon the actual marketing material produced by the bank concerned, the position is unfortunately not that straight forward.

If the FSA was to comment upon a hypothetical situation (which happened to match the specific details of marketing material used by a bank), it could be placing itself in a position where its views could be used against the bank concerned. Despite your views, I concur with the FSA's opinion that making such a comment would have the unfortunate consequence of placing the FSA in a position where it was becoming involved in a dispute between a regulated firm and a consumer. Given these concerns, the only option open to the FSA was to effectively not make any comment upon the accuracy of your calculation.

In your letter to my office you have stated that, by not challenging the contents of your letter of 20th March 2010, you hold the view that the FSA is accepting your views. This is not correct. The FSA, in both its telephone conversation with you of 20th January 2010 and the letter it sent to you on 21st January 2010 set out that it cannot become involved in disputes between regulated firms and consumers. Your letter of 20th March 2010 addressed to the FSA stated you were "*enclosing a letter that [you] have sent to [the bank] concerning this case*". Given the clear explanations regarding the limitations of the FSA's responsibility in this area, in my opinion a simple acknowledgement letter was all that was required. I would add that, as the letter had already been sent to the bank any clarification by the FSA staff involved would have been too late to correct the position.

Likewise, I have noted that you are unhappy that the FSA has not provided you with clear and unambiguous details of what investigations it made of the bank concerned and appear to hold the view that the FSA did not act upon the information presented to it. Whilst the FSA is able to receive information or 'intelligence' from consumers pertaining to the actions of regulated firms, the fact that a consumer has alleged that a firm may have acted inappropriately *does not* (my emphasis) in itself mean that action will be taken against the firm.

Before the FSA can take action, it must first assess the information a consumer has provided and then, if it feels it appropriate, it must then conduct its own further enquiries to establish if there have been any breaches of its rules. I would add that the fact that the FSA has not indicated what action, if any, it took as a result of the information provided to it (or what enquiries it may have made) does not mean that it has failed to fulfil adequately its objective of protecting consumers.

I will comment at this point about the general issue of protecting consumers. I must go into some 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 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, 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 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 and I have borne in mind when examining in detail all the many records the FSA has now presented to me when I examined your complaint in all its detail.

Next I turn to the issue of disclosure of what action the FSA has taken after receiving the information that it did receive. Parliament has imposed real restrictions upon both the FSA and myself by the imposition of section 348 of the Act as to how that question 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).

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, although I can do this, 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.

However, what I can say is that, from the considerable information the FSA has freely 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 detail on what action the FSA took, I can confirm that the information provided to me indicates that the FSA considered in considerable depth the information presented to it. Following its own enquiries I believe that the FSA undertook what I consider to be reasonable course of action. It certainly did not ignore the referral you made and it made judgements following its own enquiries which in all the circumstances I consider to be reasonable. Sometimes, particularly with hindsight, I can be left with the impression that different conclusions may have been reached by those involved. Yours is not such a case.

I appreciate that you would like to know specifically (and in considerably more detail) what action the FSA took and why and that you will be disappointed that I simply cannot provide you with any further information. This is not because I wish to be unhelpful but simply because the provisions of Section 348 apply and under the current legislation further details simply cannot be provided to you. Incidentally I feel I must add that Section 348 in its effect is repeated in the new legislation that I referred to at the start of this Decision.

I understand that you would like me to clarify whether the FSA holds a recording of the telephone conversations you had with a member of the Financial Promotions team on 20th January and 13th July 2010. I understand from the FSA that recordings are not held. However, the FSA has presented me with contemporaneous notes of the telephone conversations and a copy of a letter which the operative sent to you the day after the first call was made.

I know that you would like me to undertake a further full review of the FSA's actions but, having reviewed the papers presented to me, the issue you are raised does not appear to be something which can be considered under the rules of the Transitional Complaints Scheme. I would also specifically draw your attention to paragraphs 6.14 and 6.8 of the complaints scheme which states:

6.14 The Complaints Commissioner will not investigate any complaint which is outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with the Complaints Commissioner.

In my view, your complaint essentially relates to the continuation of a 2009 dispute over the manner in which a bank set out the AER rate payable to consumers who invested in a nine-month savings bond *in which you did not invest* (my emphasis) and as a result have not been adversely affected.

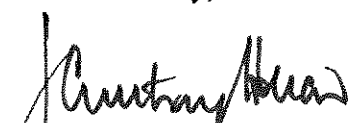
I should point out that whether a complaint is within the complaints scheme is at my sole discretion. Currently, for the reasons explained above, I do not believe that this case justifies an investigation by me.

6.8 Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the relevant regulator(s)' progress in investigating a complaint, may refer the matter to the Complaints Commissioner, who will consider whether to carry out his own investigation.

This is a relevant provision as it gives me an unfettered discretion as to whether or not I carry out an investigation. I am bound to say that on what I have read the issues you have raised appear to have arisen as a result both of your displeasure with the actions of a regulated firm (a bank) rather than the regulator itself and the fact that the regulator will not clarify what action it took as a result of your referral to it. As I have set out above, complaints of this nature, particularly where there does not appear to have been any loss which is directly attributable to the actions of the Regulator (and where the action taken by the Regulator appears reasonable in all the circumstances) are not something which can be considered under the rules of the Transitional Complaints Scheme.

I am sorry that I am therefore not able to help further in this matter. I am copying this letter to the FSA

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner