

The complaint

Mr P complains about the way Tickmill UK Ltd operated its trading platform. He complains that:

- He told Tickmill he wasn't working when he opened his account.
- He lost all his deposit within a few days, around €70,000.
- He wasn't provided with any specific risk information, including before a margin call when he was given no warning.
- At times the platform didn't work as it should, for example not accepting stop-loss entries or when its customer area was down 'for hours' and so he couldn't carry out any transactions.
- His accounts were blocked after his complaint and downgraded to retail status. Mr P said *"if I now have retail status then professional status should not have been permitted from the beginning"*.

As a result of his complaints, he has suffered ill health and inconvenience, as well as a significant financial loss.

What happened

In June 2022 Mr P applied to open a Contracts for Difference (CFD) trading account. He completed an appropriateness assessment where he declared:

- He was retired, with gross annual income of between £20,000 and £50,000.
- He was investing from savings and investments and was looking to invest between £60,000 and £100,000 in CFDs.
- His overall investment portfolio amounted to over £500,000.
- He had worked three years in a bank and was already trading with leverage of 1:200.
- He had previously traded derivatives between 5 to 19 times in the previous 12 months, with average trade size between 1 to 5 lots.
- He correctly answered the knowledge questions.

Tickmill concluded that Mr P had sufficient knowledge and experience to understand the risks of CFD trading and allowed him to open an account. Mr P then opted to ask for his client status to be categorised as elective professional. This required a separate assessment, which Tickmill carried out. As part of this assessment, Mr P demonstrated, via a statement, that he had a portfolio worth more than €500,000. He provided a trading

statement to demonstrate his trading frequency, but Tickmill did not accept this was sufficient. He then explained he had worked as a client advisor in a bank for three years.

As a result of this information, Tickmill agreed to categorise him as an elective professional client, and Mr P began trading. On 6 June 2022 he deposited €70,000 and by 19 June 2022 he had lost his entire deposit trading a variety of currency pairs and cryptocurrencies.

Mr P complained. He said that his losses had been caused by Tickmill's platform and provided screenshots of errors he had experienced on specific days. Tickmill looked into his concerns. It offered to compensate him almost £5,000 for a period of time when its customer area on its website had been inaccessible, but considered Mr P's other trading losses were down to his own trading decisions. As part of his complaint Mr P had declared some personal circumstances around his health, and Tickmill therefore suggested his account be "downgraded" to retail client status in order to afford him greater protection. Mr P remained unhappy and referred his complaint to this service.

One of our investigators looked into his complaint but didn't think it should be upheld. In short he considered Mr P's trading decisions caused him the financial loss, he was satisfied the account was properly opened and Mr P met the relevant criteria to be considered an elective professional client. Mr P didn't agree and asked for an ombudsman to decide the matter.

Before reviewing Mr P's case, I asked Tickmill to provide evidence of Mr P's initial application, including its appropriateness assessment, as well as its assessment of Mr P's elective professional client application.

I issued a provisional decision on 1 March 2024. In it I said:

"As part of Mr P's complaint, he has submitted some information which he says shows that attempts were made, after he raised his complaint, to scam him by impersonating the Financial Conduct Authority (FCA). He says the information the scammers knew about him showed that Tickmill had leaked his information in some way.

Whilst I've considered Mr P's evidence, I'm sorry to say that this isn't something I can comment on or make a finding about – and I note that Tickmill did not have an opportunity to address this in its final response. I make no further finding about these matters.

It isn't in dispute that Mr P had experience trading CFDs, and as a result, I will make no further comment about the initial assessment that Mr P had sufficient knowledge and experience to understand the risks involved. I'm satisfied it was fair and reasonable for Tickmill to conclude as it did.

I'm also satisfied by the explanations Tickmill has provided for the technical issues Mr P experienced. I've seen insufficient evidence that these technical issues caused Mr P any losses, and I'm satisfied that by and large, the markets Mr P was trading on operated as they should.

I focus instead on Tickmill's assessment that Mr P met the criteria to be considered an elective professional client.

In 2022, the FCA's Conduct of Business rules (COBS) which are set out in its Handbook are clear about the criteria that needed to be met for a firm to categorise a retail client account as an elective professional one.

COBS 3.5.3 says:

Elective professional clients

COBS 3.5.3: 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.*

The European Securities and Markets Authority (ESMA) produced questions and answers which gave further guidance about how to assess retail clients, and this approach has been endorsed by the FCA.

Of relevance to this case, it says that when firms are considering the third limb of the test (i.e. the professional role) firms should:

"ensure that the position was professional in nature and held in a field that allowed the client to acquire knowledge of transactions or services that have comparable features and a comparable level of complexity to the transactions or services envisaged. Consequently, knowledge gathered in relation to simple products may not be relied upon where a private individual investor requests to be treated as a professional client in respect of more complex products (e.g. knowledge related to vanilla government bonds should not be relevant with respect to envisaged transactions in complex derivatives)".

It isn't in dispute that Mr P had a portfolio of the relevant size, and that the evidence he had provided of his previous trading was not sufficient to meet the trading criterion. So the question is whether it was fair and reasonable for Tickmill to conclude that his declared occupation was enough to meet the third limb of the criteria set out in COBS.

In its response to this service, Tickmill itself has said that Mr P's evidence of his profession showed he was a "savings bank employee" for a period of time, and he declared on his form that he had been a "client advisor" but had accumulated relevant experience through

'several years of experience in trading'. Tickmill's scoring appears to suggest that it wasn't satisfied Mr P met the criteria – because it gave him 1 point for the average number of significant trades he declared (but could not prove), 1 point for having a portfolio of relevant size, but 0 points for his description of his profession – and 1 point for his answer 'yes' to the question of whether he had worked in the financial sector for at least one year in a professional position that required knowledge of leveraged products, even though the evidence he supplied did not demonstrate this. In total Mr P was given 3 points out of a total possible of 7.

The evidence I've seen does not show that Mr P had professional experience that was relevant or involved derivatives trading. As I've said above, there's no doubt that Mr P was an experienced trader – but that's not enough to satisfy the criteria set out above. In my view, it wasn't fair and reasonable for Tickmill to have concluded Mr P met the relevant criteria, because the evidence it had showed that Mr P had not traded in relevant size and frequency in the previous 12 months, and was not employed (either at the time or in the past) in a professional role that gave him the required knowledge of CFDs or leveraged products more generally. The fact that he worked or had worked in a bank as a client advisor or savings bank employee was not enough to give Tickmill the reasonable assurance it needed.

Taking all this into account, I'm therefore satisfied that it wasn't fair and reasonable for Tickmill to have categorised Mr P's account as an elective professional client – and as a result, I consider he was exposed to more risk than he would've been as a retail client.

Putting things right

In order to put things right for Mr P, my aim is to put him as close as possible to the position he would've been in had his account not been recategorized. In other words, had his account remained a retail client one. Apart from negative balance protection, which is one of the main protections, Mr P would also have been limited in the leverage available to him. And he would not have been able to trade CFDs on cryptocurrencies.

However, as I've said above, it's clear that Mr P was an experienced trader who clearly had a strategy and was intent on carrying out his trades. And I'm satisfied he likely would've traded in the same way, and with the same amount of money, had he been trading as a retail client.

I'm therefore intending to ask Tickmill to recalculate the trades Mr P placed as if he had placed them as a retail client. This means applying the leverage he would've had access to had he been a retail client. This includes the trades he made losses on, as well as the ones he made profits. This will give Tickmill an overall figure of the loss he would've made as a retail client. If that loss is smaller than the loss he made an elective professional client, it needs to pay that difference to him.

It needs to assume that his cryptocurrency trades would not have been placed – and therefore both profitable and loss-making trades need to be cancelled.

It's clear the matter has also caused Mr P considerable distress and inconvenience, and this has no doubt been exacerbated by the fact that he was placed in a position to lose so much of his capital in such a short period of time. I'm satisfied that a payment of £500 for this distress and inconvenience is fair and reasonable."

Mr P agreed with my provisional decision, but Tickmill did not. It said:

- Mr P applied “*without any solicitation to be reclassified as an Elective Professional*” and he declared meeting all three criteria.
- Mr P declared working as a Client Advisor in a Bank, with “*several years of experience in trading*”. It provided a highlighted screenshot of his application.
- I had misinterpreted its scoring mechanism that was part of Mr P’s application – this was only part of the application process.
- In May 2022 Mr P provided a copy of his BD Swiss Holding Plc Professional Client Agreement from July 2018 which showed he was a Professional client with this broker proving his professional capacity.
- He provided a trading balance confirmation letter from BDS Markets which showed his trading account summary “*and the high volume of sums within*”. This was coupled with a letter from the bank Mr P worked at. Although Tickmill has provided a copy of this letter, I’m only including a summary here. In short, the letter confirms Mr P’s period of employment with it and confirms that his “*main area of responsibility included all cashier transactions*”. It says that Mr P was “*a clerk with the usual payment transaction activities and customer advice for standard products such as savings books, savings bonds and building society savings*”. Tickmill also supplied a certificate of excellence which demonstrated that “*he exceeded his proficiency in product offerings within the bank and was awarded this certificate of excellence*”.
- The Bank confirmed that after Mr Ps “*general training he was placed in various departments, among others also in the securities portfolios department, assets department and private banking*” and during his time he acquired a “*Bank Certificate that allowed him to work in bank securities and investments and also in credit foreign exchange business and real estate etc*”.
- The trading statement Mr P provided was not considered for his classification, but Tickmill said that it showed “*he has the professional mindset and experience to trade high lots (4 lots each trade) and the amounts are of significant size as well as the funding involved*”.
- Tickmill also provided further details of some of Mr P’s call recordings at the time of his reclassification. In relation to Criteria 2, the phone call showed that Mr P said:
 - He had trading statements that proved his trading activities over the previous 4 to 5 years as he had been trading since 2018 as a Professional Client.
 - In regards to the securities portfolio he confirmed that his positions had been opened for 20 years and that he had a balance of over one million. Mr P confirmed that this portfolio was to be considered for long term investments and was not a day trading account.
- In relation to Criteria 3, Mr P told it:
 - He had worked in the bank and was placed in various departments, including securities portfolios department, assets department and private banking.

- During his time in the bank, he also acquired a Bank Certificate that allowed him to work bank securities and investments and also in credit-foreign exchange business and real estate.
- He had an initial and introductory call where he “*clearly statement his intention to trade stocks and cryptos and was specifically asking about these instruments*”.
- Tickmill provided a transcript of a call with Mr P.
 - Mr P was unhappy about how long the matter was taking and about being asked to send in more information. Tickmill reassured Mr P but explained that he needed to meet two criteria points. Tickmill told Mr P that whilst it had his bond account, it required a “*statement which is not older than 3 months*”.
 - In response Mr P said that he only received this statement once a year and wasn’t willing to send it again because he had been scammed in the past. But Tickmill said that it needed to see a document which wasn’t blacked out and showed the information it was after.
 - Mr P said that he had been a professional client with another broker since 2018, and repeated that he found the length of time unacceptable.
- Tickmill sent through the transcript of another call in which Mr P again repeated his claims that he had been trading with another broker and could provide a statement from September, but only received a yearly or quarterly statement. He again conveyed his concern about being scammed and for that reason not wishing to provide any more information. Tickmill explained that the compliance team had the last word on whether or not the relevant documents would be accepted and this had not yet been confirmed.
- Tickmill said that all clients it onboarded were retail clients, and it did not promote or solicit clients to reclassify as elective professional. It said that this application was “*at the sole discretion of the client which is available on the Client Area portal*”. It said that this showed the criteria and the assessment and the risks which would be lost if the application was approved. Mr P had to agree to these terms when applying.
- Tickmill confirmed that its back office team reached out to clients to ask for supporting evidence, and if that evidence was not forthcoming applications were rejected.
- It said that given Mr P had supplied his professional client agreement with another firm, a trading balance with another firm, his bank certificate and certificate of excellence, as well as his profession, and the content of the transcripts and recordings, Tickmill had acted reasonably and followed due process.
- It said that Tickmill did not act unreasonably in believing Mr P met the criteria to be considered an elective professional client. It said Mr P was only complaining because he lost funds.

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.

In doing so, I've taken into account Tickmill's detailed comments and supplementary evidence. I appreciate the time it has taken to provide this information which I can confirm I've considered very carefully. But I don't agree it makes a difference to my provisional findings. Furthermore, I'm not persuaded it has addressed the obvious deficiencies that I already outlined in the way that it assessed Mr P's elective professional client application.

I should start by saying if the regulator considered a client's insistence on being classified as an elective professional client as sufficient to supersede the process or the criteria set out in COBS, then it would've said so. In my view, the transcripts merely show that Mr P was keen on being classified as an elective professional client. And they also show that, for whatever reason, he was unable to provide the evidence required to actually show that he met two of the three criteria.

Tickmill could simply have rejected his application then and there. There was no risk to it telling Mr P that unfortunately the evidence he provided was not sufficient, and as a result, his application could not be approved. Alternatively, it could've asked Mr P to provide the yearly statement from his other account – this would've shown whether his trading was done with the sufficient size and frequency required in COBS. The fact that Mr P was unwilling to provide this information is not a relevant consideration – or a mitigating factor to Tickmill's decision to reclassify him. In my view, it was a reason to conclude, fairly and reasonably, that his application needed to be rejected.

Furthermore, I'm not clear how the German language nuances to Mr P's role within the bank are relevant to whether or not his profession was the one described in COBS. As I explained in my provisional decision, whatever Mr P's role, it's clear that it did not involve derivatives or trading derivatives – none of the additional evidence Tickmill has provided changes this conclusion. Even if I accept Tickmill's submissions about its internal scoring, the fact remains that Mr P did not provide any evidence that he had occupied a professional role, in the past, which gave him knowledge of derivatives, trading CFDs or trading on margin more generally. The certificate of excellence which Tickmill has provided, and which I have considered, does not in any way change this fact.

I've considered the fact that Mr P appears to have had a professional client agreement with another firm and had a large trading balance somewhere else. But neither of these are criteria set out in COBS – and it's clear to me that Tickmill itself did not rely on these to accept Mr P's application. I would only add that the firm Mr P had a professional client agreement with was banned by the FCA in May 2021 from offering CFDs to UK investors – so even if I thought it was fair to have relied on this (and to be clear, I don't think it was), this isn't reliable evidence. And Tickmill did not accept Mr P as a professional client based on his trading frequency because, as it has said itself, he did not provide it with evidence that would allow it to conclude that he met this criterion – I don't agree that his trading balance gave any indication that he traded with the frequency and size required in COBS.

In reaching my decision on what is fair and reasonable in this case, I must take into account the relevant rules which Tickmill was required to adhere to – and I can't ignore those rules, or ignore Tickmill's failure to comply with them, purely because Mr P was insistent on being categorised as an elective professional client. In my view all the contextual evidence that Tickmill collected about Mr P showed that he was a very experienced and wealthy trader – but none of it met the clear criteria which the regulator set out in COBS. And therefore its conclusion that Mr P ought to be reclassified as an elective professional client was not fair and reasonable.

For these reasons, and those that I set out in my provisional decision, I'm satisfied Mr P's complaint should be upheld.

Putting things right

In order to put things right for Mr P, my aim is to put him as close as possible to the position he would've been in had his account not been recategorized. In other words, had his account remained a retail client one. Apart from negative balance protection, which is one of the main protections, Mr P would also have been limited in the leverage available to him. And he would not have been able to trade CFDs on cryptocurrencies.

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My final decision

My final decision is that I uphold Mr P's complaint. Tickmill UK LTD must pay the compensation I've outlined above within 28 days of when we tell it Mr P has accepted this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 25 April 2024.

Alessandro Pulzone
Ombudsman