DRN-4223153

The complaint

Mr A complains he was mis-sold an investment into a minibond held in an ISA wrapper by EGR WEALTH LIMITED (formerly EGR Brokers). He says he was led to believe the investment was secure but interest due hasn't been paid or his capital returned.

What happened

In December 2019, Mr A invested around £20,000 in a bond. He was due to receive interest at a rate of rate 8.1% per annum, with payments were due to be paid twice a year in June and December. He also took out an ISA wrapper at the same time that the investment was placed within. He was initially introduced to the opportunity by a third party and then referred on to EGR. He completed the required application paperwork provided by EGR – this included a suitability and appropriateness test. Mr A invested a further £20,000 in May 2020 into the same product, which was to be held in his ISA. Again, he completed an application process through EGR.

In January 2022, Mr A received notice from the bond issuer of continued delayed payments of interest. In May 2022, EGR sent Mr A an update from the bond issuer, which again apologised for the lack of communication regarding interest payments and explaining further issues with the performance of the investment.

Following this, Mr A contacted our service, and we forwarded his complaint to EGR to provide him with a response.

EGR issued a final response letter. It didn't uphold the complaint. In summary it said:

- The person who introduced Mr A to the investment wasn't an agent of EGR. The role of the introducer is to provide the clients with the EGR documentation with all its disclosures and warnings.
- EGR was always the execution only broker and platform provider for the transaction and did not advise Mr A. As such EGR never did any "selling". It only provided administrative services, and all of this was clearly stated on the documents signed by Mr A.
- Mr A filled in all of the relevant sections of the account opening documentation and signed acknowledgment of risk warnings. The allegation of being "mis sold" is patently contrasted by every document that EGR provided.
- EGR clearly and expressly stated that the investment was high risk and not protected by the FSCS. The allegation of being "safe or protected" is contrasted by every document it provided and Mr A signed.

Mr A didn't agree and asked this service to complete an independent review of his complaint. One of our investigators considered Mr A's complaint and concluded it should be upheld.

He said, in summary:

- Mr A didn't meet the criteria of a "restricted investor" and EGR didn't take the appropriate steps to ascertain he met the criteria as per the regulatory requirement.
- The assessment of the appropriateness of the bond for Mr A didn't gather sufficient

information to comply with the FCA's rules.
- Overall, EGR didn't comply with its regulatory obligations. Had it done so, Mr A wouldn't have decided to invest or EGR should have concluded that it shouldn't allow him to invest. For these reasons, both cumulatively and individually, it was fair to uphold the complaint and for EGR to put Mr A as close to the position he would probably now be in if he had not invested in the bond.

EGR didn't agree with the investigator's conclusions. In summary it said:
- EGR provided execution only services to Mr A where it did not make any personal recommendation for the purposes of COBS 9. Therefore, there was no requirement to assess him for his suitability for the bond. He was also provided with numerous warnings confirming this and that he did not benefit from any protections as a consequence.
- It satisfied the requirement to assess Mr A for his appropriateness for the product and had gathered sufficient information to do so through the application process.
- Based on the information received at the time Mr A appeared appropriate for the product and since then insufficient evidence has been produced to contradict this view.
- At no point between his initial investment and complaint, has Mr A attempted to request a disinvestment. To date it is unclear whether he has suffered any loss – and it is noted he has received a total of £5,463.69 in dividend payments, which EGR forwarded to his nominated bank account.

As no agreement could be reached, the complaint has been passed to me to reach 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.

What role did EGR play in the sale of the investment?

I've firstly considered EGR's involvement in the arrangements of Mr A's investment. It says it provided an execution only service and it didn't did not make a personal recommendation or assessment of suitability. I've considered the submissions EGR make on this point. I accept there isn't evidence of regulated advice being provided by EGR. This isn't an allegation made by Mr A either. So, I've looked at the evidence available to show what EGR's involvement was.

Mr A refers to a third-party introducer telling him about the investment opportunity. From the evidence available he was then referred on to EGR to complete the transaction. I've seen details of the application process and what EGR was involved in. There is evidence of an application form provided by EGR that consisted of two stages, designed to meet the rules restricting who the bond could be promoted to and on how to test whether the investments were appropriate for the potential investor. There are application forms for both tranches of the investment Mr A made – December 2019 and May 2020. Within these Mr A completed a certification and was categorised as a restricted investor. There was also an appropriateness test which asked questions about Mr A's knowledge and experience.

I've seen evidence of an onboarding document completed by EGR in December 2019. This confirmed it had collected the relevant due diligence from Mr A such as identification and investor categorisation. It also confirmed an appropriateness test had been completed.

There is also evidence of EGR notifying Mr A of receipt of funds and also included confirmation of issuing a contract note when the investments had been successfully placed.

It's clear that EGR played an active and significant role in the arrangements of Mr A's investments. I am satisfied Mr A's complaint relates to a regulated activity. The bonds were a security or contractually based investment specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). At the time Mr A made his investment, the RAO said regulated activities include arranging deals in investments. Acts such as obtaining and assisting in the completion of an application form and sending it off, with the client's payment, to the investment issuer would come within the scope of Article 25(1), when the arrangements have the direct effect of bringing about the transaction. So, I am satisfied the application process falls within the scope of Article 25(1). It involved making arrangements for Mr A to invest and had the direct effect of bringing about the transactions.

Did EGR meet its obligations to Mr A in the arrangement of the investments?

Mr A's complaint concerns what he considers to be a mis-sale of the investment. I'm satisfied that this includes EGR applying relevant tests regarding investor categorisation and appropriateness. Therefore, I will first set out the relevant considerations when looking at the application process EGR conducted before allowing Mr A to invest.

Relevant considerations

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint. In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

In my view the key consideration as to what is fair and reasonable in this case is whether EGR met its regulatory obligations when it carried out the acts the complaint is about. I consider the following regulatory obligations to be of particular relevance here.

The Principles for Businesses, which are set out in the FCA's Handbook "are a general statement of the fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G). I think Principles 6 (Customers' interests) and 7 (Communications with clients) are relevant here.

Principle 7 overlaps with COBS 4.2.1R (1) (A firm must ensure that a communication or a financial promotion is fair, clear and not misleading), which I also consider to be relevant here.

The bond Mr A applied for was a non-readily realisable and therefore there were rules restricting who this type of product could be promoted to and how to test whether the investment was appropriate for the potential investor.

These rules were set out in COBS 4.7 and COBS 10. I have set out below what I consider to be the relevant rules, in the form they existed at the time.

COBS 4.7 - Direct offer financial promotions

COBS 4.7.7R said:

"(1) Unless permitted by COBS 4.7.8 R, a firm must not communicate or approve a direct-offer financial promotion relating to a non-readily realisable security a P2P agreement or a

P2P portfolio to or for communication to a retail client without the conditions in (2) and (3) being satisfied.

(2) The first condition is that the retail client recipient of the direct-offer financial promotion is one of the following:
(a) certified as a 'high net worth investor' in accordance with COBS 4.7.9 R;
(b) certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;
(c) self-certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R; or
(d) certified as a 'restricted investor' in accordance with COBS 4.7.10 R.

(3) The second condition is that the firm itself or:
(a) the person who will arrange or deal in relation to the non-readily realisable security; or
(b) the person who will facilitate the retail client becoming a lender under a P2P agreement or a P2P portfolio, will comply with the rules on appropriateness (see COBS 10 and COBS 10A) or equivalent requirements for any application or order that the firm or person is aware, or ought reasonably to be aware, is in response to the direct offer financial promotion."

COBS 10 – Appropriateness

At the time COBS 10.1.2 R said:

"This chapter applies to a firm which arranges or deals in relation to a non-readily realisable security, derivative or a warrant with or for a retail client, other than in the course of MiFID or equivalent third country business, or facilitates a retail client becoming a lender under a P2P agreement and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion."

COBS 10.2.1R said:

"(1) When providing a service to which this chapter applies, a firm must ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client.
(2) When assessing appropriateness, a firm must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded."

COBS 10.2.2R said:

"The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:
(1) the types of service, transaction and designated investment with which the client is familiar;
(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
(3) the level of education, profession or relevant former profession of the client"

COBS 10.2.6G said:

"Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for him to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience."

COBS 10.3.1R said:

"(1) 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."

COBS 10.3.2R said:

"(1) If the client elects not to provide the information to enable the firm to assess appropriateness, or if he provides insufficient information regarding his knowledge and experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him."

COBS 10.3.3G said:

"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."

Having taken careful account of these relevant considerations, to decide what is fair and reasonable in the circumstances, and given careful consideration to all EGR has said, I'm satisfied the complaint should be upheld. I'll explain my findings below.

Certification

The first condition set out in COBS 4.7.7R required a retail client, such as Mr A, to be certified as being in one of four categories of investor in order to receive promotional communications relating to the bonds. In this case, Mr A was certified as a "restricted investor".

The detail of this category and the process by which an investor can certify themselves as belonging to it is set out in COBS 4.7.10R

4.7.10R requires the prospective investor to agree to all of the following:

- In the twelve months preceding the certification date, not to have invested more than 10% of their net assets in non-readily realisable securities.
- To undertake that in the twelve months following the certification date, they will not invest more than 10% of my net assets in non-readily realisable securities.
- To accept that the investments may expose them to a significant risk of losing all of the money invested.
- To be aware that it is open to them to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

During our investigation we have asked Mr A about his circumstances at the time. Mr A has explained that he had limited savings and the money invested in these bonds was effectively most of his savings – meaning more than the 10% requirement. Also, it is unclear that Mr A did have a full understanding of the risks based on his circumstances. I haven't seen anything that suggest to me that his experience and knowledge would have given him the required understanding of the risks he was taking by investing.

The December 2019 application form did ask Mr A questions about his knowledge and experience. This asked him several questions. These included whether he had been in a

position that requires financial knowledge relevant to the product, whether he currently held this type of investment or a similar one and whether he had made an investment in this type of instrument in the last 12 months. His answer to all of these questions was “No”. But he has answered “Yes” to say he had the experience and knowledge in order to understand the risks in relation the product offered. My observation is that this seems at odds to his previous answers.

Mr A also signed to say he qualified as a restricted investor. I note this declaration did largely mirror what is set out about in 4.7.10R, but it is unclear that this is an accurate declaration. In my view, I think it unlikely Mr A knowingly gave a false statement, rather I think it is more likely he did not consider the detail or relevance of what he was being asked to agree to. I also haven’t seen persuasive evidence to support he met any of the other categories either.

This means I haven’t seen evidence to show Mr A’s investment fell below the 10% threshold or that he had any significant knowledge or experience about investments. I also note EGR have questioned the evidence provided by Mr A about his circumstances, but it hasn’t given me strong reason to discount Mr A’s submissions. So, it follows that I have significant concerns about whether EGR certified Mr A correctly and therefore acted fairly and reasonably to meet its regulatory obligation. In this situation Mr A could not have gone passed this stage. But even if I’m wrong about this and Mr A would have met the certification requirements, I have other concerns that mean Mr A hasn’t been treated fairly - I will now consider the appropriateness test.

Appropriateness test

The second condition set out in COBS 4.7.7R required EGR to comply with the rules on appropriateness, set out in COBS 10 and quoted earlier in my findings. The rules at the time (COBS 10.2.1R) required EGR to ask Mr A to provide information regarding his knowledge and experience – and for this information to be relevant to the product offered (the first limb of the rule). The rules required that information to then be assessed, to determine whether Mr A did have the necessary experience and knowledge in order to understand the risks involved (the second limb of the rule).

As set out above, COBS 10.2.2 R required EGR, when considering what information to ask for, to consider the nature of the service provided and the type of product (including its complexity and risks). It needed to think about asking questions on:

- the types of service, transaction and designated investment with which the client is familiar;
- the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
- the level of education, profession or relevant former profession of the client.

Having reviewed the appropriateness test Mr A was directed to complete during the his initial application in December 2019, I’m not persuaded EGR, asked for an appropriate amount of information about Mr A’s knowledge and experience, as required by COBS 10.2.1R and COBS 10.2.2 R.

The questions asked were limited and the answer given by Mr A do not demonstrate the necessary experience and knowledge in order to understand the risks. Whilst I accept that, depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for him to understand the risks involved in a product or service (COBS 10.2.6G), I’m not persuaded Mr A had the sufficient knowledge here.

I note when he came to the make the top up a few months later more questions were asked. At this time Mr A confirmed he had made a similar investment in the past, but no detail is

given about what this is despite the follow up questions asking for this detail. He also answered he had one to four years' experience of this type of investment – a question he'd answered no to only months earlier during the initial application. It seems likely the experience here was in relation to the bond he had taken in December 2019 – which is subject to this complaint. I haven't seen any other evidence that he held investments of this type prior to this.

Taking all of the evidence into account, I'm not persuade EGR did adequately test whether Mr A had the knowledge to understand the risk associated with the bond – I think this is particularly relevant for the initial sale as this appears to be the first time he has invested in this type of complex investment. The evidence available all supports that his experience and level of knowledge was limited. The risks of the bonds were complex and multifactorial. It was not, for example, a question of whether Mr A simply understood money could be lost – but whether he was able to understand how likely that might be and what factors might lead to it happening.

As the first limb of COBS 10.2.1R was not met EGR was unable to carry out the assessment required under the second limb. EGR should have been confident, from the information it asked for, that it was able to assess if Mr A had the necessary experience and knowledge in order to understand the risks involved with investment in the bond. But it was not in a position to make such an assessment, based on the information it obtained. I accept that taking Mr A's appropriateness test answers in isolation would suggest he knew his capital would be at risk, But as mentioned, I've not seen that this would demonstrate an understanding of how likely it would be that he could lose his capital and/or what factors might lead to it happening.

Had EGR followed its obligations, I think the most likely conclusion it would have reached, was that Mr A did not have the necessary experience and knowledge to understand the risks involved with the bond. And for the avoidance of doubt, I don't think the fact Mr A had taken at the first bond gave him the experience required or means that a different conclusion should be met about the second sale. As previously mentioned, COBS 10.2.2 R required EGR to consider the "nature, volume, frequency of the client's transactions in designated investments" and I don't think one previous investment is sufficient for it to have determined Mr A had the required knowledge and experience – especially as this investment forms part of the same mis-selling complaint.

If EGR assessed that the bond was not appropriate, COBS 10.3.1R said a warning must be given and the guidance at COBS 10.3.3G said a business could consider whether, in the circumstances, to go ahead with the transaction if the client wished to proceed, despite the warning. I've explained my concerns about the testing of Mr A's knowledge and experience, and had it adequately tested this, EGR would have come to the conclusion that the bond wasn't appropriate for him in the first place (so the later top up would not be either).

A clear, emphatic statement would have left Mr A in no doubt the bond was not an appropriate investment for him. And he ought to have been privy to such a warning, had his appropriateness been tested in line with the requirements of the rules. Even if Mr A still said he wanted to proceed after being given a warning, I still think there is more EGR needed to do if it had asked for appropriate information about Mr A's knowledge and experience. In these circumstances, I think it would have been fair and reasonable for EGR to conclude it should not allow Mr A to proceed. Had Mr A been asked for appropriate information about his knowledge and experience this would have shown he may not have the capacity to fully understand the risk associated with the bonds. I've seen no evidence to show Mr A had anything other than a basic knowledge of investments. So, it would not have been fair and reasonable for EGR, to conclude it should proceed if Mr A wanted to, despite a warning (which, as noted, was not in any event given).

In summary, I'm satisfied EGR did not act fairly and reasonably when assessing appropriateness. By assessing appropriateness in the way it did, it was not treating Mr A fairly or acting in his best interests. If it had acted fairly and reasonably to meet the relevant regulatory obligations when assessing appropriateness, Mr A would not have got beyond this stage.

I have noted the comments EGR make about the risk warnings contained in the Information Memorandum (IM). As the second condition set out in COBS 4.7.7R could not be met and things could not have proceeded beyond this, this means Mr A shouldn't have received the IM at all. And so, any information within that cannot now reasonably be relied on to show he was aware of the risks associated with the bond. I acknowledge it is unclear at what point (if at all) Mr A receive the IM. But in any event, I've also not seen sufficient evidence to show Mr A had the capacity to fully understand the IM – a lengthy and complex document – given his limited knowledge and experience. As such, EGR can't fairly rely on any possible reading of this as a means to correct the failings set out above.

Is it fair to ask EGR to compensate Mr A?

EGR says during the application process Mr A was informed that capital is at risk, and full capital loss is possible and despite this evidence Mr A proceeded to invest in the bond regardless of what it did. However, I do not think it would be fair to say Mr A should not be compensated on this basis.

Firstly, Mr A should not have been able to proceed had EGR acted fairly and reasonably to meet its regulatory obligations. I acknowledge that other parties may have caused or contributed to Mr A's losses but, notwithstanding that, I'm satisfied it is fair to ask EGR to compensate Mr A as the appropriateness test was a critical stage, for which it was responsible for.

Secondly, for the reasons I have given, I am not in any event persuaded Mr A did proceed with a full understanding of the risks associated with the bond. I am not persuaded he looked at the full detail of the acknowledgements he gave, given what Mr A has said about his understanding of the bond and her lack of investment experience. I am not persuaded Mr A had the capacity to fully understand the risks associated with the bond – and he was in this position because EGR did not act fairly and reasonably to meet its regulatory obligations at the outset. I'm therefore satisfied it is fair to ask EGR to compensate Mr A for the losses he claims.

I note EGR has questioned whether Mr A has actually suffered a loss on his investment. Based on my understanding of the situation, it seems the investment is illiquid and the likelihood of any return of capital is remote. But I have covered this scenario in the section below setting out what EGR needs to do to put things right. I also note that EGR raise a point that Mr A has received dividends from the investment that were paid to his bank account. These payments should be considered as part of the loss calculation and, where appropriate, a deduction made from any loss identified. Again, I cover this in the section below setting out what EGR needs to do.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr A as close to the position he would probably now be in if he had not invested in the bond -- – both initially and the top up.

I take the view that Mr A would have invested differently. It is not possible to say *precisely*

what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr A's circumstances and objectives when he invested.

What must EGR do?

To compensate Mr A fairly, EGR must:

- Compare the performance of each of Mr A's investments with that of the benchmark shown below.
- A separate calculation should be carried out for each investment.
- EGR should also add any interest set out below to the compensation payable.
- Pay to Mr A £350 for upset caused by the total loss of the investment.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
December 2019 Access Bond	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)
May 2020 Access Bond	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

For each investment:

Actual value

This means the actual amount paid or payable from the investment at the end date.

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mr A agrees to EGR taking

ownership of the investment, if it wishes to. If it is not possible for EGR to take ownership, then it may request an undertaking from Mr A that he repays to EGR any amount he may receive from the investment in future.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, EGR should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

As noted, I understand dividend income has been paid out of the investments. This should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if EGR totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr A wanted to achieve a reasonable return without risking any of his capital.

- The average rate for the fixed rate bonds would be a fair measure given Mr A's circumstances and objectives. It does not mean that Mr A would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.

My final decision

I uphold the complaint. My decision is that EGR WEALTH LIMITED should pay the amount calculated as set out above.

EGR WEALTH LIMITED should provide details of its calculation to Mr A in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 7 December 2023.

Daniel Little
Ombudsman