DRN-3885056

The complaint

Mr O complains that Trading 212 UK Limited ("T212") allowed him to open a CFD trading account. In brief, he feels it should've had checks in place that would've highlighted that the account wasn't appropriate for him. He's explained that he has several conditions that impacted his ability to understand how the account worked and its risks.

What happened

Mr O opened his account in April 2020 and traded for a couple of weeks, during which he incurred losses of around £17,000. Soon after, he requested information from T212 about his account opening process, indicating he needed it because he intended to make a complaint. He contacted this service towards the end of 2020 and the matter was referred back to T212, which then issued Mr O with its final response on the matter.

T212 explained it wasn't upholding the complaint, primarily on the basis that Mr O had been provided with multiple general risk warnings and had also been taken through the required appropriateness assessment process, in accordance with the rules set out in the Financial Conduct Authority's (FCA) Conduct of Business Sourcebook ("COBS").

It explained that this assessment had determined that a lack of knowledge and experience of CFD trading meant the account was likely to be inappropriate for Mr O, so in accordance with the rules he'd been given an additional specific warning. Mr O had then actively 'clicked' to confirm his understanding and his desire to trade with real money. T212 stressed that it had not been aware of any conditions that might've impacted upon his ability to understand the information presented to him.

Our investigator then considered the matter and reached a different conclusion – she felt the complaint should be upheld.

She acknowledged that T212 had carried out the appropriateness assessment and had given Mr O an additional warning. But she went on to highlight the FCA's Principles for Businesses, particularly 2.1.1.6 A, which say that a firm must pay due regard to the interests of its customers and treat them fairly. She also noted the guidance in COBS at 10.3.3 (G), which says that where a customer wants to go ahead and use a product or service despite being given a warning, it was for the business to consider whether to do so having regard to the circumstances.

The investigator felt that a consideration of what T212 knew about Mr O's lack of knowledge and experience of CFD trading (along with what it knew about his wider circumstances – that he was unemployed and on a low income) should've led it to either not allow him to go ahead and trade CFDs, or, failing that, at least to seek further information from him before doing so. And she felt that if T212 had sought further information, it was likely Mr O's difficulties would've become apparent. In short, the investigator didn't think that the appropriateness assessment alone had provided T212 with sufficient information about Mr O's circumstances for it to have paid due regard to his interests in allowing him to trade.

The investigator noted T212's concerns that it would've potentially been acting illegally if it

had prevented him from trading simply on the grounds of his conditions. But she stressed that her view was more that if T212 had asked Mr O additional questions, it would likely have led to it gaining an understanding of how the overall challenges he faced might've impaired his judgement when applying for and running the account. And, in any event, these potential challenges weren't the only relevant issues – there was also Mr O's underlying lack of knowledge and experience, and apparent inability to withstand losses.

The investigator concluded that Mr O hadn't fully understood the account and risks and that in failing to take additional steps to understand more about his circumstances, T212 hadn't shown due regard for his interests. She recommended it reimburse the deposits Mr O had made to the account, minus any withdrawals.

T212 didn't accept the investigator's view. It said, in brief:

- It had given Mr O sufficient warnings and information and had treated him fairly – no differently to any other customer.
- Although the investigator had said that Mr O had difficulties with the written words, he'd been able to email T212 to request information in pursuit of his complaint. He'd also been able to open and close positions on the account.
- The investigator's view had placed a greater level of responsibility on T212 than COBS intended, as it was only required to carry out the assessment and issue the additional warning.
- If Mr O had wanted to discuss the account opening process before proceeding, he could've done so.
- Ultimately, he made his own conscious, informed decisions to trade.

The investigator wasn't persuaded to her change her view. She felt that no explanation had been given by T212 as to how the opening of the account had been in Mr O's interests, given what it knew of his circumstances at the point of the account opening. She said there was a difference between simply providing information and acting in the interests of a customer, and she reiterated that a conversation with Mr O was likely to have brought his difficulties to light.

T212 continued to disagree. It remained strongly of the view that the investigator's consideration of the matter absolved Mr O of any responsibility for his trading and losses. It questioned what more it could've done and stressed again that there was no requirement for it to have taken specific further action following the issuing of the additional warning to Mr O - although it had provided further information about risk. It noted that Mr O could've made contact if he'd been uncertain of any aspect of the service, or he could simply have decided himself not to proceed.

T212 said Mr O's application had been effectively declined, with the issuing of the appropriateness warning. But he had accepted it and actively chosen to continue. If it was concluded that T212 ought to have prevented him from trading, equal weight should be given to what Mr O ought to have done – for instance, to have informed T212 more about his circumstances or sought assistance.

The investigator's view remained unchanged, so the matter was referred to me to review.

I issued a provisional decision in which I explained that, having reviewed the matter afresh, I had reached the same conclusions as the investigator and for broadly the same reasons. I said, in part:

"It's agreed that T212 acted correctly up to the point of it issuing Mr O with an additional warning following its assessment of his (lack of) knowledge and experience of CFD trading.

As noted, there is a regulatory requirement in this respect – specifically at COBS 10.3.1R, which says that –

> "If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client."

I accept that once Mr O then confirmed that he wished to proceed there was no further requirement for T212 to question him, obtain additional information, or give any further warning to him. But I'm nevertheless conscious that COBS sets out guidance at 10.3.3G that says –

> "If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances."

By clicking on the "I confirm" button on the appropriateness warning, Mr O was effectively asking to go ahead with a transaction – to open the account and trade.

As I've said, there was no absolute requirement that T212 do anything in particular or heed this specific guidance. But it did, as a regulated business, have an overarching responsibility to consider the FCA's Principles for Businesses, set out in the FCA's handbook, which are "a general statement of the fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G).

Principles 2 and 6 are:

> "Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence."

> "Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

And there is also, at COBS 2.1.1R:

> "A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule)."

Having carried out the account application process and required assessment for Mr O, T212 was aware that, in addition to him lacking knowledge and experience of CFD trading, he was also unemployed and had very low (possibly even zero) income and savings. At this point I think that it ought reasonably, in line with Principle 6, to have had regard for Mr O's interests and either declined to open the account and let him trade or taken further steps to contact him to find out some more information about his background and circumstances.

T212 has said, as I've highlighted above, that it didn't have to take these extra steps. It has focussed on Mr O's personal responsibility for his actions and decisions and the fact that he was provided with numerous warnings about the risks involved. It has said that if he was unsure about anything, he could've sought help and guidance.

But T212 is a regulated business and must have regard for the responsibilities that come with that. Clearly it isn't the intention of the regulation to prevent all consumers who lack knowledge and experience of CFDs from trading, otherwise that's what COBS would say. But the very existence of the guidance at 10.3.3 is an acknowledgement that there will be occasions where consideration of the consumer's circumstances as a whole ought to result

in them not being allowed to go ahead and trade. And I think that is an entirely reasonable situation from the perspective of a business having to have regard for consumers' interests and treating them fairly.

Further, the matter of consumers failing an appropriateness assessment but still wishing to trade has been subject of wide-ranging regulatory scrutiny. In a "Dear CEO" letter to firms from the FCA in 2016 one issue of concern raised was that:

> "We saw that many firms had not established a process to assess whether clients who fail the appropriateness assessment (and who have received a risk warning letter), but who nonetheless wish to trade in CFDs should be allowed to proceed with CFD transactions."

This was followed by an FCA review published in June 2017 - 'CFD firms fail to meet our expectations on appropriateness assessments'. Under the heading 'Failure to evaluate whether failed applicants who fail the appropriateness assessment should be allowed to make CFD transactions' it said:

> "This finding relates to a failure to evaluate adequately whether applicants who fail the appropriateness test (and receive a risk warning) but who nonetheless wish to trade in CFDs, should be allowed to proceed with CFD transactions (COBS 10.3.3G).
>
> In most cases firms didn't give meaningful consideration to whether the applicant should still be permitted to proceed. This allowed prospective clients to override the appropriateness assessment and risk warning and proceed to trade without substantive deliberation."

I note also the European Securities and Markets Authority's ("ESMA") 'Questions and Answers' document from 2016, relating to the provision of CFDs and other speculative products to retail investors under MiFID (which the FCA review referenced). This said, in respect of how a business offering CFDs or other speculative products should consider other information that may be available relating to the client's situation, that NCAs (National Competent Authorities) –

> "…may reasonably expect the firm to not permit a prospective client to proceed if, for example, the firm is in possession of information that indicates potential vulnerability, e.g. due to the client's age and/or financial situation."

I recognise, as before, that none of this created an absolute requirement that T212 or any business must take specific extra steps when a consumer fails an appropriateness assessment (beyond issuing the additional warning). But I think what it does do is suggest the type of potential actions that are relevant to a consideration of whether T212 is likely to have met its regulatory obligations to have regard for Mr O's interest and to treat him fairly.

I've not seen that T212 gave any consideration to Mr O's circumstances (in particular his financial situation that indicated a potential vulnerability) once it had issued him with the additional warning. If it had done so, I think it would, and certainly should, have declined to offer him an account. Alternatively, it could've sought more information from him about his background and understanding. However, I think if it had engaged with him in this way, it's highly unlikely it would've concluded that it was appropriate to allow him to go ahead and trade CFDs.

I can't see that there was anything Mr O could have said or provided that would've outweighed what T212 already knew about him and his circumstances. In fact, I think it likely that the challenges he faced as a result of his conditions would've become apparent and

simply underscored further the fact that CFD trading wasn't appropriate for him. Either way, the end result would've been that Mr O wouldn't have proceeded to trade CFDs with T212 and wouldn't have incurred the losses.

I accept there's an inevitable element of subjectivity in all this. We're not dealing solely with hard and fast rules and a straightforward determination of whether they've been followed or not. But looking at the circumstances in the round, I find I'm satisfied Mr O's complaint should be upheld. In my view he clearly fell into a category of consumer whose best interests would've been served by T212 having regard for the wide-ranging regulatory guidance and going beyond the additional appropriateness warning to actively consider whether he should be allowed to trade. And I think in all likelihood such consideration would've led to him not being allowed to."

Mr O accepted my provisional decision. T212 provided some further comments, saying, in brief:

- It accepted the matter involved an element of subjectivity but felt I was applying a higher than reasonable level.
- If no subjectivity was applied, it would clearly have complied with all relevant rules. And subjectivity also provoked a number of 'what ifs?' that led to a loss of context.
- I'd commented several times that the rules had been followed and there'd been no finding that Principles 2 and 6 had been breached.
- I'd acknowledged that a lack of experience and knowledge shouldn't preclude someone from trading and although COBS 10.3.3 implied there would be circumstances where a consumer shouldn't be able to go ahead and trade, there were no specific thresholds.
- My comments regarding the Dear CEO letter were noted, but there was no definition of 'meaningful consideration' and it can't be reasonable for any consideration that is given to be adjudged as not meaningful simply because of subsequent losses.
- I'd further confirmed there was no absolute requirement for T212 to take extra steps.
- In any event, there *were* checks in place that initially highlighted that the account might not be appropriate for Mr O and he was warned of this.
- The only point against T212 was that, despite compliance with the rules, T212 hadn't gone far enough.
- It couldn't have considered Mr O's conditions as it wasn't made aware of them and it was subsequently confirmed that he could make decisions and had a support network.
- If Mr O didn't understand any aspect of the account or trading, he could've asked for help or chosen not to proceed.
- He'd placed many trades making losses without stopping and instead had chosen to continue.
- Given the extent of T212's acknowledged compliance and Mr O's willingness to accept the risk and proceed, T212 shouldn't be held responsible for his losses.

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 taken careful note of all that T212 has said in response to my provisional decision. But having done so, I remain of the view set out previously that the complaint should be upheld, and compensation paid to Mr O.

As I acknowledged in my provisional decision, and as T212 further highlighted, considering

the evidence and circumstances in this case unavoidably involves a degree of subjectivity. The matter doesn't begin and end solely with the application of a finite set of rules. There's clearly more to consider than that, as illustrated by the existence of the aforementioned COBS and other regulatory guidance. And such guidance is one of the things that the FCA's DISP rules, which govern how we determine complaints, say I will take account of when considering what is fair and reasonable in all the circumstances of a case.

There's no dispute that T212 applied the relevant COBS *rules* in assessing Mr O's knowledge and experience and in doing so, issued him with an additional warning. But I've not seen that it took account of any of the *guidance* and went beyond this in any way. It doesn't appear that any consideration was given to whether Mr O – unemployed, with no knowledge and experience of CFD trading and potentially zero, or at best minimal, income or savings – should be allowed to go ahead and trade having regard to these circumstances.

Given the wide-ranging regulatory guidance referred to in my provisional decision, issued prior to Mr O opening his account in 2020, I find I'm unable to conclude that T212 can be said to have met it obligations under Principle 6 and paid due regard to the interests of Mr O. I don't think it can be reasonably concluded that in simply issuing him with the same warning that would've been issued to any potential customer who gave the same answers to the knowledge and experience questions – regardless of what other information was known about them – it was treating him fairly.

Businesses are entitled to rely upon information provided by a potential customer and if Mr O had given misleading information that painted him as a financially secure individual then the situation would be different. But he clearly told T212 by way of the application process that he was unemployed and had minimal income/savings. And, despite possessing this information about his financial circumstances, I've not seen that T212 gave any consideration to whether he should be allowed to trade.

I note what T212 has said about Mr O's own responsibilities and the fact that he didn't tell it about his conditions – saying that he could've made contact with T212 to ask any questions he had, seek support or explain his conditions. But equally T212 could've contacted him and, given its regulatory obligations and what it knew about him, I think it should've done. I appreciate what it's said about – as an on-line, execution-only service – this not being a feature of its business model. But there was the other straightforward option available to it, to simply not open the account and not allow Mr O to go ahead.

Clearly if Mr O had not been able to go ahead and trade, he wouldn't have incurred his losses. And, as I said before, I think if he had been asked to provide further information I can't see there was anything he could've said or provided that would've been likely to support a decision to allow him to go ahead and trade in the circumstances.

So, either way, I think that if T212 had given regard to Mr O's interests and the wide-ranging guidance, in light of its over-arching regulatory responsibilities, he wouldn't have lost the money he did.

Putting things right

Trading 212 UK Limited must reimburse Mr O with the amounts paid to his CFD trading account, minus any withdrawals made. As noted, I understand this sum to be approximately £17,000.

I make no direction for interest to be added to this amount, as it appears Mr O was seeking to invest the money in some way, so I don't think it would be fair to also award any sort of guaranteed return.

My final decision

For the reasons given, my final decision is that I uphold the complaint and direct Trading 212 UK Limited to pay compensation to Mr O as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 14 February 2023.

James Harris
Ombudsman