

## **The complaint**

Mr L complains about the cash oil positions in his Contracts for Difference account held with CMC Markets UK plc. He says when the market went into negative pricing, they moved his holdings to a December contract without giving him notice and causing him significant losses.

## **What happened**

### *Mr L's' position*

Mr L held Crude Oil West Texas Cash positions in his Contracts for Difference (CFD) account with CMC Markets UK plc (CMC). In April 2020, for the first time in history, oil went into negative pricing causing a dislocation in the market. He says this revealed a flaw in the algorithm that CMC use for cash commodity spot pricing - it didn't allow them to record negative pricing. He says this was a localised issue for CMC who were not able to deal with a negative cash commodity spot product and led to the actions they took.

On 20 April 2020, they made the decision to roll over from the May to June contract and the following day decided to move from June to December contract. Mr L says other providers were able to deal with the negative pricing and continued to allow each contract to be priced individually whether negative or positive and so continued to trade as a cash commodity spot product. He says CMC's decision to move to a December contract meant it was no longer the same cash commodity spot product with oil prices that reflect the market and created a false market.

In addition, he says he wasn't given sufficient notice of the changes and was tied into this new contract with large holding costs. He says the change in contract date meant the product was no longer based on the front months futures contract and was fundamentally changed from the product that he had originally invested in. He contacted CMC on 23 April 2020 to complain about this and the holding costs. He says this caused him approximately a £7000 loss and a 220% increase in holding costs on the new contract.

He also complains about the lack of transparency around the new product with insufficient information available and that CMC restricted trading on the June contract preventing him from closing his trades. He says this impacted his trading strategy and preventing him from making a profit. He would like to be paid for his loss of profit.

### *CMC's position*

When Cash Oil prices went into negative pricing in April 2020, CMC say they had to act swiftly in order to protect the interests of the customers while the volatility continued. They say it is standard practice when the contract expiry is approaching to rebase its pricing to the most liquid near futures contract available in the underlying market at that time, which in this case was June 2020.

They say cash oil prices are affected by inferred holding rates which are impacted every time a change is made in the contract. These are inferred because they don't have a fixed continuous price (as is the case with other trades) and is calculated based on the difference in the mid-point of each contract – so for example where a contract is from 1<sup>st</sup> – 30<sup>th</sup> April, the mid-point would be 15<sup>th</sup> April. The holding rates would be calculated based on the price difference between 15<sup>th</sup> April (current cash price) and 15<sup>th</sup> May (the mid-point of the nearest most liquid available contract). Any difference in price is then offset as holding costs during that trading contract. The price is recalculated and built into the new contracts with 3% applied as daily holding costs.

CMC say that despite rebasing the price to June contract, the negative pricing meant the holding costs were very high so they had to rebase to a December contract in order to balance out the increase in holding cost. They say they had to do this because:-

- They needed to maintain stability in the cash price and safeguard against any continued fall, that could have led to another negative settlement price if rebased to the near month future contract. A further negative price meant they would not be able to offer the product for that future contract.
- They needed to reduce holding costs for their clients. These would have been around 780% if rebased to the near month future contract, June. The June contract was trading at US\$22.50 compared with US\$0.45 in May. Even though December pricing was US\$30.38, the expiry time being seven months later allowed for a period of convergence to create a discounted holding rate at 225%.

They say the terms of their User Agreement allows them to set their own prices, to make changes to those prices and without notice, so they were within their rights to do this. They also say they gave Mr L notice of these changes on 21 April 2020 at 17:06 and a further notice on 23 April 2020 with more detail.

They say the losses on Mr L's account were based on the trading decisions he made. They say they informed Mr L of the decision they took and asked him to review his positions and take any steps he felt appropriate. They feel it is not reasonable to assume that his future trades would have been profitable if they hadn't taken this action – which they feel was reasonable given the extreme circumstances of the market and was not intended to negatively affect clients.

### *Investigators view*

Our investigator looked at the complaint and initially said, CMC had acted in accordance with the terms of the User Agreement and didn't uphold the complaint. Mr L didn't agree and provided further information. Upon reconsideration, she upheld Mr L's complaint in part. She explained that CMC had the discretion to make changes to the contract and that he had agreed to these terms; but she didn't think their exercise of that discretion was done in a fair way. She said he was notified after the changes were made to the contract and wasn't given the opportunity to void any trades without penalty. She also agreed with Mr L that CMC had fundamentally changed the product which he had invested in. She concluded that:-

“CMC Markets should put Mr L back in the position he would’ve been had he not opened his positions in the Crude Oil West Texas cash product around the time the changes were made on 21 April 2020. This means CMC Markets should unwind the trades that were opened between 20 to 21 April 2020 and were still open when the switch to the December 2020 futures contract was made, i.e. trades that were rolled over to the December contract. This should also include a full refund of the associated holding costs, and other relevant charges (if any).  
I’m also recommending CMC Markets pay Mr L £250.00 for trouble, upset and distress he has suffered as a result of the way the changes were made.”

CMC didn’t agree with the investigator so this has come to me for a final decision.

### **What I’ve decided – and why**

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

Having done so, I agree with the investigator and for broadly the same reasons. I will explain further.

I have started my investigation by looking at whether CMC had the contractual right to make the changes they did. Clause 9.3 of the user Agreement confirms that CMC can set their own prices and make changes to those prices without giving any notice. So, it is clear they are within their rights to set their own prices for their products and make changes to the price and products they offer - their terms give them the discretion to make those changes.

Whilst it is not within my remit to tell a business what its terms and conditions should say or how it should operate, it is key to look at how CMC have exercised their discretion when making these changes. I would expect them to be fair and reasonable in exercising their discretion and so must consider whether in this instance their action was exercised in this way or not.

CMC have explained how their prices are derived from the mid-point of the current contract and the mid-point nearest liquid future contract with any difference in prices offset against holding costs and 3%. I would expect their prices to be similar as they would follow crude oil prices in the underlying market but that doesn’t necessarily mean they have to be the same because CMC set their own prices so some variation is expected.

I have to consider what consumers would reasonably expect to happen when rebasing the futures contracts and pricing. Rebasing to the nearest most liquid future contract would be standard practice. The positions Mr L held had a May expiry and so the nearest liquid future contract would be June and this is what would reasonably be expected and usually happens. In Mr L’s case, the positions were all moved from June to December contract which was unexpected. CMC themselves have accepted that this is the first time they’ve moved to a futures contract this many months ahead. I understand they say their reason for doing this was to stabilise the price to avoid a further negative price and to reduce the holding costs for consumers by relying on convergence over that period. However, the very act of making these changes meant the price was no longer derived the same way using the nearest liquid futures contract and fundamentally changed the product and was no longer the oil cash commodity spot product which Mr L had invested in.

So, this brings me onto thinking about whether Mr L should have been informed of these changes. As mentioned above, I accept that changes to the pricing of its products does not require CMC to notify its consumers. However, where the change is of such significance that

there is a fundamental change in the product, would it be fair to tie Mr L into a futures contract for a product he never invested in without informing him or giving him the option to cease the trades? CMC say they did inform Mr L of these changes in an email to him on 21<sup>st</sup> April 2020 at 17:06 but looking at the date and times, this notification was sent after his positions had already been transferred an hour and 43 minutes before. So, I think it was a reasonable expectation that CMC should have notified him of this change prior to making it. In the event where they were unable to give him prior notice, they should at least have given him the opportunity to cease any trades without penalty.

I've also considered what information Mr L was given in the notification and whether this was sufficient in allowing him to make an informed choice on what to do next. CMC offer a non-advisory execution only service so they weren't responsible for the trading decisions he takes but they must give him information that is clear and not misleading in order for him to make an informed decision. So, I looked at the contents of the communication to him and would ordinarily say that the level of detail is insufficient in informing the consumer what the real impact of such a change was. However, with someone of Mr L's calibre and trading history, I believe it was clear enough that he would understand the significance of these changes.

In his email to this service in March 2021 he accepts he worked out what the notice meant himself, the day after he received it.

*"In fact that e-mail contained a more relevant detail, that I missed on first read, and worked out for myself the day later from the WTI cash product signal itself, in that CMC changed the peg of the Texas product from the immediate closing contract of June to the December contract, while locking clients out of being able to trade the front end June contract. This was the change in algorithm - and it cost clients holding the WTI cash product a considerable sum of money."*

Given Mr L's experience, I feel he was in a position to understand the impact of these changes and make an informed decision to mitigate any further losses that would have been incurred on these positions. This leads me to conclude that any trades made after the notification to Mr L was his own trading decision so I don't think it would be fair to hold CMC responsible for any losses on these later trades.

In terms of trades that were opened between 20-21 April 2020 and moved to the December contract before notifying Mr L, I am satisfied that he opened these positions when he believed it was a oil cash commodity with a near month futures contract. Through no fault of his own, there was a fundamental change in the product which meant it was no longer the same product he invested in and so I think it would be unfair for him to bear any losses as a result of CMC's decision to make those significant changes to it.

It is difficult to say what he would have done had the positions stayed at the June contract and whether he would have continued with the positions or closed them. With the market conditions being as they were, I feel any speculation on this will largely be dictated by the benefit of hindsight. I'm also not persuaded that Mr L would have still invested in the oil positions had he been informed of these changes beforehand because it was a specific cash oil product that he was looking to invest in and the changes CMC made, meant it was no longer that product. So, I think it's only fair that CMC should have given him the opportunity to exit those trades. As I don't think he would have invested in these positions had he known about these changes, it follows that he wouldn't be paid for loss of profits on positions he wouldn't otherwise have invested in.

### **Putting things right**

CMC should put Mr L back in the position he would have been in had he not opened his positions in the Crude Oil West Texas cash product. They should unwind the trades that were opened between 20 to 21 April 2020 and were rolled over to the December contract before notice was given to him. This should also include a full refund of the associated holding costs, and any other relevant charges that were applied.

The way in which the changes were made to the oil positions and the uncertainty of it, in addition to the holding costs caused considerable distress and inconvenience to Mr L. CMC should also pay Mr L £250.00 for the distress and inconvenience he has suffered.

As explained, I will not be asking CMC to pay Mr L for loss of profits.

### **My final decision**

For the reasons given above, my decision is that I uphold this complaint against CMC Markets UK plc. They should unwind all trades that were opened between 20 to 21 April 2020 and were rolled over to the December contract.

In addition, they should pay him £250 for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 17 March 2022.

Naima Abdul-Rasool  
**Ombudsman**