

The complaint

Mr M has complained that Pepperstone Limited ('Pepperstone') encouraged him to 'opt-up' from retail to an elective professional client ('EPC') status for his spreadbetting account. He says he wasn't suitable for such an account and the information he provided about himself wasn't sufficient for him to obtain EPC status. Mr M lost money and wants the higher leverage trades to be voided.

What happened

Your text here Mr M first spoke with Pepperstone in March 2020 and a retail spread betting account was opened on 18 March 2020. The EPC account was opened in April 2020 and Mr M started trading in September 2020. Mr M suffered a net loss of £674,836 across more than 6,300 trades. Mr M didn't think the EPC account was right for him so raised a complaint with Pepperstone.

Pepperstone didn't uphold Mr M's complaint in its letter of 1 January 2024;

- It provided details of phone calls with Mr M initiating the opt-up process in March 2020.
- It provided the details of information Mr M had given to complete the appropriateness test and the EPC account application completed on 1 April 2020. By completing that application Mr M would have understood the protections he lost.
- It detailed the regulations it had abided with in accepting Mr M's account application and that it was Mr M's responsibility to inform Pepperstone if his circumstances changed.

Dissatisfied with the outcome, Mr M brought his complaint to the Financial Ombudsman Service.

Our investigator who considered the complaint thought it should be upheld. He said;

- He detailed the regulator's rules – the Financial Conduct Authority ('FCA') – that applied to the eligibility for EPC status – the qualitative and quantitative tests.
- He was satisfied that Mr M fulfilled the qualitative test but not the quantitative test of which Mr M had to satisfy two out of three of the criteria. The investigator wasn't satisfied that Mr M's trading history evidenced he had carried out enough trades of significant size nor did Pepperstone verify Mr M's employment and its relevancy to the account opening.
- For that test Pepperstone needed to confirm Mr M had worked in the financial sector for a least a year which required knowledge of the transactions planned. But Pepperstone had relied on Mr M's profile on a well-known professional networking site – that I shall refer to as 'Business K' in my decision – and a third-party platform – that I shall refer to as 'Business G'. However, Business G's platform information was incorrect, so it was imprudent of Pepperstone to have relied upon that without additional verification. And the profile on Business K's site couldn't evidence that

Mr M had professional experience and knowledge of CFDs or spread bets.

- Mr M would also have failed on the third test as even though Mr M told Pepperstone he had a financial portfolio exceeding €500,000 he didn't provide any evidence.
- To put the matter right the investigator said that Mr M would still have carried out the same trades but just using a lower leverage so Pepperstone should rework those trades to give an overall figure of loss.

Mr M agreed with the investigator. Pepperstone responded with the following;

- It said the quantitative test had been satisfied with the provision of sufficient statements. Mr M always gave assurance of the trading he had carried out which was demonstrated in the phone calls.
- It provided a screenshot of Mr M's responses to the 'Qualify as a Professional Client' application which alongside Business K's profile Mr M provided, cross referenced with Business G's profile and details of the information Mr M gave about his employment history during calls, was sufficient to satisfy the criteria.
- Mr M had told Pepperstone of his relevant experience and one of his professional roles giving him a 'full working knowledge of trading and CFDs'. Pepperstone had validated that information online and it was reasonable for it to have relied on Business K to validate his professional experience.
- Mr M may not have been listed on the FCA's register but that was only for people who carried out controlled or senior management functions.
- Given data protection laws it would be difficult to verify Mr M's employment history with his employers so relied on resources available to it and as provided by Mr M. Pepperstone did take reasonable steps to clarify the rules.
- The complaint was not made in good faith – Mr M was an experienced EPC trader who fully understood the risks and only challenged his client categorisation when he incurred losses.

Our investigator responded to Pepperstone's points and confirmed they hadn't changed his view on the outcome of the complaint. As Pepperstone requested the complaint be considered by an ombudsman, it was passed to me for a decision.

After reviewing all the available evidence I was thinking of reaching a different conclusion than the investigator. So, I issued a provisional decision to allow the parties to respond before I issued my final decision. Here's what I said;

'I'm aware I've set out the background to this complaint in far less detail than the parties and I've done so using my own words. The Financial Ombudsman Service was set up to be a quick and informal alternative to the courts. And the purpose of this decision is to explain what I think is fair and reasonable in the circumstances, not to offer a point by point response to everything the parties to the complaint have said. So, I will not refer to every submission, comment, or relevant consideration. Instead, my decision sets out what I think are the most important points to explain my decision in a way that is intended to be clear and easy to understand.

In deciding what's fair and reasonable, I am required to take into account relevant law and regulations, regulators' rules, guidance and standards, and codes of practice; and, where appropriate, I must also take into account what I consider having been good industry practice at the time. Although I am required to take the relevant law into account, I am not bound by it. I am required to determine a

complaint in accordance with what is, in my opinion, the fair and reasonable outcome in all circumstances of the case.

As referred to above, the regulator, the FCA lays out the relevant rules in the Conduct of Business Sourcebook ('COBS'). The COBS rules say for a customer to become an EPC rather than a retail customer certain criterion must be fulfilled;

'Elective Professional clients

COBS 3.5.3R

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 [... 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");'

(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.

In addition, COBS 3.5.6R states;

'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 quantitative test.'

And I've also borne in mind another of the rules that applies;

'Reliance on information

COBS 10.2.4R

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.'

I've reviewed the file to see how the above were applied to Mr M's EPC application, how Mr M presented himself, the information he provided and whether Pepperstone took all reasonable steps to ensure Mr M satisfied the tests.

I've considered Mr M's circumstances as discussed during his initial calls with Pepperstone in March 2020. Pepperstone has provided us with all its call recordings that relate to Mr M opting up. From the calls I have heard, while Mr M did speak with other colleagues, his primary relationship was with one particular representative, who I shall refer to as 'Mr B' in my decision. But if Mr M considers important calls are missing, he should let me know in response to this provisional decision.

During what seems to be the first main call on 18 March 2020 Mr M asks for an overview of Pepperstone, its history etc. He appeared satisfied with Mr B's response and then gave information about himself;

'...I've been around for a while. I've had accounts with most of the major players, quite substantial accounts [gives the businesses names]'

He explained that he was dissatisfied as he didn't feel he was getting his money's worth for his business and to give Pepperstone;

'...an idea of the volumes I can do is I think for example my statement for the month of January is a notional value roughly just shy of £2bn notional values...'

He complained that the businesses he was currently using couldn't handle the;

'...sizes I can run. Anywhere between kind of an average size £200 a point all the way up to £2,500 a point. So quite substantial sizes and I can place anywhere between five to 15 trades a day.'

He was looking to mainly trade in the DOW, DAX and FTSE and was looking for a business who could;

'...handle the sizes and volume that I want to put through.'

Mr M explained he wanted to be valued and;

'...I know that I can go to pretty much anybody else at the moment and I transfer and kind of begin as a professional client with them they will be say they match my deposit or give me an introductory kind of £5,000 trading credit 'which you can use and once you've done a certain notional value that

becomes yours' and in the reality within about three or four trades I've covered off anyway.'

Mr M then asked about leverage and margin cut rates but Mr B referred back to the;

'...possible pro client – I assume you meet the criteria which is obviously – you know how it works – you need to meet two of the three criteria. One being volume, one being have you worked in the industry or the other being do you have €500,000...'

Mr M responded and said;

'I hit all three criteria'

Mr M said that he didn't want to share details of his personal assets and Mr B advised Pepperstone would need to see evidence of two out of the three. Mr M said he would send his December/January trading statement and that he wasn't going to go into all of his employment history but would provide his online profile;

'...which will tell you I've been in banking and financial services and trading for the last 25 years.'

Mr M referred to his trading statement for December 2019 as showing a notional value of around £1.2bn and the January 2020 statement as being around £2bn. He said his average monthly notional value was between £1bn to £2bn. During the conversation Mr M explained that he had taken losses of around £200,000 as well as gains and understood that's how it worked.

At the end of the call, it was agreed that Mr M would complete the EPC application online and Pepperstone was to send him an email. In the meantime, there was an email from Mr M to Mr B on the same day as the call;

'Please see attached a recent trading statement, if you want others i do have but for some reason they [the then current provider] started listing some new personal info at the start of this year so would just need to redact hence send my Dec one.'

But even then the notional value for Dec was just shy of 1BN....'

Emails continued about timing of when Mr M could start trading as well as margin, leverage and rebates etc. It was clear that Mr M was very keen to get the account up and running, during which time Mr B emailed Mr M on 31 March to say;

'One thing you can do in the meantime is get your professional status approved.'

All you need to do is go into your Pepperstone client area and you will be able to start the pro app from there.

For us to categorise you as Professional client, we would need some information/supporting documentation to meet two of the below:

Trading history

We note that you have declared trading an average frequency of 10 significant positions over the previous four quarters.

Could you please provide us with trading statements showing your name and significant trades placed over the last 4 quarters?

Saving and investments

We note that you have also declared in excess of 500,000€ in savings and investments.

Can you please provide us with a screenshot of your holdings, clearly showing your name, a recent date and savings or investment in excess of the above?

Experience

We note that you have declared to have Professional experience on derivatives and FX. Could you please give us more details about your exact job function, employer and tasks you were doing which are linked with derivatives and FX?’

In response to the above about Mr M replied to say;

‘You already have a record and proof of my trading history, and please find a link to my experience

[Link to Mr M’s online profile link with Business K]

as you can see I have been a senior banker for almost 20 years managing global banking and markets

I assume this should give you all you need to confirm my criteria.’

In making his complaint Mr M said;

‘...the categorization of my account from a retail account to an elective professional should not have been conducted, which was concluded at the bequest of the business, and it was clearly driven by the fact that Pepperstone had only recently entered the market and was seeking clients to bolster their client base, due to the increased fee income.’

But I disagree with Mr M’s recollection of how his EPC status came about. I say this because it’s quite clear from the initial phone calls that Mr M verbally presented himself to Mr B as being able to fulfil the requirements to become an EPC from the outset. It was Mr M who initiated the possibility of him becoming an EPC and it was also Mr M who started the credit discussions, requested a bespoke deal and rebates.

During the calls of March/April 2020, amongst many other ‘bullish’ comments Mr M referred to himself as being an experienced investor and having ‘been around for 15 years’ with substantial accounts. He also said he had been ‘a senior banker for over 20 years’, was ‘putting through £10bn in notional value over 12 months’ and used the services of other spread betting providers.

While Mr M made these statements, which would suggest he was suitable for EPC status, under the rules Pepperstone had an obligation to take reasonable steps to ensure the account was appropriate and Mr M fulfilled the criteria for both the qualitative and quantitative tests.

The qualitative test

I am satisfied that Mr M was more than capable of making his own investment decisions and understood the risks involved. I say this because it's clear from the information and evidence provided that Mr M was an experienced investor who fully understood the complex markets he was trading in. The phone calls and the trading statements demonstrate Mr M was a very experienced trader who knew he wanted to invest, how much he wanted to invest and the markets he wanted to invest in. He understood the risks involved with respect to the type of transactions and services envisaged.

So, it remained for Pepperstone to ensure Mr M fulfilled the requirements for the quantitative test.

The quantitative test

As referred to above, Mr M was emailed on 31 March 2020 to start the EPC status approval process which Mr M could complete online. Pepperstone said it would need details of Mr M's trading history, savings and investments and experience to satisfy two of the three criteria. I have considered the information Mr M provided along with the other information and evidence presented to me.

Trading history

Mr M had to provide trading statements showing significant trades over the previous four quarters prior to the EPC account opening. Mr M's retail account was opened on 18 March 2020 and Pepperstone's email requesting the EPC information was sent on 31 March 2020. Mr M completed the EPC application on 1 April 2020 and the EPC account was approved on the same day. For the purposes of this complaint, to comply with the regulatory requirements, I would expect to see statements for the four consecutive quarters leading up to that date. And I would expect those statements to show significant trades at an average frequency of ten per quarter. Mr M was already trading as an EPC with another provider and Pepperstone has provided copies of the statements it was given by Mr M showing his trading history.

The dates of those statements are;

- 28 February to 29 March 2019
- 31 May to 28 June 2019
- 30 August to 30 September 2019
- 29 November to 31 December 2019

For ease of reference, I've broken down the statements into the quarters relevant to the timing of the EPC account opening;

- April to June 2019 – Quarter one

The statements provided by Mr M evidence trades were carried out in June 2019 which totalled 66 spread bets with more than ten trades of notional values above £1m.

- July to September 2019 – Quarter two

Only one statement provided which covered the month of August 2019 showing nine trades. The notional value for these ranged between £371,000 and £1.4m.

- October to December 2019 – Quarter three

One statement for this quarter for December 2019 which showed during that month Mr M placed 152 spread bets which in the main had notional values exceeding £1m.

- January to March 2020 – Quarter four

Pepperstone hasn't provided any trading statements for this period.

Taking account of the above, Pepperstone technically failed to correctly assess Mr M's trading history as required by COBS5.3.5(2)(a). That rule required evidence of an average of ten substantial trades over the previous four quarters, but the statements provided show that Pepperstone only had sight of three of the four quarters.

Mr M has questioned whether his suggestion to be considered for EPC classification should hold any weight as the only consideration is the criteria as set out in the rules. His argument being that as he failed to fulfil the criterion then his complaint should be upheld. But, bearing in mind my role is to make a fair and reasonable finding based on the individual circumstances of a complaint, I've gone on to consider what would have happened, but for this technical error, if Pepperstone was in receipt of statements for the fourth quarter.

It's clear that Mr M had traded in early 2020 as he said as much during a call and that his January 2020 statement showed around £2bn of notional value trades. I asked Mr M for trading statements for January to March 2020 because it was clear these were available in March 2020 as Mr M stated in one of his emails that other statements (other than the December 2019 statement) were available, but he would need to redact his personal details as the statement provider had started adding that information since the beginning of the year.

In response Mr M told us he hadn't traded between 2 and 28 January as he was working outside of the country but provided trading statements for the period 1 January 2020 to 30 March 2020. Those statements show that Mr M carried out ten trades, all with a notional value of a significant size. So, while Pepperstone may have overlooked this at the time, it's evident if Mr M had provided that statement at the time of the EPC opt up application, then there wouldn't have been any reason for him not to have fulfilled the necessary criteria as one part of the qualitative test.

So, while Pepperstone's failing here is that it didn't carry out an adequate assessment of Mr M's trading by not obtaining the more recent statements, if it had carried out a more adequate assessment, then Pepperstone would have obtained the necessary evidence and Mr M would have met the criteria. So overall, this lack of assessment doesn't have an impact as we know the criteria could have been met.

Saving and investments

In response to the appropriateness questionnaire Mr M said his role was in banking at director level and earned an annual salary 'Greater than £450,000' and had savings 'Greater than £450,000'. But Mr M made it clear he didn't want to divulge details of his assets/wealth.

Again, bearing in mind what would otherwise have happened if Mr M had provided evidence of his savings and investments, I asked Mr M to provide me with some evidence of his financial status at the time.

In response Mr M provided a screenshot of his bank 'accounts at a glance' which showed a total balance of just over £2,800 and if these were Mr M's total assets, then clearly, he would have failed the savings and investment criteria. Mr M went on to say;

'During my initial discussions with Pepperstones, I explicitly stated that I would not be discussing or sharing any details about my personal savings and investments. However, the Pepperstones sales team, while promoting their EPC account and the incentives it provided, advised that even if I chose not to disclose this information, I should still give the impression that I had more than 500,000.'

As mentioned, I've listened to the account opening calls and with regard to the three criteria and saving and investments of €500,000 Mr M responded to say that he would 'hit all three' but;

'...in all fairness I would probably not evidence my personal assets as I'm not about to share that with you, with all respect.'

Evidently Mr M didn't want to share his asset details with Pepperstone, but Mr B went on to acknowledge that point and referred to the other of the three requirements. I would add though that during the conversations I've listened to I haven't heard any comments to indicate Mr M was being coerced to give the impression he had that level of assets. And as I haven't heard anything to suggest this was case, after listening to all the call recordings Pepperstone has provided, I'm satisfied that Mr M's decision to represent himself as someone as having that level of savings and investments, came about at his own volition.

I wasn't sure why Mr M would do that if it wasn't the case. Mr M presented himself as an EPC to Pepperstone during the March 2020 calls so, I asked him, if he didn't think he satisfied the criteria, why at the time he said he could 'hit all three criteria'.

Mr M responded to say he was experiencing trauma at the time as he had lost family relatives to COVID and had had to organise the funerals. He said he informed Pepperstone of this during his initial communications and follow ups – the account was opened in March/April, but trading didn't start until September 2020. He said he was 'unaware of which account type I would be using.' Mr M also explained he was a layperson without any professional, industry background or qualifications in complex investments. He said it was Pepperstone who promoted its industry leading spreads, rebates and incentive schemes to encourage use of its EPC account.

I am very sorry to hear of the deaths in Mr M's family and no doubt this must have been a very difficult time for him. But equally I have to consider how Mr M presented himself to Pepperstone and whether there was anything that would have led it to conclude that it would be unreasonable for it to have relied 'on the information provided by a client unless it is aware that the information is manifestly out of date, inaccurate or incomplete' as per COBS 10.2.4R.

I haven't heard Mr M referring to the family deaths or how this may have impacted him during his initial discussions with Pepperstone. And when he further discussed

beginning trading with Pepperstone in August 2020, after an absence since April which potentially could have been caused by Mr M needing some time away, he says;

'I'll be blunt with you, like last few months obviously with the amount of volatility, I just stepped back, it's just not worth the headaches or sleepless nights.'

So, I haven't heard anything that would corroborate Mr M's recollections. And there is nothing in Mr M's behaviour during any of the call recordings that I have listened to that suggest he was struggling. He comes across as reasonable, coherent, experienced, and looking to do business with Pepperstone, but on his terms. I haven't seen or heard anything that would indicate Mr M was suffering any trauma or to such an extent that it would impact on his decision making to approach Pepperstone to open a retail account in March 2020.

And further I'm satisfied that it was Mr M who broached the subject of him 'opting up' to an EPC account. It was Mr M who was proactive in asking about rebates, incentive schemes and credit/capital matches, and not the other way around.

As Mr M was a knowledgeable and experienced EPC, he was aware of the requirements needed to become an EPC and would also have been aware of the advantages – such as increased leverage as well as the disadvantages – the loss of retail client protections as an example. So, he would have known that it was important for him to be accurate in his representation of himself and his circumstances to Pepperstone. So, I think it was fair and reasonable for Pepperstone to accept what Mr M was saying about his assets and based on everything Pepperstone knew about Mr M – the statements and including what he told Pepperstone.

I say this because it's known that Mr M had EPC status elsewhere. So, he was aware of the need of accuracy in his presentation of himself rather than say a retail customer who might not be fully cognisant of the implications of being inappropriately categorised and potentially misinforming a business about his circumstances.

Experience

On his online EPC application, questionnaire and 'quiz' form Mr M said;

'I have placed trades, of significant size, on CFDs or Forex at an average frequency of 10 per quarter over the previous four quarters

I worked in the financial sector for at least one year in a professional position, which has provided me knowledge of Forex and/or CFD trading full working knowledge of Trading and cfd'

Mr M also said his role was as a 'Market Analyst/Researcher/Strategist' and his 'Experience' as being 'Advanced.' I appreciate Mr M has told us some of his answers came about as a result of drop-down menu options, but I understand from Pepperstone there was also the option for Mr M to choose 'other' and add his own information.

When Pepperstone requested evidence from Mr M in order to satisfy COBS5.3.5(2)(c) it said;

'We note that you have declared to have Professional experience on derivatives and FX. Could you please give us more details about your exact job function, employer and tasks you were doing which are linked with derivatives and FX?'

In response Mr M said that he had already satisfied the experience criterion of the rules by providing a copy of his profile on Business K's platform.

In contradiction with what Mr M told Pepperstone about his professional position which gave him knowledge of CFD trading and 'full working knowledge of Trading and cfd' he has told us his roles were in the retail side of banking. His profile on Business K's site as provided by Pepperstone dated 3 November 2019 shows his various roles as 'Global Manager, Group Strategy and Planning', 'Chief of Staff', 'Senior Strategy Consultant', 'Senior manager Strategy & Shared services', 'Senior strategy Manager, Business development manager for business and retail strategy' 'Senior commercial associate – Strategy development manager' and 'Relationship Wealth Manager'.

Pepperstone cross referenced what Mr M told it about his professional circumstances and trading experience over the phone with Mr M's profile on Business K's site and Business G's platform. Pepperstone has provided a screenshot of the information provided on Business G's platform. Mr M's employment is similar to the roles recorded on his profile with Business K – 'Banking, Stakeholder Management, Business Transformation Corporate Finance, Portfolio Management, Financial Modelling, Relationship Management; Business Analysis, Credit Risk and Strategy'. Amongst others, Mr M's skills were noted as being Banking, Portfolio Management and Credit Risk.

But Mr M has told us that his education was recorded incorrectly on Business G's site which potentially could raise questions about the validity of the other information recorded. While that may not have any impact on Pepperstone's assessment of Mr M's professional experience, I can't see from either of the above profiles there is definitive evidence that Mr M worked or had;

'worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged'

Or whether – as per the European and Securities Markets Authority – 'ESMA' – guidance Pepperstone ensured;

'...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.'

While some of the role's profiles don't necessarily contradict what Mr M told Pepperstone about his experience nor were some of the profiles so dissimilar with what Pepperstone had been told, but there's nothing of substance in any of the job titles that would suggest Mr M had anything to do with trading CFDs or any kind of derivative knowledge. And that is the type of evidence I would have expected Pepperstone to have ascertained and considered.

So, overall, I'm not persuaded Pepperstone carried out an adequate assessment about Mr M's professional status and its link with the type of services envisaged. I'm not satisfied the evidence, provided by Mr M – Business K's profile and

Pepperstone's cross reference with Business G – provided him with the required knowledge of the transactions or services to be engaged in.

In conclusion, I'm not persuaded that Pepperstone carried out an adequate assessment for it to satisfy itself that Mr M fulfilled the criteria for the qualitative test. It didn't fully obtain the evidence it needed to satisfy itself that Mr M had traded over four quarters. And I think it should reasonably have concluded that Mr M's profession, as evidenced by him, did not give him the required knowledge of the services envisaged.

However, I'm persuaded that it was fair and reasonable for Pepperstone, given everything it knew about Mr M via its phone conversation, his trading history and the fact that he was an EPC elsewhere, plus his very senior professional banking background, for Pepperstone to have accepted Mr M's testimony that he met the relevant portfolio size criteria.

So, I've gone on to consider whether Pepperstone's failure to properly obtain relevant evidence about Mr M's trading made any difference to what actually happened. And I don't think it did. I say this because had Pepperstone asked for additional evidence of Mr M's trading for the relevant quarter four period, I'm satisfied Mr M would have provided it because it's very clear Mr M wanted an EPC account with Pepperstone. The calls evidence this. So, Mr M would have provided the necessary evidence if he had been requested to do so.

I'm persuaded there is compelling evidence that Mr M was capable of making investment decisions and understood the risks involved. And I'm further satisfied that what Mr M said to Pepperstone was plausible and I can't see any reason for it not to have taken the information and assurances provided by Mr M as being given in good faith. As a result, although I'm of the opinion Pepperstone should have done more when it assessed Mr M's circumstances and EPC application, I don't think the failings I have identified made any difference. I say this, because, on balance, I am satisfied Pepperstone would have concluded Mr M met the criteria anyway and would have allowed him to open an account as he did.

In short, I'm satisfied that Mr M was fully aware of the EPC account he wanted to open and was willing to provide both factual and verbal assurances to Pepperstone in order for that account to be opened. While I've identified failings on the part of Pepperstone during the opt up process I think Mr M would have provided the evidence if he had been asked. So, I don't think it was Pepperstone who unfairly or unreasonably placed Mr M in the foreseeable position of him incurring losses that he wouldn't otherwise have incurred as a retail client.

With his experience as an EPC, Mr M was himself fully aware of those potential losses but was willing to provide evidence and assurance to Pepperstone that he was capable of accepting that.

So, I don't think it would be fair or reasonable of me to conclude now, after the event, that Pepperstone is responsible for the losses Mr M has incurred on those EPC leveraged positions when I'm persuaded he was fully cognisant in the opening of the EPC and was aware such losses were a very real possibility.'

Pepperstone didn't respond.

Mr M did reply to say he didn't agree with the outcome and was shocked to have received it. He provided several responses for my consideration.

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.

As outlined in the provisional decision this service provides an informal complaint handling service and this is reflected in the way I've approached the complaint. It's part of my role to identify and concentrate on the core issues I need to address to reach what I consider to be a fair and reasonable outcome and I will make comment on everything that I consider makes a difference to the outcome of the complaint.

The rules

Mr M referred to the rules and that COBS 3.5.3 set out two very different sorts of test, the qualitative and the quantitative. The former being subjective and the latter being binary as to the outcomes, and in reaching my conclusions he said I had applied the subjective nature of the qualitative test to the quantitative test.

He also referred to COBS 10 where a firm has to assess the appropriateness of a customer for the type of investment being offered but said that rule related to retail clients whereas Mr M opted for EPC status. Mr M noted that a retail client would need to undergo a separate assessment for an EPC account as they were distinct accounts. I agree with this and referred to COBS 3.5.3 in my provisional decision. When Mr M initially opened his account with Pepperstone he did so as a retail client – during which time he didn't carry out any trades – and moved onto EPC status as soon as he could.

Mr M said the under the rules – COBS 3 – they didn't allow a firm to bypass checks or client declaration that they were eligible for an EPC account. For the quantitative test the rules don't allow a firm to draw speculative assumptions based on a client's employment history.

Regarding my reference to COBS 10.2.4R and a firm's reliance on information provided by a client Mr M went on to refer to the other rules within COBS 10 about a firm having the obligation to ask a client about his knowledge and experience in the investment field being provided and whether the client understands the product or service offered in relation to a 'retail derivative account'.

He says the comments and language he used during phone calls, and as referred to in my provisional decision with reference to COBS 10.2.4R, were only relevant to the opening of his 'retail derivative account' and only supported the fact that a 'retail derivative account' was the only account appropriate for him.

Mr M has said that COBS 10.2.4R is limited in its remit to supporting COBS 10.1, 'cannot override the relevant law, regulations, and regulator's rules set out by COB 3.5' and it 'cannot be taken in isolation, nor can it be applied to other regulations within COBS, specifically COBS 5.3, as it forms part of the wider regulation of COBS 10, COBS 10A and COBS 10.2.' He says that COBS 10.1.2 relates to a client having enough knowledge and experience to understand the product offered, in this case a derivative account for a retail investor. Whereas COBS 3.5, along with ESMA guidance set out the process of an upgrade to an EPC derivative and is only relevant to that upgrade.

But I think Mr M is wrong on this point. I've copied the rules from the FCA's website with the original emphasis still intact;

'Reliance on information

COBS 10.2.4R03/01/2018RP

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.

As in the rule 'client' is in italics, then it is a defined term. And the glossary link goes on to say;

'(except in PROF and except in relation to a home finance transaction) [so ie the exceptions don't apply] has the meaning given in COBS 3.2, that is (in summary and without prejudice to the detailed effect of COBS 3.2) a person to whom a firm provides, intends to provide or has provided a service in the course of carrying on a regulated activity, ...'

So, to my mind a client would include both retail clients defined as;

'COBS 3.4 Retail clients

COBS 3.4.1R03/01/2018RP

A retail client is a client who is not a professional client or an eligible counterparty.'

And it would include an elective professional client;

'COBS 3.5 Professional clients

COBS 3.5.1R03/01/2018RP

A professional client is a client that is either a per se professional client or an elective professional client.

And as there does not seem to be an exemption to this general position in COBS 10 I can't see why the general position – that 'client' means both types of client – does not apply. And this makes sense when the purpose of the rule is considered. So, while I recognise the COBS 10.1 does say – again with original emphasis intact;

'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,...'

But it's clear from COBS 10.2.4 that particular rule doesn't refer just to 'retail clients' but to the FCA's definition of 'client' as identified above. And in any event the chapter applied on the basis that at that point, when Mr M was providing information to Pepperstone, he was a retail client, and it was carrying out MiFID business (or intending to carry out MiFID business).

And with reference to MiFID business, the rules amount to the same;

'Reliance on information: MiFID business

COBS 10A.2.6 (03/01/2018)

'55(3) An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

[Note: article 55(3) of the MiFID Org Regulation]

So, I don't accept Mr M's point here.

While I agree that different rules apply to the information and experience etc that should be established about a retail client in opening a derivative account is different than that needed for an opt up to an EPC status. But its Pepperstone's abidance by those rules as per COBS 3.5.3 that I am assessing in this decision. However, as clarified above I've also borne in mind a firm's ability to rely on information given to it by a client as per COBS 10.2.4 and COBS 10A.2.6. And in any event, it's clear from the conversations I have listened to that it was Mr M's intention – from the outset – to become an EPC so I think any comments or evidence he provided relate to that application. And as referred to above its obvious that the intention in the rules is to allow firms to be able to rely on what a consumer tells it about their factual circumstances.

The quantitative tests

Mr M referred to his comment that he 'hit all three criteria' of the quantitative tests as being vague, gave no specifics and had no weight for compliance to reasonably accept his statement. He says he is a layman and had no knowledge of the rules set or the knowledge and credentials Pepperstone needed to consider. And he says he specifically refused to provide evidence about the quantitative test so he concluded the only reason he was allowed to open the account was to ensure that he would trade with Pepperstone.

In his response Mr M quoted an internal note about Pepperstone's agreement to it allowing him to opt up to EPC and the fact I didn't use it in my provisional decision;

'01/04/2020 @ 5.08pm : [Head of Compliance employee name] : Pro opt up approved, Trading attached, Employment can be found online so no[t] proof has been requested, Client is known [to another CFD broker]'

He said that Compliance would have known that the EPC application should have been declined as per COBS 3.5.6R that a firm 'must take all reasonable steps' to ensure the client satisfied the qualitative test and if applicable the quantitative test. He said it wasn't enough for a firm to accept a client's declaration or to make assumptions and that he had never spoken with the Head of Compliance who was reliant on his discussions with Mr B so they wouldn't have been able to gauge any statements he had made during other calls.

Mr M has said that the sales team would have a different agenda to a compliance team, but I don't think this is relevant as it's not for me – as part of this decision – to assess whether an individual failed to correctly assess the tests, but Pepperstone itself as a firm. But further to Mr M's comments made in response to my provisional decision I asked Pepperstone for any other call recordings it may have had. Mr M said it had so far only provided calls that supported its position, there were calls missing and other calls made from Mr B's mobile phone which included the promotion of its account, advising it of his personal circumstances and its requests to set up accounts to obtain promotions.

Pepperstone responded to say it took its regulatory obligations very seriously and had robust compliance procedures in place to ensure adherence to them. All calls had to be conducted over a recorded line and it trained and monitored staff to ensure strict compliance. It said it had provided all calls related to the complaint.

And regarding calls from Mr B's personal mobile, as Mr B was no longer with Pepperstone, it asked for any evidence of any dates etc, and it offered to look further into this. I referred back to Mr M who told us he didn't have the capacity to record communication, the calls were from nearly five years ago and mobile phone logs don't go back that far nor do phone bills record income calls. However, he was aware that Mr B had contacted him on his mobile several times because he was frustrated with his home setup (during the COVID lockdown) and the connection was poor.

I accept Mr M's comments about the lack of evidence he has been able to provide about this and thought about it very carefully and the impact on this complaint. Clearly Pepperstone isn't now in the position to speak with Mr B about this or interrogate any mobile device he may have used – if still available. And it wouldn't be right if it was this lack of evidence that caused me to conclude Mr M hadn't been coerced by Pepperstone in his representation of himself in order that an EPC account be set up. In light of Mr M's comments, I have relistened to the calls that Pepperstone has provided.

I agree with Mr M there is a short discussion during a call of 31 March 2020 that refers to Mr B's workstation being set up in his bedroom and him needing to change that. But there's no mention of him not being able to make calls or otherwise function in his professional capacity as he would usually be able to.

And any cross references between the calls, only refer to calls that are available to me ie one call made further to an earlier discussion or reference back to what was discussed during calls of earlier weeks as examples. I haven't heard anything to suggest there were calls over and above those had on the recorded phone lines. Clearly, I can't know this for sure but when I am presented with conflicting arguments, I have to base my decision on the balance of probabilities and what I think more likely happened. And in this case, I haven't been given anything to persuade me it more likely that additional calls were had between Mr M and his adviser which caused Mr M to present himself and his circumstances any differently than he would otherwise have done by his own volition.

COBS 3.5.3 (2)(a) Trading history

With reference to Mr M's previous EPC status with another firm he has said Pepperstone wouldn't have known whether the test conducted by his previous broker had been carried out or correctly in line with COBS 3.5. So, it was wrong of Pepperstone to have assumed that because he held an account elsewhere, he would meet the criteria. I acknowledge this point, but I don't think Pepperstone solely relied on this. And I've accepted in my provisional decision Pepperstone hadn't fulfilled its obligations in the quantitative test around this point.

Mr M has said I have made very speculative assumptions in my provisional decision about his circumstances and ability to meet the quantitative tests and my conclusion was that I considered it to be a 'technical error'. He said the head of compliance's comments about 'trading attached' was knowingly wrong. But it's accepted he would have met the criteria – albeit with only nine trades rather than ten for quarter two – if the correct statements had been provided. Mr M says I shouldn't apply the rules retrospectively, but in my provisional decision I concluded that but for Pepperstone's failing I went on to consider what would have happened.

Mr M has said he didn't want to provide those trading statements to Pepperstone and my 'on balance' finding was wrong about this. However, the phone call quoted in my provisional decision shows that he was willing to send on further statements, but they would just need redacting. And he was able to provide them to me in any event, so I don't agree with Mr M's point that he didn't want to provide the statements. And in any event, it's established that Mr M would have met the trading test if the additional statement had been provided.

Mr M has said that as Pepperstone didn't have the relevant trading history at the time it wasn't able to take a detailed look and seen he had incurred significant losses in December 2019 which would have raised questions about this ability to meet the criteria for the size of his portfolio. But bearing in mind Mr M's comments during the account opening process and that he had incurred losses of around £200,000 as well as gains and understood that's how it worked, I don't think that would have raised a 'red flag' to

Pepperstone as to the value of his investment portfolio which Mr M had assured it was in place. But I've gone on to consider this further.

COBS 3.5.3 (2) (b) Savings and investments

Mr M isn't happy that I thought it was fair and reasonable – when taking everything else that was known about him into account – for Pepperstone to have accepted his testimony that he met the relevant portfolio size criteria. He said that as part of his EPC application Pepperstone never performed the portfolio criteria test as per the rules so I shouldn't have made a comment about it and there was no provision for it to be assessed in a qualitative way. And he said that the rules and guidance stated firms should avoid self-certification by the client and that I had retrospectively applied a test that hadn't been conducted. If it had been conducted Pepperstone wouldn't have obtained the evidence to meet the portfolio size criteria so it shouldn't have made assumptions.

I agree with what Mr M is saying here. As stated in my provisional decision, I was satisfied that Pepperstone hadn't sufficiently sought evidence about the size of Mr M's portfolio. But I also thought it was fair and reasonable for Pepperstone to have concluded that, in the round, and taking into account COBS 10.2.4R it wasn't unreasonable for Pepperstone to have relied upon what it was told by Mr M about his circumstances.

Mr M is referring to him having financial assets of €500,000 here, and his refusal to provide the information. He says he had explicitly stated he didn't want this to be taken into consideration. But that's not what he said. He said he wasn't going to provide evidence of his personal assets as he didn't want to share that sort of information with Pepperstone, and not that he didn't want it to be taken into consideration as he is now saying.

Mr M has said he was advised by Pepperstone 'that even if I chose not to disclose this information, I should still give the impression that I had more than 500,000.' But as referred to above, I haven't been provided with any evidence Mr M was coached into the answers he should have given in the quantitative tests or that Mr M was under any external pressures – bereavements in the family – that would have led to Mr M not understanding what his EPC application was for or what type of account he would be opening. I don't believe Mr M was 'unaware of which account type I would be using.' He already had a retail account open so I'm satisfied he would have known what he was doing during the application process of opting up to EPC status. That being said, I have already made a finding that Pepperstone didn't fulfil its obligations for this quantitative test but also found that Mr M chose to present himself as someone having those assets and that I was satisfied it was Mr M's decision to represent himself as such.

COBS 3.5.3 (2) (c) Experience

Mr M said that his professional background wasn't a precursor to assuming the size of his portfolio and Pepperstone had no idea of the level of debt he may have had or what his financial obligations were. I agree with Mr M here and I've already concluded I wasn't satisfied his employment history evidenced relevant knowledge or experience for the trades envisaged so I don't think his comments have added any weight to what was previously known.

Mr M has raised the point that Pepperstone was relying on his EPC application as self-certification and even if Pepperstone was considering that he was self-certifying as an EPC then it wouldn't have had the knowledge as to how he met those criteria and the regulator and ESMA were clear that firms should avoid self-certification. But I don't think that's relevant here. There's no evidence that Pepperstone was assuming Mr M was self-certifying

and, in any event, the qualitative and quantitative tests would still have needed to have been assessed and it's the latter of those tests that Pepperstone failed to ensure were satisfied.

I remain of the view the Mr M presented himself as a client who sufficiently met the criteria to satisfy COBS 3.5.3. and in Mr M's response he hasn't told me why he presented himself as an EPC if he didn't think he would pass the tests, whether that be by self-certification or otherwise. I'm persuaded he had the knowledge and experience to know what he was getting himself into when he chose to opt up to EPC. And as stated in my provisional decision Mr M was reasonable and controlled when he spoke with Pepperstone so there was nothing in his manner that would have caused Pepperstone to have doubted what he said or have reasonably relied upon it as per COBS 10.2.4R/COBS 10A.2.6.

I say this partly because it's accepted Mr M held an EPC account with another CFD broker so was aware of the requirements needed to satisfy the tests and assured Pepperstone he 'hit all three'. While he says he wasn't aware of the rules Pepperstone needed to abide by, he had gone through the process with his previous CFD broker in March 2019, placed 1,570 trades between then and March 2020, invested over £610,000 and withdrawn around £454,000. I am allowed to take this information into account as it is known to me and wouldn't be fair to Pepperstone if I didn't take it into account. So, even if the previous broker failed in how it carried out its assessment of the quantitative tests, we know that account was still opened which indicates Mr M was fully aware of the application process, how this type of trading worked and of the advantages and disadvantages of being treated as an EPC.

Mr M has referred to 'insistent clients' and a firm not being able to bypass the rules because of that. But there's no evidence to suggest that Mr M was being 'insistent' and wanted to act against Pepperstone's wishes in which case it would have needed to have been proactive in managing that 'insistence'.

Overall, Mr M concluded that taking into account the relevant law, rules etc Pepperstone wouldn't have concluded that he met the criteria, and the EPC should have failed, and he should only have been able to trade as a retail client. He didn't agree my provisional decision and that what the investigator had said should stand. But for the reasons given, I remain of the same opinion as in my provisional decision. I say this because, in conclusion;

- Although I acknowledge Mr M's points, I don't agree that Pepperstone needed to completely ignore what Mr M had told it about his circumstances or how he met the criteria.
- The rules allow Pepperstone to accept the information Mr M was providing it.
- I don't consider it would be fair and reasonable to hold Pepperstone responsible for Mr M either deliberately giving incomplete or inaccurate information to it in order to be able to open an EPC account.
- As I've previously concluded, while there were shortcomings in Pepperstone's assessment, particularly in that it ought to have asked for more information at times, if it had done so, Mr M would have provided it given how keen he was to trade with it.
- And the fact that Mr M was an EPC elsewhere meant he knew the process and implications of having an EPC account.
- Mr M was a very experienced trader and was persuasive and clear in his phone conversations with Pepperstone about his circumstances.

- Given Mr M previously had an EPC account elsewhere and traded with Pepperstone for over two and a half years as an EPC, I'm persuaded he was fully aware and content with risks and possible benefits of trading as an EPC. Taking everything I've said here and in my provisional decision into account, as well as the length of time he continued to trade with Pepperstone, I'm satisfied Mr M's losses incurred were trading losses and were not something I think Pepperstone should fairly and reasonably be responsible for compensating.

Mr M has quoted from several other ombudsman decisions that are available on this service's website. But one ombudsman's decision doesn't set the precedent for other decisions. When this service considers a complaint, it does so taking into account the individual merits and particular circumstances of that complaint. And that is what I have done here.

It follows, I don't uphold Mr M's complaint.

My final decision

For the reasons give, I don't uphold Mr M's complaint about Pepperstone Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 25 April 2025.

Catherine Langley
Ombudsman