

The complaint

Mr N 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 made the decision to rebase his holdings to a December futures contract causing him significant losses. He also complains about the pricing of the instrument.

What happened

Mr N's' position

Mr N 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 contract and historically has always been the way it has been calculated. He says that by changing it to the December futures contract, CMC have fundamentally changed the product that he invested in.

Mr N says CMC's decision to rebase to the December contract meant that his holding costs increased from 23% per annum to 225% per annum. In addition, they have unfairly fixed the price of oil daily cash instrument low at \$8, despite the rest of the market increasing prices by around \$10 to around \$16.4 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 the cash product was trading at \$17.24 and so to keep the price at \$8 is unfair. The low price has meant he is at a loss having purchased his positions at a much higher price.

As a result of the change in approach by CMC and the reduced price at \$8, Mr N has seen his holdings drop in value, leaving him with losses amounting to around \$18500. He says these changes had nothing to do with the oil market and happened because CMC chose to change their approach for their own benefit because they gain from the interest rate in the holding charge and also on the spread.

He says he sold all his positions by 30 April 2020 after he didn't get a successful outcome from complaining to CMC. As a resolution he wants to be put back in the position he would have been in had CMC not rebased from June to December.

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, 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 N's account were based on the trading decisions he made. They say they informed him 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.

CMC also agreed to make a payment of £504.64 as a “gesture of goodwill” for errors in relation to an additional increase in holding costs on 21st and 22nd April 2020. It is noted that this is separate to the holding costs going up to 225% as a result of the rebase to the December contract. However, Mr N says this was actually a refund for being charged in excess of 500% holding costs in error and they refunded this money as correction of the error.

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 N didn't agree and provided further information.

Upon review, the investigator agreed that CMC should have provided their customers notice of the changes in advance but said it wasn't obliged to let the positions run for an indefinite period and would not be liable for any loss of profit these changes would bring about. He didn't agree that the trades should be unwound back to the June contract and didn't uphold the complaint.

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

I issued a provisional decision on 30 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 would like to reassure both parties that I have reviewed all the information provided by them and mean no discourtesy by not commenting on every point mentioned.

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 N 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 N'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, I agree with Mr N that 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. It was no longer the oil cash commodity spot product which he had invested in.

So, this brings me onto thinking about whether Mr N 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 N 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 N of these changes in an email to him on 21st 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. 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 N 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 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 N is an experienced trader who has been trading for several years. He didn't have prior knowledge of what was to come but from the information he has provided of the detailed communications with CMC and this service, it is clear that the notice given to him was sufficient for him to know what was happening. He was in a position to understand the impact of these changes and make an informed decision to mitigate any further losses that would be incurred. I take on board what Mr N says about his communications with CMC and that he was hoping for a positive outcome from them but essentially, he knew what was happening at this point and made the decision to continue with these trades. This leads me to conclude that any positions still open after the notification to Mr N 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 to 21 April 2020 and moved to the December contract before notifying Mr N, 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 N 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 N 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 added considerable distress and inconvenience to Mr N. I intend to ask CMC to pay him £250 for the distress and inconvenience he has suffered. As explained, I don't intend to ask CMC to pay Mr N 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. It will be for CMC Markets UK plc to decide how best to do this, but they must ensure Mr N is put in the position that the trade did

not happen. In doing so, if a balance payable arises, they should not stand to benefit.

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

Responses to my provisional decision

Mr N responded to my provisional decision interpreting my provisional decision to say CMC should unwind all loss making trades and refund all holding costs and associated charges. He made further comments on the wording of the provisional decision seeking clarification.

CMC responded to my decision asking for clarification of the redress in my provisional decision.

My addendum to the provisional decision

In response, on 14 June 2022, I wrote an addendum to my provisional decision amending my original provisional decision above.

“What CMC needs to do

Mr N would like CMC to put him back in the position as if the rebase from June to December 2020 hadn't happened. As I've explained above, CMC had contractual rights to make the changes they did so I am unable to agree the redress that he has claimed for. I had originally suggested unwinding his trades to put him back in the position as if he never had invested, but given that he has made more in profits than he has incurred in losses, I doubt the idea of awarding redress based on unwinding *all* his trades is likely to appeal to him.

I've already said that when the notification was given on 21st April 2020, Mr N became aware what the impact was of these changes. I commented that he wouldn't have invested in the product had he known what was going to happen because it was a specific oil spot cash product that he invested in. What obscures this claim a little is that he opened more positions on 23 April after knowing about the changes and kept these open until 30 April 2020. His decision to continue to invest in this futures product after the changes took effect demonstrates he adapted his trading approach. I don't think this has any real bearing on his earlier trading decisions which were based on the information he knew at that time so I'm not necessarily persuaded that there is a conflict here in his motivation for trading. It still seems unlikely that he would have invested in this product had he known at that time about these changes but that doesn't mean his future trading couldn't be changed. On balance, I am not persuaded by his claim to pay him as if the rebase was in June 2020.

I've not found that CMC was unreasonable in changing the pricing basis for the WTI Spot product, it was only unreasonable in the way it made those changes. So, I do not find grounds to award compensation for the loss of potential profit that Mr N has claimed. As explained above, CMC should have given Mr N the option to exit the trades without penalty and so I intend to ask CMC to give him a full refund of the holding costs they had charged him, and any other relevant charges that were applied, if they have not already done so.

The way in which the changes were made to the oil positions and the uncertainty of it, in addition to issues with the holding costs added considerable distress and inconvenience to Mr N. So, I intend to ask CMC to pay him £250 for the distress and inconvenience he has suffered.

As explained, I don't intend to ask CMC to pay Mr N for loss of profits.

My provisional decision

For the reasons give above, I intend to uphold this complaint against CMC Markets UK plc. As I understand it, they have already refunded Mr N the holding costs and relevant charges that were applied. In the event that this hasn't already been paid, they should pay this.

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

Responses to addendum to my provisional decision

Mr N responded in detail with further information including his April 2020 account statement. Whilst I haven't noted all of his comments below, I'd like to re-assure him that I have considered all the information he has provided. I have copied elements of this below to address these points specifically.

"The unwind of trades referred to in the Ombudsman's interim report I understood to mean the 22 trades held at the end of the day on which the scheme change was made; that being 21 April 2020. Unwinding these trades back to the purchase cost as if the trades didn't exist would mean a refund to my account of £29380.70. Add to that the related holding costs of £1345.76 increases the refund to £30726.46."

"I have never claimed compensation for loss of profit as has been stated in paragraph 5 of the Ombudsman response above. The CMC statement attached shows beyond any doubt that substantial WTO net losses were incurred. I have claimed that the change in holding charges from 23% pa to 225% pa without notice was a radical change and that undermined the substance of my understanding of the investment. Never at any time have I requested compensation for loss of profit; only recognition of the losses I incurred due the unfairness of CMC's shock implementation and radical scheme change without notice."

He also remains unhappy with my intention to award £250 distress and inconvenience payments.

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.

CMC accept my second provisional decision, but Mr N didn't agree. He's understood my provisional decision to say I intend to unwind his twenty two loss making positions so that he would be refunded his losses. This is not what the provisional decision or addendum says. It specifically refers to unwinding *all* his positions not just the loss making ones. Given the amount he's made in profits, I can see that this outcome would not be particularly appealing to him.

I appreciate his strength of feelings on this issue, but unwinding only loss making positions and allowing Mr N to retain the benefit from profit making positions puts him in advantageous position which I don't consider to be fair. So, I have been clear above in explaining that I am not upholding Mr N's complaint about his losses. Any losses incurred as a result of the pricing change hasn't been upheld.

The uphold I've agreed relates to the way CMC have fundamentally changed the Crude Oil West Texas Cash product without notice by moving it to the December futures contract. The losses which follow from this are the holding costs and associated charges – these I have agreed should be refunded. CMC should calculate the total amount and refund all costs and

charges up to and including 21 April 2020 when the notice of change was given and include the credit of £504.64 Mr N says has already been refunded.

Mr N also hasn't provided me any further information that would persuade me to make any changes to the award for distress and inconvenience. With the information I already have, I am also inclined to maintain £250.

Having reviewed all the evidence he's provided in response to my provisional decision and addendum, I don't think Mr N has given me any information that would persuade me to change my mind so I don't have anything further to add. As such, I see no reason to depart from my provisional findings and addendum and make the same findings here.

Putting things right

To put things right CMC should refund in full any holding costs charged up to and including 21 April 2020, and any other associated charges that were applied, after deduction of £504.64 credit for refund already paid.

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

My final decision

For the reasons given above, my final decision is that I uphold this complaint against CMC Markets UK plc. They should pay Mr N as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 22 July 2022.

Naima Abdul-Rasool
Ombudsman