

## The complaint

Mr G complains that Infinox Capital Limited (Infinox) incorrectly recategorised his Contracts for Difference (CFD) trading retail client account as an elective professional one. He complains that he didn't understand at the time what protections he was losing by having his account recategorised, and didn't fully understand what negative balance protection involved. As a result, Mr G complains that he now owes Infinox over £38,000 and would like that debt written off.

## What happened

In January 2019 Mr G opened a CFD trading account with Infinox. He was initially categorised as a retail client, but he emailed Infinox and explained that he was *'interested in a professional account'* and asked Infinox to 'list additional documents in accordance with ESMA procedure'.

As part of this assessment, Mr G provided evidence that he had carried out transactions, in significant size, on a relevant market at an average frequency of 10 per quarter over the previous 4 quarters.

He also provided evidence that he worked or had worked in the financial sector for at least one year. This position was a *'financial advisor'* for a company based abroad. He explained that he had experience in investments, and he traded forex himself.

As a result, Infinox thought that Mr G met the criteria to be categorised as an elective professional client. It wrote to him to explain the protections he'd be losing, including negative balance protection, and required him to sign and accept the new terms. Mr G did so on 30 January 2019 and his account was recategorized.

Mr G traded for over a year, until in March 2020 a number of his positions suffered a loss. As a result, Mr G ended up having a negative balance of over €38,000. Mr G complained to Infinox. **In short, he said he hadn't fully understood what negative balance protection was**, nor that he could end up owing so much money beyond what he'd deposited. Infinox didn't think it had done anything wrong, and confirmed he met the criteria to be categorised as an elective professional client. So, Mr G referred his complaint to this service.

One of our investigators looked into Mr G's complaint, but didn't think it should be upheld, so the case was passed to me to decide.

I issued a provisional decision in February 2022. In it I said:

*It's not in dispute that Mr G met the criteria requiring a certain amount of trading, and that he didn't have a portfolio worth over €500,000. So, the only way Mr G could be categorised as an elective professional client is if he worked (or had worked) 'in the financial sector for at least one year in a professional position, which requires knowledge of margin FX and CFD trading'.*

*The key question in this case is therefore whether Mr G met this criterion – if he did, then Infinox didn't do anything wrong and Mr G was correctly recategorized. Mr G has complained that he didn't fully understand what negative balance protection meant nor that this could involve him owing such a large amount to Infinox. But I'm not persuaded that it would be fair and reasonable to hold Infinox responsible for that. In my view, the warnings he was given as well as the explanations he was given when he applied to become an elective professional client were clear in explaining what protections he was giving up. It was for Mr G to ask any further questions, if he had any, and to be sure he understood what he was giving up in exchange for the higher leverage he evidently wanted.*

*But if Mr G did not meet this criterion, then this means he was incorrectly classified as an elective professional client. In turn, this meant that it was wrong for him to have been exposed to higher leverage and wrong for him to have not benefited from the protections retail consumers usually have, particularly negative balance protection.*

*Having considered the evidence Mr G provided to Infinox at the time, I'm not currently persuaded he demonstrated that his job required knowledge of margin FX and CFD trading. In fact, in my view, it's quite clear that his job did not involve this type of trading at all.*

*Infinox initially seemed to accept that it needed more information from Mr G before allowing him to proceed. Shortly after his request Infinox emailed Mr G and asked for additional statements to show that he met the criterion in relation to trading. And it also asked him to confirm details of his job – for example his job title, nature of the role and products he dealt with.*

*Mr G said that he worked as 'financial advisor, life planner' and he confirmed his role involved 'financial consultancy, sale of financial solutions'. He then said that for 'over 20 years he [had] been working on products of investment funds, shares, insurance, forex'. In a previous response he had provided his foreign financial services license, the website of the company he worked for and his professional profile on a networking site. He confirmed that he had 'high financial qualifications' and had invested his 'money on Forex, stock exchange, investment funds, real estate'.*

*Infinox reviewed the information Mr G provided and concluded that he met the criterion – and therefore recategorized his account and allowed him to trade as an elective professional client.*

*But I'm not persuaded Infinox did review this information properly. There's no doubt Mr G was an experienced financial services professional – and there was no doubt that Mr G had substantial personal experience in trading margin products and CFDs. But Infinox needed to satisfy itself that Mr G 'worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged'.*

*ESMA has explained that 'investment firms must ensure that the position was professional in nature and held in a field that allowed the client to acquire knowledge of transactions or services that have comparable features and a comparable level of complexity to the transactions or services envisaged'.*

*It said that this meant 'knowledge gathered in relation to simple products may not be relied upon where a private individual investor requests to be treated as a professional client in respect of more complex products (e.g. knowledge related to vanilla government bonds should not be relevant with respect to envisaged transactions in complex derivatives)'.*

*It wasn't enough that Mr G had worked in financial services for a long time. He was looking to trade CFDs – and COBS 3.5.3 required him to have had a job which involved margin or*

*CFD trading. I've seen insufficient evidence to persuade me his role at the time he applied for account involved this. And I've seen no evidence that Mr G had any other role in the past which involved CFD trading. Mr G's role was described, variously, as financial planner or financial advisor. He worked for an insurance company that sold life insurance products among other things – but I've seen insufficient evidence that this company had anything to do with margin trading or CFDs.*

*It's clear that Mr G mentioned a number of times that he had experience in CFDs – and in one of his replies it isn't clear whether he is suggesting that his job involved this or not. But it was for Infinox to be satisfied he met the criteria – and in my view, Infinox had enough evidence to show that Mr G did not meet the criteria, and this is what it should've told Mr G. Instead, rather than satisfying itself and clarifying any incomplete or contradictory information about Mr G's professional role, it simply offered him the opportunity to trade as an elective professional client. So, I'm currently minded to uphold Mr G's complaint.*

Mr G agreed with my provisional decision, but Infinox did not. It said:

*'The Ombudsman has interpreted this rule, stating 'COBS 3.5.3 required him to have had a job which involved margin or CFD trading.*

*However, our interpretation and understanding of this rule differs to that of the Ombudsman. Our understanding is that 'requires knowledge' does not automatically mean that the individual's job must directly be involved in margin or CFD trading. We interpret this to mean that in the individual's professional position and experience, they are required to have knowledge of margin or CFD trading and an understanding of how these products work. [Mr G] quite clearly stated that he worked as a financial advisor and life planner and that he had over 20 years experience of working with various financial products, including forex, which is traded on margin. Together with the trading statements he supplied which quite clearly showed he was trading on 1:100 leverage meaning he was already registered as a Professional Client with another firm.*

*We take our regulatory responsibilities very seriously and do not agree with the Ombudsman that we did not carry out our assessment of [Mr G's] Professional Client application properly. We made an informed decision based on all of the information before us. And we believe the decision to opt the client up to Professional was made in good faith, based on our interpretation of the rules and all the information available to us*

*Nevertheless, we had already concluded last year not to pursue [Mr G] for the negative balance and this has already been written off by Infinox. However, we are still inclined to contest the decision made by the Ombudsman based on the above comments."*

### **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.

I've carefully considered Infinox's comments – having done so, I've not been persuaded to change my provisional findings.

COBS 3.5.3 sets out quite clearly what type of professional role is required in order for a client to be able to rely on, it in order to become an elective professional client:

*(c) the client works or has worked in the financial sector for at least one year in a*

professional position, which requires knowledge of the transactions or services envisaged; (my emphasis)

And I already set out, in my provisional decision, that ESMA has made clear that a professional role that requires knowledge of ‘vanilla’ investments is not the same as a professional role that requires knowledge of complex derivatives.

In that regard, I’m not suggesting the role itself required Mr G to be a trader – there are many ways in which Mr G could’ve worked in a sector which gave him detailed knowledge of complex derivatives without being a trader himself. But the key question is whether the professional position itself required knowledge of the transactions or services envisaged – in Mr G’s case, that broadly meant trading CFDs.

As I said in my provisional decision, it’s clear that Mr G was an experienced trader himself – but his role did not require knowledge of CFDs and did not involve trading or advising on CFDs. I’m satisfied based on the evidence I’ve seen that Mr G’s role involved what ESMA termed ‘vanilla’ investments at best, and was not relevant to the complex derivatives Mr G was intending to trade without the protections usually afforded to retail clients. This means that Mr G did not meet the criteria to be recategorised as an elective professional client. I cannot comment on what other firms Mr G was trading with or how they decided to categorise him – I can only consider Mr G’s complaint against Infinox.

For these reasons, and those that I gave in my provisional decision, I’m satisfied that Mr G was incorrectly categorised as an elective professional client

### **Putting things right**

I’m therefore satisfied that what I suggested in my provisional decision for putting things right is fair and reasonable. I consider Infinox Capital Limited ought to erase the debt Mr G accrued as a result of trading while he was an elective professional client with it.

I note that Infinox has explained in its response to my provisional decision that it had already decided to do this.

### **My final decision**

My final decision is that I uphold Mr G’s complaint against Infinox Capital Limited.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr G to accept or reject my decision before 23 March 2022.

Alessandro Pulzone

**Ombudsman**