

Finalised guidance

Guidance for designated Consumer Bodies on making a Super-Complaint under s234C

June 2013

Purpose

- 1.1 The Financial Services and Markets Act 2000 (FSMA) provides that certain consumer bodies may complain to the Financial Conduct Authority (FCA) about a feature or a combination of features of a market for financial services in the UK that are or may be significantly damaging the interests of consumers. This process is intended to provide consumer bodies with a mechanism to raise issues with us about features of the market that may be affecting consumer interests. We must respond within 90 calendar days. This process has been modelled on the 'super-complaint' mechanism applicable to the Office of Fair Trading (OFT) provided for in s.11 of the Enterprise Act 2002. Section 234G requires us to issue guidance about the presentation of a reasoned case for a complaint under s.234C.
- 1.2 This guidance aims to help designated consumer bodies make comprehensive and robust complaints so that the FCA can respond in a manner that addresses a complainant's concerns most appropriately.

Who can bring a super-complaint?

- 1.3 The Treasury decides which consumer bodies should be able to make super-complaints. The Treasury can make any organisation a designated consumer body provided it represents the interests of consumers of any description, including representatives of small and medium-sized enterprises (excluding consumers who are authorised financial

services firms). The Treasury has published criteria to be applied by them in determining whether to make or revoke a designation. It is expected that those designated bodies will be informed bodies that are in a strong position to represent the interests of consumers, and are able to provide clear reasoning and evidence in support of any complaint they make.

- 1.4 Consumer bodies that want to apply for designated status should contact the Treasury for further information or can find information at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200454/guidance_for_super_complainants_120313.pdf

Matters to be addressed in a super-complaint

- 1.5 When making a complaint, the super-complainant should write to us setting out the reasons why, in its view, a UK market for goods or services has a feature or a combination of features that is or appears to be significantly harming the interests of consumers and should therefore be investigated. The super-complaint should be clearly identified as such.
- 1.6 The complaint should be supported, wherever possible, by documented facts and evidence. The objective of presenting the case is to help us fully assess whether any feature or combination of features of a UK market is or appears to be significantly damaging consumer interests and what action, if any, is required.
- 1.7 Complainants are encouraged to discuss their complaints with the FCA before submitting a formal super-complaint. This will allow the FCA to highlight any gaps in the information. If we have information that may be relevant to the complaint, an early discussion may also help us do some preliminary investigative work before formally receiving the complaint and will enable complainants to better understand the information the FCA requires for its consideration. Where relevant, a designated consumer body who is also designated to make super-complaints to the OFT may want to discuss their complaint with the OFT before deciding where best to submit their complaint.
- 1.8 Complaints should be submitted electronically to FCASuper-Complaints@fca.org.uk or in hard copy to:

Redress Policy
Policy, Risk and Research Division
The Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS
- 1.9 A super complaint received by the FCA will be promptly acknowledged.

Features of the UK market

- 1.10 The designated consumer body will need to highlight the features of the relevant market for financial services that may be significantly damaging the interests of consumers. FSMA¹ provides that a feature of a market in the UK for goods or services is to be read as a reference to:
- the structure of the market concerned or any aspect of that structure;
 - any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
 - any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
- 1.11 This may cover, for instance, complaints about issues arising from the characteristics of a certain financial product or service, or from the conduct of any authorised or exempt person, any recognised investment exchange, or any person or activity covered by s.19 of FSMA, whether or not that person is acting in contravention of the general prohibition. It may also cover issues arising from consumer behavioural weaknesses.
- 1.12 While we may consider complaints about any feature of a market for financial services, the FCA may have limited authority to take action in certain circumstances. This may especially be the case where another regulator may be better placed to address the concerns raised.
- 1.13 For the purposes of making a complaint, a market must be in the UK and includes:
- any market which operates in the UK (or part of the UK) and in another country or territory (or in a part thereof); and
 - any market that operates only in a part of the UK.
- 1.14 We expect that a cross-border issue that may affect consumers in the UK or that involves UK firms is likely to satisfy this requirement. We will not consider an issue that solely affects consumers, firms or markets in overseas jurisdictions.

The interests of consumers

- 1.15 The complainant should set out why it considers that a feature of the relevant market for financial products or services is, or may be, significantly damaging the interests of consumers, including, where applicable:
- the features of the relevant market, including any details about market practice, product features and/or pricing in relation to the relevant product or service;

¹ Section 140A, Financial Services and Markets Act 2000 (as amended by the Financial Services Bill 2012).

- details of the conduct of the relevant authorised persons (or their customers) identified as significantly damaging the interests of consumers;
- details of any relevant FCA principles, rules and guidance or other relevant legislation (for instance, EU rules), guidance, or policies that the relevant authorised person may be failing to comply with or that may otherwise be relevant to protecting the interests of consumers;
- whether any particular class or classes of consumers may be particularly vulnerable to harm;
- how the relevant feature of the market is or may be causing damage to the interests of the relevant class of consumer, including the impact and extent of the damage or potential damage and an explanation of how this has been assessed or estimated; and
- an indication of what outcome(s) the complainant is seeking to address the damage to consumers that has been identified.

1.16 It is not necessary for a super-complaint to demonstrate that the interests of consumers have actually been damaged. Where a complaint does not demonstrate that consumers are actually suffering harm, complainants should provide us with clear information about why they think consumer interests are at risk of being damaged.

1.17 A consumer is any person who has used, may use, or otherwise has relevant rights or interests arising from the use of any financial product or service regulated by the FCA. It includes, for example, any person who has acquired, may acquire, or holds relevant rights or interests in relation to investments.

1.18 While this may include consumers who do not reside in the UK, it should be noted that there may be a more limited range of actions that the FCA can take for complaints about damage to the interests of those consumers.

1.19 We expect that, in most cases, the consumers will be retail customers (being persons acting for purposes outside their trade, business or profession). We note, however, that consumers' interests may be damaged indirectly, such as where they are beneficiaries of funds or pension schemes that have been negatively affected by the feature of the market that is the subject matter of the complaint. So we will consider any complaint that clearly identifies the potential impact on consumers.

1.20 Super-complaints must relate to the interests of consumers generally or to those of a specific class or classes of consumer. Complaints about damage to the interests of individual consumers will continue to be handled by the Financial Ombudsman Service (Ombudsman Service).

Evidence

- 1.21 All matters raised in the complaint should be supported by documented facts and evidence where possible. While we do not expect complainants to provide the level of evidence necessary for us to take regulatory action, the information provided by the complainant should be sufficient to enable us to determine whether we need to carry out further investigation.
- 1.22 Where relevant and feasible, the complainant should try to provide us with evidence about:
- details of the market (including details about the nature of the financial product or service concerned) to which the complaint relates, and whether there are particular aspects of the product or service causing potential problems for consumers;
 - whether the complaint relates to the market as a whole or only to certain firms or parts of the market;
 - sales or distribution practices that could be harming consumers, for instance high-pressure selling or inappropriate targeting of consumers;
 - any available indicators showing how well-informed consumers are, relative to firms, about the costs, risks and benefits of financial products and services offered by different suppliers;
 - whether complex aspects of the financial product or service, the way in which it is distributed, or difficulties in properly assessing cost, risks and benefits, present particular problems for consumers;
 - any costs incurred or practical difficulties experienced by consumers as a direct result of switching to alternative suppliers or of seeking to exit or terminate a financial product or service;
 - the general level of profitability of firms in the relevant sector for the financial product or service and/or the price and pricing structures of the relevant financial product or service, including the existence and level of secondary charges, if any;
 - practices by firms in the relevant sector that may be restricting or distorting competition;
 - whether the relevant financial product or service is only supplied together with other product or services rather than separately;
 - whether claims relating to the financial product or service, or elements of the financial product or service, are covered by the Ombudsman Service and the FSCS;
 - the general quality of the financial product or services in the relevant sector;
 - details of any industry codes of practice or guidance that apply to the good or service;
 - the way in which firms are dealing with complaints about the relevant financial product or service and whether consumers are receiving fair and appropriate levels of redress;

- whether consumers or specific groups of vulnerable consumers are facing barriers to accessing relevant products or services;
- the steps the super-complainant has already taken or attempted to take in relation to the issue; and
- any other matter that may be relevant to assessing whether a feature or combination of features of the relevant market is or may be significantly damaging the interests of consumers.

1.23 Given the possible breadth of complaints that may be made, it is not possible to provide exhaustive guidance on the type of information and evidence that will be required. For example, a complaint about breaches of applicable regulatory requirements will require significantly different information compared to a complaint about a gap in the regulatory framework. Complainants should consider the type of complaint being made and ensure that they have made a reasoned case for the FCA to consider. Ultimately, it will be for the FCA to consider what action is most appropriate when responding to a complaint. However, a complete and thorough complaint will ensure that we are best placed to assess the matters raised and respond appropriately.

1.24 Complainants that do not provide sufficient information to us to determine whether further investigation or action is warranted will be dismissed as unfounded. Similarly, complaints that are, or appear to be, frivolous or made in bad faith, will be rejected. For example, a complaint that does not raise any new point or provide any new information about a matter that we have already published a view on, or that we have already responded to as part of a previous complaint, may be rejected on the grounds that it is unnecessary.

How will super-complaints be handled?

1.25 We will examine the contents of the super-complaint in more detail to determine if it meets the criteria set out in FSMA, that is:

- the complainant is a designated consumer body;
- the complaint is about a feature or the combination features of a financial market in the UK; and
- there is a reasoned case showing that the feature or combination of features complained of is or appears to be significantly damaging the interests of consumers.

1.26 All the criteria must be satisfied for the complaint to receive super-complaint status.

1.27 If the complaint satisfies the criteria under FSMA, we will assess the quality of information and evidence supplied. We will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. Where we find that a reasoned case for complaint has not been made or that it requires clarification, we will contact the designated body as soon as possible requesting further information or clarification. Where a request for clarification or further information is made, the super-complainant will be given a set time period within which to respond. If it

fails to do so, we may consider making a formal response that no action will be taken regarding the complaint. We may choose to meet with the designated body making the complaint to raise any immediate questions about the evidence submitted and to offer a broad indication of its lines of enquiry.

1.28 We may then carry out wider enquiries, with a view to testing the evidence provided and obtaining any further information we consider necessary to form a reasoned view on whether the complaint justifies further action. Exactly how we do this will be determined on a case-by-case basis, but may involve:

- internal research;
- public requests for information;
- carrying out a review of the relevant regulated firm(s);
- approaching relevant businesses or trade associations for information;
- publishing information the we already hold;
- approaching consumer organisations, trading standards departments, government departments and/or other public bodies for information;
- initiating thematic work or some other form of market study or research;
- consultation with the Ombudsman Service, the FCA, the Prudential Regulation Authority, the Financial Services Consumer Panel or any other relevant body; or
- any other action we deem necessary.

1.29 We will keep the complainant informed of progress and complainants can contacted us to clarify issues or for further information as appropriate. Any discussions held with the complainant will be subject to the general restrictions on us relating to the disclosure of confidential information as outlined in s.348 FSMA.

What action will result from a super-complaint?

1.30 We are required under s. 234D to publish a response to the complaint within 90 days setting out how we propose to deal with the complaint, explaining in particular whether we have decided to take any action, if so, what action, and in any event, reasons for our decision. Any action we take will be subject to the usual procedures and controls that may be relevant to that action. For example, if we proposed to make changes to our rules as a response to a super-complaint, we will follow our general consultation process for making rules. The possible outcomes of a super-complaint include, but are not limited to:

- regulatory action by the FCA (including, but not limited to, taking enforcement action against a firm or firms or varying permissions granted under the FSMA);
- initiating a consumer redress scheme under s.404 FSMA;
- initiating a review of our relevant rules or guidance;

- referring the complaint to another regulatory agency that may be better able to address the complaint;
- initiating further assessment of the matters raised in the complaint;
- deciding that no action should be taken; or
- dismissing the complaint as unfounded, frivolous or unnecessary.

Publicity for super-complaints

- 1.31 It is for a complainant to decide whether or not to issue a press notice recording its super-complaint. However, complainants should consult with us to avoid jeopardising investigations that could be hampered by prior disclosure of the complaint. In such circumstances, the agreement of the complainant may be sought to keep the existence of the super-complaint confidential for a period.
- 1.32 It should be noted, however, that we are required to publish our response to the super-complaint. As a minimum, this publication will include a copy of the complaint and our reasons for our proposals on our website. If it is appropriate, a press notice may also accompany the response.
- 1.33 In some circumstances we may decide that it would also be appropriate to issue a press notice itself when we receive a super-complaint, for example if the announcement of the complaint was to be combined with a public request for information. This will be decided on a case-by-case basis. Complainants may be encouraged to create a public summary of their complaint, where not already in the public domain, to assist the submission of relevant information from interested parties.