DRN-3546822

## The complaint

Mr R complains about the Crude Oil West Texas Cash positions in his Contracts for Difference account held with CMC Markets UK plc. He says they rebased his holdings from the May 2020 to December 2020 contract for their own gain, causing him significant losses.

## What happened

*Mr R's' position*

Mr R 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.

On 20 April 2020, CMC made the decision to rebase from the May 2020 to June 2020 contract and the following day then rebased from the June 2020 to December 2020 contract. He says the changes made by CMC allowed them to benefit from excessive charges. It had significant impact on the pricing of the product and his holdings as he held several open cash oil positions. He says she suffered significant financial loss and that CMC has committed the crime of usury – a law about excessive interest charges.

*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 1st – 30th April, the mid-point would be 15th April. The holding rates would be calculated based on the price difference between 15th April (current cash price) and 15th 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, negative pricing in the market meant the holding costs were very high so they had to rebase to December 2020 contract. 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 R notice on 21 April 2020 that these changes would be effective from 23:00 that evening (Italian time), that he should review his positions and consider other WTI oil instruments with lower holding costs. A further notice on 24 April 2020 with more detail about what the changes would mean.

*Investigators view*

Our investigator looked at the complaint and upheld Mr R's complaint in part. He explained that CMC had the discretion to make changes to the contract and that he had agreed to these terms; but he didn't think their exercise of that discretion was done in a fair way. He said Mr R should have been notified of the changes to the contract before they were made particularly as the changes to the product fundamentally altered its basis to treat him fairly and reasonably. He concluded that CMC should refund all holding costs charged between 21st – 23rd April 2020, which he says were a total of €87.11 and pay Mr R €162.89 compensation for the distress caused to him.

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 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.

I have to consider what consumers would reasonably expect to happen when rebasing the futures contracts and pricing. CMC have explained how their prices are derived and I would expect their prices to be similar to 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. Rebasing to the nearest most liquid future contract would be standard practice. The positions Mr R 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 R's case, the positions were all moved from June to December contract which was unexpected and so had an unexpected impact on the pricing too. 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 R had invested in.

So, this brings me onto thinking about whether Mr R 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, I don't consider it fair to tie Mr R into a futures contract for a product he never invested in without informing him or giving him to option to cease the trades. CMC say they did inform Mr R of these changes in an email to him on 21st April 2020 but looking at the date and times, this notification was sent after the changes had already been implemented. 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 note Mr R complains about his communication issues with CMC after receiving the email on 21 April 2020. During this type of busy period, it would be reasonable to expect waiting times on phones would be longer than usual as would be the case for email communications. Nothing I've seen suggests he was prevented from contacting them or that he wouldn't have been able to speak to them if he had waited in the queue longer.

I've also considered what information Mr R 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 on 21st and 24th April 2020. It wasn't until the email of 24th April 2020 that it was clear what the changes would mean to Mr R and the actions he took with his open positions support that. This leads me to conclude that any trades made after the notification on 24th April 2020 were his own trading decision so I don't think it would be fair to hold CMC responsible for any losses on these later trades.

At the time the changes were implemented on 21st April 2020, Mr R had seventeen open positions in Crude Oil West Texas Cash. These were all opened between 6th March and 21st April 2020. He closed fourteen of these positions after the notice on 24th April 2020 incurring a range of losses. Three positions were kept open until 7 July 2020 and then closed with a profit. The fourteen positions he closed after the 24th April 2020 incurred losses not because of anything CMC have done but due to the changes in the market, so I won't be asking CMC to refund these losses to him.

I also don't think Mr R is entitled to a refund of the holding costs charged for the three positions that remained open from 24th April 2020. As I've explained above, it was clear he knew what the changes meant for his positions when he received the notification on 24th April 2020, so he himself made an informed decision to continue with these positions knowing what the holding costs would be for these.

The positions that were still open between 21st -23rd April 2020 and moved to the December 2020 contract, 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 shouldn't bear any losses as a result of CMC's decision to make those significant changes to it. I think it is only fair for CMC to have given him the option to close out these positions without incurring any penalty or higher holding costs.

I note Mr R's complaint about the holding costs being illegal due to usury law – to apply excessive interest of charges to a loan. These laws don't apply in England and it is outside of the remit of this service to comment on matters of Italian law. Should Mr R wish to pursue this element of his complaint he would need to seek independent legal advice outside of this service.

**Putting things right**

CMC should refund all the holding costs charged on Crude Oil West Texas Cash positions between 21st – 23rd April 2020 which amount to €87.11

The way in which the changes were made to the oil positions and the uncertainty of it, in additional to the holding costs added considerable distress and inconvenience to Mr R. CMC should also pay him €162.89 for the distress and inconvenience he has suffered.

**My final decision**

For the reasons given above, my decision is that I uphold this complaint against CMC Markets UK plc. They should refund all the holding costs charged on Crude Oil West Texas Cash positions between 21st – 23rd April 2020 which amount to €87.11.

In addition, they should pay him €162.89 for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 26 December 2022.

Naima Abdul-Rasool
**Ombudsman**