

Consultation Paper 04/6: Changing the FSA's Complaints Scheme

Formal Response by the Complaints Commissioner

Introduction

This is the formal response from the Complaints Commissioner to FSA Consultation Paper 04/6: Changing the FSA's Complaints Scheme. The response is divided into two substantive sections, representing my comments in respect of the two questions posed on page 9 of the Consultation Paper (CP). The first substantive section, therefore, sets out my views on the FSA's proposals for changes to the Complaints Scheme as described in the text of the CP and the second section sets out my views on the FSA's draft amendments to Complaints Against the FSA (COAF) in the FSA Handbook.

Before dealing with the specifics of the CP, however, I believe it is important first to set the context for my comments by emphasising the importance of the Complaints Scheme. The Financial Services and Markets Act 2000 (FSMA) requires the FSA to establish a Complaints Scheme for the investigation of complaints arising in connection with the exercise of, or the failure to exercise, any of its functions (other than its legislative functions). FSMA also requires that, as part of the complaints procedure, there must be a Complaints Commissioner who is independent and able to conduct impartial investigations. That is the role I currently fulfil.

By providing a clear framework for the handling of complaints, and by providing for independent investigation of complaints, the Complaints Scheme helps to ensure that the FSA can be held to account for its actions. This, in turn, helps to promote market confidence amongst firms and consumers. The Scheme, and the role of the independent Commissioner within it, thus represents a key component in the overall accountability arrangements for the FSA.

The Complaints Scheme has now been in operation for nearly three years and it is in my view appropriate at this point to review how well it is working and whether there are improvements that could be effected. I therefore welcome the FSA's review of the current arrangements. I also note the FSA's comments, at paragraph 1.2 of the CP, to the effect that the changes proposed are aimed at ways in which the economy and efficiency of the current arrangements for complaints handling can be improved without compromising its effectiveness or the Commissioner's independence. I agree that the effectiveness of the Scheme and the independence of the Commissioner must be paramount. My response to the CP, therefore, is based on my firm belief that changes that will improve the efficiency or economy of the Complaints Scheme should be supported but **only** if these changes do not restrict the rights of complainants and do not affect the independence of the Commissioner.

Question 1: Do you agree with our proposals for changing the way that the Complaints Scheme operates?

In general, I believe that the main thrust of the changes outlined by the FSA in the CP, namely a streamlining of the complaints procedure via the introduction of a graduated approach, should be welcomed as providing for overall improvements to the Scheme. In my experience, there have been occasions when the current arrangements have resulted in a disproportionate application of resources and in delays which could have been avoided by a graduated approach to complaints handling.

I do, however, have concerns about certain of the proposals in the CP and, as set out below, I am strongly opposed to some of them because I consider that they would have the effect of limiting the scope of the Scheme or the independence of the Commissioner, or would be likely to result in further delays in procedures rather than in improved efficiency.

Paragraph headings below refer to the paragraphs in the CP.

CP 1.2

As already noted above, I welcome the FSA's recognition that any changes made should not compromise the effectiveness of the Scheme or the independence of the Complaints Commissioner. I have kept this very much in mind when considering the remainder of the CP.

CP 2.1

The figures quoted for the number of Stage 2 investigations undertaken by the Commissioner are correct but they give an incomplete picture of the Commissioner's role and the composition of her workload. The Commissioner's role is not limited to undertaking Stage 2 investigations. During the two years 2002/03 and 2003/04 I received 318 enquiries and complaints. These included 75 referrals of FSA decisions to exclude complaints from the Scheme or not to investigate complaints, decisions that the Commissioner must, under the current terms of the Scheme, review. I also reviewed many other matters that required considerable investigation in addition to the 38 matters that became the subject of formal Stage 2 investigations.

CP 2.3

I note the FSA comments in paragraph 2.3 of the CP to the effect that it intends to make it clearer in COAF that complaints that are about the way in which the FSA carries out its functions under legislation other than FSMA are outside the Scheme. This suggestion is carried into the draft amendments of COAF at paragraph 1.4.2G(4).

I strongly disagree with this suggested amendment. The Complaints Scheme was introduced to ensure the accountability of the FSA as a result of its newly-acquired and very considerable powers under FSMA. It may be argued that every act of the FSA is carried out as a consequence of FSMA. However, the FSA, in discharging its responsibilities under FSMA, is also obliged to take into account other legislation; for example, it must have regard to the provisions of the Human Rights Act, the Data Protection Act and disability legislation.

Suppose that the FSA is accused of misconduct in discharging its responsibilities and one feature of the misconduct alleged is a failure on the part of the FSA to take proper account of legislation other than FSMA, but legislation that the FSA should have taken into account. An example might be an allegation that the FSA has failed to respond appropriately to a request for information or for help from a disabled person and in doing so has failed to recognise the rights of that individual under disability legislation. In my view, the person affected by such alleged misconduct should be able to bring a complaint against the FSA under the Complaints Scheme and (using the words of the FSA in the CP) should be entitled to "a thorough and impartial inquiry into what went wrong and to be told what the FSA will do to put things right". It should not be possible for the FSA to argue that such a complaint does not fall within the scope of the Scheme simply because the alleged misconduct involved failure to comply with legislation other than FSMA. In some circumstances, such a restriction might mean that the person affected had no way of seeking a remedy for the alleged misconduct.

I am aware that, in certain situations, there may be other, more appropriate, avenues through which a person may seek satisfaction of a complaint in respect of allegations of misconduct arising in relation to legislation other than the FSMA. For example, a complaint about the way in which the FSA has acted in respect of its response to a subject access request under the Data Protection Act is a matter for the Information Commissioner to consider. However, in these circumstances the FSA is already able, under the current terms of the Scheme, to decide not to investigate such a complaint if it considers that it could be "more appropriately dealt with in another way" (COAF 1.4.3), subject only to oversight by the Commissioner that the decision not to investigate is reasonable. I do not, therefore, see the need for the proposed amendment and I believe that to make this change would significantly limit the scope of the Scheme to the detriment of those who seek to use it.

I should also like to record my concern that such a potentially significant change is only mentioned very briefly in the CP and that the ramifications were not fully set out for the reader to consider.

CP 2.4

I welcome and support the principle of a graduated approach to handling complaints (the "fast track" procedure) in order to improve the efficiency of the Scheme. It is my experience that there a number of minor complaints (such as those alleging delays in providing information or returning telephone calls or other minor administrative mistakes) which could be dealt with quickly and effectively at local level within the FSA without the need to refer the matter to the FSA Company Secretariat and to undertake a formal Stage 1 investigation. As things currently stand, every complaint about the FSA must be dealt with in the same way under the detailed provisions of the Scheme. This can be unwieldy and can take unnecessary amounts of time, which is disadvantageous to complainants. The graduated approach should help to ease the administrative burden on both the FSA and the Commissioner and to ensure that resources are deployed in proportion to the seriousness of the subject matter of the complaint.

Nevertheless, there must be safeguards in place to ensure that this approach does not fetter the rights of the complainant in any way and I believe that a statement of principle to this effect should be included in COAF.

In addition, I consider it to be vital that any person or firm who has a complaint dealt with under the proposed "fast track" procedure is informed in very clear terms by the FSA that it is

handling the complaint on this basis and that the complainant has the right to ask for the matter to be escalated within the Scheme if they are not entirely satisfied with the way the complaint is handled by local management. I believe that the current draft amendments are satisfactory in this respect (although also see my comments below). However, those responsible within the FSA for writing the internal staff guidelines on this new approach must ensure that this message is made clear to FSA staff handling complaints. I should therefore welcome the opportunity to comment on the drafting of these guidelines and also the drafting of a standard paragraph to be included in all correspondence to explain the "fast track" procedure to complainants and the right of complainants to escalate the matter.

I also consider that the "fast track" complaints procedure should only be used as a means of dealing with complaints that can be resolved very quickly. The draft amendment to COAF 1.5.1DG (see my comments below) states that the FSA intend to deal with these complaints "promptly". I do not consider this to be sufficiently "fast track" and believe that it would be more appropriate to apply a requirement to respond within five business days of receipt, reflecting the provisions of the preceding paragraph 1.5.1 BG.

CP 2.10

I welcome the decision of the FSA to commit to notifying the Commissioner of its decisions not to investigate a complaint and also its decisions to exclude a complaint from the Scheme. I also believe that it is appropriate to require the complainant to take the step of notifying me of their desire to have these FSA decisions reviewed by the Commissioner (rather than the current requirement that I review every decision of this nature whether or not the complainant has requested a review).

I observe, however, that this represents a significant change to the current procedure and I am pleased to note that the FSA will be required to notify complainants of their right to have the Commissioner review these decisions. Again, I should welcome the opportunity to comment on the standard wording that the FSA will include in its letters notifying complainants of any decision to exclude or not to investigate a complaint and of complainants' rights of referral to the Commissioner.

CP 2.11

I support the FSA's suggestion that the eight week requirement for completing investigations be replaced with a requirement that the FSA deal with a complaint within four weeks or, where this is not possible, to write to the complainant within this time setting out a **reasonable** timetable for dealing with the complaint. In my experience, it is often very difficult, especially in relation to complex or lengthy complaints, for investigations by the FSA to be completed by the end of the eight week period. In some cases, this deadline can result in a rushed and unsatisfactory investigation, and so I consider the degree of flexibility offered by this amendment to be an improvement to the current arrangements.

CP 2.13

I am opposed to the proposal relating to reporting against service standards and on methodologies, which seems in my view to stem from an incomplete understanding of the work of the Commissioner and how accountability and transparency, to which I am wholly committed, can best be achieved with regard to the Commissioner's operations.

It is neither practical nor of much value to complainants or the FSA for the Commissioner to commit to many service standards or to report against these in the Annual Report. At present, the Commissioner has service standards for responding to correspondence, and reports against these, but service standards are not set for the time taken to undertake Stage 2 investigations or to review a decision by the FSA to exclude or not to investigate a complaint. This is because the time needed to conduct a full and proper investigation is enormously variable and is also very substantially influenced by factors outside the Commissioner's direct control. This is in marked contrast with the FSA's position in conducting their Stage 1 investigations where, by definition, the process is under the FSA's direct control. When conducting any investigation, the Commissioner, for example, is wholly dependent upon the FSA providing full and complete files, and providing them promptly, and arranging interviews with their staff, where required, as speedily as possible. This, more often than not, does not happen in practice. In my view, it is of much more practical value, in the case of Stage 2 investigations for example, to provide the complainant and the FSA with an estimated timetable at the beginning of each investigation, which can take account of the particular requirements of the case, and then to keep both parties informed regularly of progress. This is the practice I adopt.

I am unclear what is meant by the reference in the CP to reporting on methodologies. Independent complaints investigations do not lend themselves to the development of detailed standard methodologies: there is too much variation from case to case. What is important is that like cases should be treated alike and this is one of the five objectives that I set for myself at the beginning of my term and against which I already report. Further, in the area of independent investigations it is in my view a better test of accountability to measure performance and comment in reports on what has been achieved. In my Annual Report, for example, I describe the number of complaints I have dealt with and the time it has taken to deal with formal Stage 2 investigations. Where these have been protracted, I give reasons. This, I believe, is both informative and conducive to proper transparency with regard to the Commissioner's arrangements.

CP 2.14

I note the FSA's comments in paragraph 2.14 of the CP and I would comment that a great deal of work will need to be carried out by the FSA and the Office of the Complaints Commissioner in updating leaflets, internal operational guidelines and other explanatory materials in order to reflect the changes that are ultimately made. This will have to be done if the benefits of the changes are to be realised.

CP 2.15

Paragraph 2.15 of the CP comments on the FSA's intention to look for more cost-effective ways to fund and staff the Commissioner's Office. I have a number of comments on this issue because I am concerned that the suggestions made might impair the effectiveness of the Commissioner's investigations.

First, the FSA comments that it plans to remove the specific commitment to remunerate the Commissioner and to replace this with a more flexible commitment to provide the Commissioner with sufficient financial and other resources to fulfil his or her role under the Scheme. There is no justification given for the suggested change and I do not understand why it is necessary. It would appear obvious that any Commissioner must be remunerated appropriately for his or her work.

Second, I do not understand the reference in this paragraph to the consideration that has been given as to whether the Commissioner can be supported by a special purpose company. I am aware of no such proposal. I have, however, been drawing the FSA's attention, over a prolonged period of time, to the problems consequent upon the Office of the Commissioner having no legal status. These problems arise, for example, in relation to the employment status of staff who may work with the Commissioner. They are brought up in sharp focus as the end of the first Commissioner's term approaches with the consequent need to hand over to a successor. I have commented on this in my Annual Report. However, this is not in my view a matter for the CP or for amendments to COAF.

Third, and most importantly, I am strongly opposed to the idea that accommodation might be provided for the Commissioner within the FSA headquarters. As I have already noted, one of the main principles of the Scheme is to ensure the independence of the Commissioner. In other words, the Commissioner must not only be independent but must also be **seen** to be independent. This is a matter that was originally considered by the FSA when it first introduced COAF. In CP73 (Investigation of complaints against the FSA), the FSA concluded that "it would probably have been cheaper to provide ... support in-house, but we have decided that, on balance, that is outweighed by the benefit of having secretariat support for the Commissioner which is visibly independent and separate from the FSA". I am not sure what has changed since that decision. Indeed, to the contrary, my own experience suggests that if the Commissioner were to be accommodated within the FSA it would reinforce complainants' worries that the Commissioner is part of, and not independent of, the FSA. For example, it should be remembered that all complainants whose complaints are the subject of a Stage 2 investigation are offered a private meeting with the Commissioner. For this to be in an office within the FSA's premises would undoubtedly confuse and intimidate some complainants. In my opinion, the damage to perceived independence far outweighs any economic benefit to the FSA and the industry.

CP 3.1

I have noted the FSA's comments about the reduction of the administrative costs of dealing with complaints. I would simply point out that it is my belief that the emphasis on new changes should also be on improving the quality of the Scheme and not just on saving money.

The FSA will need to invest in changes to its complaints recording, management information and reporting systems in order to put the proposals into effect. There will also be some costs associated with producing new procedures and guidelines, and training staff in their use. The importance of the latter should not be underestimated.

Question 2: Do you have any comments on our proposed amendments to the Handbook to implement these changes?

I have a number of comments on the suggested amendments to COAF which arise mainly because I consider the way the FSA has chosen to effect the changes outlined in the CP to be, on occasion, either impractical or inadequate. I have also highlighted my concerns in respect of a number of changes which have been suggested but which are not mentioned by the FSA in the CP and could, I believe, have a significant impact on the current arrangements.

Annex

I note that the Annex makes reference to the transitional provisions being in force from 3 September 2004 for 18 months. I am not clear of the significance of this and I should be grateful for explanation from the FSA of this point.

COAF 1.2.1G

This amendment relates to groups such as trade associations or action groups and their rights to make complaints under the Scheme. I support the idea in principle that groups may bring a complaint under the Scheme where they themselves have been directly affected by the FSA's actions or inactions. I also support the view that groups may bring complaints on behalf of members that have been directly affected by the FSA's actions or inactions.

However, as currently drafted this paragraph of COAF prevents groups from bringing complaints under the Scheme unless it is apparent that **all** of its members have been directly affected. I consider it to be unnecessary to limit in this way the rights of groups, such as trade associations or action groups, to bring complaints on behalf of their members. It is my view that if, say, one quarter of a trade association's members are affected by the FSA's actions or inactions, it should be possible for that trade association to complain directly to the FSA on behalf of those members that are affected. I would therefore suggest that the second part of the final sentence after the word "inactions" be deleted and the first part of the same sentence be amended to state that "groups may also bring complaints on behalf of **all or any** members that have been directly affected by the FSA's actions or inactions."

COAF 1.3.3G

I refer to my earlier comments regarding the CP and my view that I do not think it appropriate to remove the commitment to remunerate the Commissioner.

In addition, I note that the final sentence of this paragraph has been deleted without explanation. This sentence clarified the fact that no member of the Complaints Commissioner's staff could be an employee of, or perform any duties for, the FSA. This is, in my opinion, an essential part of maintaining the independence of the Commissioner and her staff of the FSA and is an aspect of the Scheme that is specifically provided for in FSMA. I see no reason for the removal of this safeguard. I also note that no justification has been offered for this amendment in the body of the CP. This causes me significant concern.

COAF 1.4.1G

In respect of the FSA's suggested amendments to paragraph 1.4.1G(3) of COAF, I believe it is not necessary or practical to introduce a requirement that a complainant must set out the remedy they are seeking when bringing a complaint. Whilst the FSA may consider it preferable to have this information as early as possible, it is not a pre-requisite for the proper investigation of a complaint and I do not, therefore, consider it necessary. The likely consequence of such an amendment would be further delays at the outset of the complaints procedure.

COAF 1.4.2G(4)

As I have already stated above, I do not think it is appropriate that the Scheme should be limited to complaints about the way in which the FSA has carried out functions under the Act and not any other legislation. If the FSA in carrying out its function has exhibited some element of misconduct, such as an allegation of mistake, lack of care, unreasonable delay, unprofessional behaviour, bias or lack of integrity, which involves a breach or non-compliance with some other relevant legislation then this should be a matter for the Scheme (unless the complaint can be dealt with better " in another way" and therefore need not be investigated by the FSA).

In addition, I believe that paragraph 1.4.2G(5) should also include a reference to the "inaction" of the FOS or FSCS.

COAF 1.5.-1(1)G

I have a number of concerns about the suggested drafting of this new paragraph. First, I find the revised numbering for paragraph 1.5 to be confusing and I would suggest that COAF is renumbered rather than having paragraphs 1.5.-1, 1.5.1AG, 1.5.1BG etc.

Second, I can see no reason for there to be a continued differentiation between a complaint made orally by a consumer or by a firm or any other person. If there is some compelling reason for this distinction, perhaps the FSA should spell this out.

Third, I believe that in principle the FSA should be able to receive a complaint from a consumer or a firm or other person by telephone, but they should also have a broad right to ask for that complaint to be confirmed in writing. However, I do not agree with paragraph 1.5.-1G(2) that the FSA will not normally investigate a complaint **until the complainant has clarified the complaint in writing and the FSA has reached agreement with the complainant as to what the complaint is about.** I believe that this will often require lengthy correspondence between the FSA and the complainant, and will certainly give rise to arguments. I therefore consider that it would be more appropriate, if agreement cannot be reached with the complainant after a reasonable period of correspondence, for the FSA to proceed to investigate the complaint as it understands it, rather than try to reach a formal joint agreement as to the nature of the complaint.

In respect of paragraph 1.5.-1G(3), the suggested amendment that the FSA will not normally investigate a complaint **until the complainant has put any factual information that supports his complaint in writing** also concerns me. In some cases, the complainant might not have any factual information or may have inadequate information at the time the complaint is made. In these cases, and subject to the right to ask for confirmation where matters are unclear or complex, the FSA should investigate the complaint rather than refusing to investigate.

I understand that "durable medium" is to be defined in the FSA Handbook.

COAF 1.5.1AG

The reference to 1.5.1CG(4) in this paragraph would appear to be incorrect. Is it the FSA's intention to refer to paragraph 1.5.1CG(2)?

It is also not clear to me from the drafting of this paragraph how the FSA will decide what constitutes a "fast track" case and how it will determine whether those cases are within jurisdiction or not. It seems to be the case that the FSA will immediately try to investigate such cases but will reserve its position as to whether or not they fall within jurisdiction. Perhaps this should be made clear in COAF so that it is apparent that the Commissioner is still free to exclude the complaint if it proceeds to a Stage 2 investigation. In addition, I am not sure that it is appropriate to treat cases where the complaint is not sufficiently detailed under 1.5.1G in the same way as those complaints which are clearly outside the scope of the Scheme.

COAF 1.5.1BG

I should like to know how the FSA proposes to determine what constitutes a "low impact" complaint and I would welcome the opportunity to be involved in the process of drafting of any guidelines in this regard.

I also believe that, in the interests of effectively managing these complaints, it is probably appropriate for the FSA to determine in the first instance whether a complainant under the "fast track" can be adequately resolved in the timeframe. However, I note that if the complainant is not happy with the way the FSA purports to remedy the complaint, there are provisions in 1.5.1CG which enable the complainant to ask the FSA to refer the matter to Company Secretariat.

It is my understanding that the "fast track" procedure has been proposed in order to deal with complaints that can be resolved very quickly at a local level within the FSA. As these paragraphs are currently drafted, the only requirement in classifying whether or not a complaint is "fast track" is for the FSA subjectively to consider that it might be dealt with within five business days of receipt in a way that the FSA believes remedies any adverse effect on the complainant. However, paragraph 1.5.1DG states that in fact the complaint subsequently only need be dealt with "promptly". I think it appropriate to expect the FSA to apply the five business day standard in dealing with complaints rather than the promise to deal with complaints "promptly" because the latter is open to interpretation and might mean that "fast track" complaints actually take weeks to be resolved. If a complaint cannot be dealt with within five business days, then the FSA should commit to informing the complainant that it is escalating the complaint to the Company Secretariat, rather than leaving the matter open-ended.

In addition, in the interests of clarity, paragraph 1.5.1CG should be amended to state that "the FSA will advise **in every case** the complainant of his right to refer his complaint to the FSA's Company Secretariat". It is vital that this right is made clear to every complainant who is dealt with under the new "fast track".

COAF 1.5.1DG

I refer to my comments above regarding the speed with which complaints must be dealt with. I do not consider the word "promptly" to be appropriate in light of the requirement in paragraph 1.5.1BG that the FSA has considered it possible that the complaint can be resolved within five business days of receipt.

COAF 1.5.2G

I would like to note that the issue of the choice of investigator has been the subject of discussion between the FSA and the Commissioner in relation to recommendations in Stage 2 reports. It would be helpful if the FSA could reflect these decisions in the drafting of this provision.

COAF 1.5.3G

As noted above, I support the change from the eight week standard to a commitment by the FSA to write to the complainant within four weeks, setting out a reasonable timescale within which it plans to deal with the complaint if it is not possible to deal with it within four weeks.

COAF 1.5.7G

It is my understanding from paragraph 2.10 of the CP that the FSA also intend to inform the Commissioner of complaints which have been excluded from the Scheme (as well as those that it has decided not to investigate under COAF 1.5.1AG). This intention needs to be carried into the amendments to COAF.

COAF 1.5.8G(2)

In my view this addition is unnecessary. If the complainant makes a further complaint which is related to the matter which is already the subject of a Stage 2 investigation by the Commissioner, then it is usually most efficient and cost effective to include the new matter in the existing investigation. Where the new complaint is unrelated to the matter which is the subject of a Stage 2 investigation, it is appropriate for the FSA to be given the opportunity to investigate first. The practice to date has been for the FSA and Commissioner to discuss these situations as they arise and agree the best approach. I favour continuing this practice. It would be inappropriate to refer a new complaint related to matters already being investigated by the Commissioner back to the FSA, because the complainant, by requesting an investigation by the Commissioner, has already indicated their dissatisfaction with the FSA's investigation, and any investigation carried out by the FSA would almost inevitably have to be duplicated by the Commissioner.

COAF 1.5.10G

In respect of external resources that might be required from the investigation, I am happy to commit to a requirement that I should take into account the need to ensure that complaints are dealt with fairly, quickly and cost effectively.

COAF 1.5.18G

I am not entirely sure why the FSA has decided to amend this paragraph regarding my powers to recommend the FSA remedy the matters complained. FSMA Schedule 1, paragraph 8(5) states that the Complaints Scheme must confer on the investigator (i.e. the Commissioner), the power to recommend that the FSA: (a) makes a compensatory payment to the complainant, (b) remedies the matters complained of, or takes both of those steps. This is reflected in the current wording in 1.5.18G and I do not see the need to change it.

COAF 1.6.2G(2)

For the reasons set out above, I do not think the addition to the reports section of COAF is necessary or appropriate. I am wholly committed to the principles of accountability and transparency. These are matters which I already deal with in my Annual Report.

Rosemary Radcliffe
May 2004