

The complaint

Mr S complains that TF Global Markets (UK) Limited (trading as “ThinkMarkets”) incorrectly categorised him as an elective professional client (EPC) in respect of his Contracts for Difference (CFD) trading account.

What happened

Mr S opened an account with ThinkMarkets as a retail client in October 2017. He traded sporadically on it throughout the rest of the year and then similarly during the early months of 2018.

In July 2018 he applied to be treated as an EPC by ThinkMarkets and was recategorised effective as of 27 July 2018.

He then continued to trade, again sporadically but quite heavily during the last quarter of 2018 and in January and February 2020, tailing off and ending May 2020.

Mr S then complained to ThinkMarkets in September 2021 that he’d been incorrectly recategorised in July 2018. He said he hadn’t met any of the required regulatory criteria and felt that ThinkMarkets should therefore compensate him for the losses he’d incurred of just over £5,000.

ThinkMarkets felt it had handled the recategorisation correctly. It said it had relied upon the information provided to it by Mr S about his circumstances and his knowledge and experience of trading CFDs to assess his application and determine that he met the criteria. So, it didn’t uphold the complaint.

The matter was referred to this service where our investigator reached a different conclusion. He felt the complaint should be upheld.

The investigator said he was satisfied it had been appropriate for ThinkMarkets to provide Mr S with an account as a retail client at the outset. But he wasn’t persuaded it had acted correctly in then recategorising him.

The investigator noted that the rules at paragraph 3.5.3 of the Financial Conduct Authority’s (FCA) Conduct of Business Sourcebook (COBS) set out the requirements for recategorising a client as an EPC. And COBS 3.5.6 required businesses to take all reasonable steps to ensure the applicant satisfied the requirements. He also highlighted that guidance issued by the European Securities and Markets Authority (ESMA) said that businesses shouldn’t rely

on self-certification when assessing clients for recategorisation. And further, an applicant who hadn’t traded for at least a year couldn’t satisfy the criteria.

The investigator went on to say he’d seen no evidence that Mr S had met the EPC criteria. He said that if ThinkMarkets had undertaken an adequate assessment of Mr S at the time and gathered evidence to support his application it ought to have concluded that he didn’t meet the criteria and declined his application. This being so, the investigator recommended

that any additional losses Mr S had incurred because of the increased leverage and reduced protections he'd been subject to as an EPC be refunded to him, plus interest.

Mr S accepted the investigator's view. But ThinkMarkets maintained it had correctly recategorised Mr S based on the documentation he'd signed and affirmed, and an internal assessment carried out based on the customer profile that supported his original retail account application. It said that, in line with COBS 10.2.4 and its own terms, it was entitled to rely upon the information provided by Mr S.

The investigator wasn't persuaded to change his opinion, so the matter was referred to me to review.

I used a provisional decision in which I said, in part:

"The steps expected of a business when looking to reclassify a client as an EPC have for many years been clearly set out at COBS 3.5.3 R. Further, I'd note that at the point at which ThinkMarkets was considering Mr S's EPC application in 2018 there'd been additional clarification and guidance issued by both the FCA and, as the investigator highlighted, ESMA.

COBS 3.5.3 R says -

A firm may treat a client other than a local public authority or municipality as an elective professional client if it complies with (1) and (3) and, where applicable, (2):

(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");

(2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:

(a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;

(b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;

(c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;

(the "quantitative test"); and

(3) the following procedure is followed:

(a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

(b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

(c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

There's no dispute that the process in Mr S's case was broadly in line with (3), so I'll focus on paragraphs (1) and (2).

In brief, in considering whether (or not) to treat Mr S as an EPC it was a regulatory requirement that ThinkMarkets undertake an 'adequate assessment' of his expertise, experience and knowledge of CFD trading that gave it 'reasonable assurance' that he could make his own investment decisions and understood the risks involved. And part of that assessment had to involve it being satisfied he met at least two of the quantitative test criteria.

The ThinkMarkets 'Notice of Agreement' document that Mr S completed and signed in July 2018 asked him, in respect of the Qualitative Test, to confirm that he had provided *"information that has enabled us to undertake an assessment of your expertise, experience and knowledge that gives us a reasonable assurance, in light of the nature of the transactions or services envisaged, that you are capable of making your own investment decisions and understanding the risks involved."*

In respect of the Quantitative Test the form required him to tick boxes to confirm which of the three criteria he met. Under this section the form explained that *"You must tick at least 2 out of the 3 statements above to qualify as a professional client. You may be requested to provide supporting information for example your bank statement, trading account statements and proof of employment."* Mr S ticked to indicate he met (a) and (c), regarding his trading history and professional position respectively.

ThinkMarkets says that it carried out its subsequent assessment of Mr S based on his trading activity with it since 2017. But that had been over a period far less than a year. No further information was sought from Mr S at that point about any trading he might have done elsewhere. It seems that ThinkMarkets relied solely upon the information Mr S had provided in his original application where he'd said that he had "5+ years" forex and CFD experience and his volume of trades on an execution-only basis per month was "50+". No further detail was provided.

Regarding Mr S selecting the professional position criteria ThinkMarkets doesn't appear to have taken any steps at the time to seek clarity on this. Retrospectively it's pointed to a CV it has on record that shows that Mr S worked during 2010 – 2011 in 'Financial Difficulties Support' for a financial business. But there's no suggestion that required any knowledge of CFDs.

ThinkMarkets did seek further information in relation to Mr S's application later in 2018, months after his application was approved, as part of an internal compliance monitoring activity. No response was received, and a follow-up was sent in February 2019. Records of correspondence between Mr S and ThinkMarkets at this point show that ultimately Mr S acknowledged that he was unable to supply what was required and asked to be reverted to retail client status. However, it's not clear this was ever done.

COBS 3.5.6 R says -

Before deciding to accept a request for re-categorisation as an elective professional client a firm must take all reasonable steps to ensure that the client requesting to be treated as an elective professional client satisfies the qualitative test and, where applicable, the relevant quantitative test.

Having considered the way ThinkMarkets handled Mr S's request to be treated as an EPC, I find I'm unable to conclude that it did take 'all reasonable steps' to ensure he satisfied the tests.

I appreciate that what's 'reasonable' is somewhat subjective. But from Mr S's original application for a retail account in October 2017 ThinkMarkets knew only that he was 'Employed' (there was no other detail) with approximate annual income of between £15,001 and £30,000 and estimated net worth of £15,001 and £30,000. In respect of his trading experience, it knew only what's been noted above. In addition, in the retail application's Investment Knowledge section there was only a single field, 'Securities/Bonds Knowledge', for which Mr S had entered '0 years'.

Had ThinkMarkets obtained more detail at the outset about Mr S's circumstances, knowledge and experience I might have more sympathy with its argument that it was reasonable to rely only on the information he'd provided. But given the absence of detail it had, coupled with less than a year's verifiable trading activity I can't see that it was reasonable for ThinkMarkets approve Mr S's application without seeking any further information/documentation. As noted above, even its own application form indicated the likelihood it would do so as part of the application process.

ThinkMarkets has pointed to the rule at COBS 10.2.4 regarding reliance on information in support of how it handled the application. The rule states that "*A firm is entitled to rely on the information provided by a client unless it is aware that the information is manifestly out of date, inaccurate or incomplete*".

COBS 10.2 deals with assessing appropriateness, which is not what ThinkMarkets was doing when it was assessing whether Mr S should be treated as an EPC. As noted, it was COBS 3.5 that was relevant here. And in any event, there's a strong argument that the information it had regarding Mr S was clearly incomplete and therefore shouldn't have been relied upon.

Ultimately ThinkMarkets opted to recategorise Mr S based solely on his self-certification. I don't think in the circumstances that was reasonable. And it was also contrary to the ESMA guidance around client categorisation issued only a few months earlier saying that firms should avoid doing so.

No reasonable steps were taken to ensure he satisfied the EPC criteria. It would've been very straightforward for ThinkMarkets to take some, such as those which its own application form indicated it would likely do. And it's very clear from what happened later, when it carried out its compliance monitoring, that if it had taken some reasonable steps towards an adequate assessment of Mr S it would've found that he didn't meet the criteria. It follows therefore that he would never have traded with it as an EPC and would've instead continued as a retail client with all the protections that go with that status."

Mr S confirmed he had nothing further to add in response to my provisional decision, other than to confirm that ThinkMarkets hadn't reverted his status back to a retail client when asked.

ThinkMarkets disagreed with my decision, saying it felt it didn't accurately capture the sequence of events. It confirmed that all the required administrative elements of the recategorisation process had been followed and that Mr S had satisfied the criteria at COBS 3.5.3(2). This was through his trading activity with ThinkMarkets (along with his other trading experience declared when he opened the account). And further, through his professional experience gained at a prominent financial services organisation, in a role that involved him being trained to a high standard across various products and services, including high risk complex financial instruments.

ThinkMarkets also reiterated that Mr S willingly signed all relevant documentation, confirmed he met the criteria, and ultimately clearly wanted to be able to trade with higher leverage.

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 remain of the view that the complaint should be upheld. Nothing in ThinkMarkets' further submissions persuades me to depart from my provisional conclusion that it failed to carry out an adequate assessment Mr S's expertise, experience and knowledge of the service it was to provide to him.

Particularly in respect of the criteria at COBS 3.5.3(2) I've not seen how ThinkMarkets could've been reasonably assured that either of the two criterion on which it relied – Mr S's transaction history and his work experience – were met.

There doesn't appear to have been any information obtained at the time of the recategorisation request about his work experience. And in any event, as far as I've seen (and as noted in my provisional decision) the role on which ThinkMarkets relies was 'Financial Difficulties Support' for a business that was not focussed on the sort of products in question here. Certainly, when supporting documentation was eventually requested, many months later, it was the case that Mr S was unable to demonstrate how he met the criteria.

I note ThinkMarket's comments about Mr S' active engagement with the process, his confirmation (although unsupported) that he met the required criteria and his desire to trade with increased leveraged. But none of these things is a requirement of the regulation or, to my mind, an integral part of an adequate objective assessment of Mr S's expertise, knowledge and experience.

Putting things right

Mr S must be put in the position he'd have been in if he hadn't been re-categorised as an EPC in July 2018. I think on balance he would more likely than not still have placed the same trades if he'd remained as a retail client. So, it wouldn't be fair for me to direct ThinkMarkets to refund all his losses, as these were down to his trading choices not his client status.

But Mr S was able to trade with greater leverage. This means ThinkMarkets facilitated him potentially losing more money than he might otherwise have done, as he traded as an EPC without the greater protection afforded to retail clients. As such, I think it's likely his losses were greater as an EPC than as a retail client.

ThinkMarkets should therefore rework the trades Mr S placed after he was recategorised as an EPC as if he had instead remained categorised as a retail client for the period in question, using the relevant rules and margin requirements that were in place at the time. It should then compare the total Mr S would've lost as a retail client to what he lost as a professional client and pay him any difference.

I understand Mr S's account was closed on 11 May 2020. ThinkMarkets should therefore add 8% simple interest to the difference calculated above from that date until the date of settlement.

My final decision

For the reasons given, my final decision is that I uphold the complaint and direct TF Global Markets (UK) Limited to compensate Mr S as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 14 March 2024.

James Harris
Ombudsman