

## **The complaint**

Mr K complains about the cash oil positions in his Contracts for Difference account held with CMC Markets UK plc and their decision to rebase to a December futures contract. He also says they have kept the current price of oil artificially low when the market has increased its prices. He says he has suffered a loss as he invested in these positions at a higher price.

## **What happened**

### *Mr K's position*

Mr K 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 CMC's decision to move its futures contract from June to a December contract is unfair. He says the oil cash commodity spot product should be following the June or July contracts which are priced at \$17.24 and \$21.40.

Mr K says CMC have unfairly fixed the price of oil daily cash instrument artificially low at \$8, despite the rest of the market increasing prices by around \$10 to around \$17.24 and prices for December being at \$28.50. He says the new price should impact new customers who would be informed of the price at the time of purchase and shouldn't impact those customers with existing positions. He says CMC were happy to have made money in April 2020 when the price went down from \$20 to \$6.60 and they decided to roll over from the May to June contract and then to December. He says the cash product is now trading at \$17.24 and so to keep the price at \$8 is unethical and unfair, and it should be priced somewhere between \$17-\$21. The low price has meant he is at a loss having purchased his positions at a much higher price. He says he has lost around £450 and he wants his losses reimbursed.

### *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 their 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 it 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 say the losses on Mr K's account were based on the trading decisions he made. They say they informed Mr K 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.

#### *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. He explained that CMC had the discretion to make changes to the contract and that he had agreed to these terms; He also said the unpredictability in the market added to this situation. Mr K didn't agree and provided further information.

Our investigator reconsidered Mr K's complaint and agreed it should be upheld in part.

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

I issued a provisional decision on 29 March 2022 explaining why I was intending to uphold this. I include this below.

#### **What I've provisionally 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 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 that 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 K 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 K'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 further negative pricing 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 K had invested in.

So, this brings me onto thinking about whether Mr K 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 K 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 K of these changes in an email to him on 21<sup>st</sup> April 2020 at 17:06 but I think it was a reasonable expectation that CMC should have notified him prior to making any change. 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 K 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 makes 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 say that the level of detail is insufficient in informing the consumer what the real impact of such a change was.

I also understand that Mr K is an experienced trader who by his own admission says he doesn't need protecting by CMC. Although the email could've provided more information, based on his knowledge and 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 K 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 K, I am satisfied that he opened these positions when he believed it was an 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 K 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.

#### *What CMC needs to do*

CMC should put Mr K 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 and in the event this should apply, no further balance should be owed by Mr K. 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 added considerable distress and inconvenience to Mr K. I intend to ask CMC to pay Mr K £250 for the distress and inconvenience he has suffered. As explained, I don't intend to ask CMC to pay Mr K for loss of profits.

#### **My provisional decision**

For the reasons given above, I intend to uphold this complaint against CMC Markets UK plc. They should unwind all trades opened between 20 to 21 April 2020 and were rolled over to the December contract before notice was given to him and in the event this should apply, no further balance should be owed by Mr K.

They should include a full refund of the associated holding costs, and any other relevant charges that were applied and £250 for the distress and inconvenience caused.

#### **Responses to my provisional decision**

Both Mr K and CMC responded to say they accepted the provisional decision issued.

#### **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.

As both Mr K and CMC accept my provisional decision, there is nothing further for me to add. I see no reason to depart from my provisional findings and make the same findings here.

#### **My final decision**

For the reasons given above, my final decision is that I uphold this complaint against CMC Markets UK plc. They should unwind all trades opened between 20 to 21 April 2020 and were rolled over to the December contract before notice was given to him and in doing so, if a balance payable arises, CMC Markets UK plc should not stand to benefit.

They should include a full refund of the associated holding costs, and any other relevant charges that were applied and £250 for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 28 April 2022.

Naima Abdul-Rasool  
**Ombudsman**