

complaint

Mr D's complaint is that CMC Spreadbet Plc ('CMC') had a responsibility to address indications that trading (and excessive trading losses) in his execution only account was out of control. He says CMC's failure to do so allowed his out of control trading to continue and caused, at least partly, the significant financial losses in the account.

background

Mr D says his out of control trading amounted to a gambling problem and was evident between July 2013 and September 2018, during which he lost almost £3 million (accumulated over almost every month in this period).

He says CMC compounded its failure to address his problem by providing him with a succession of rebates to encourage more trading – instead of acting to restrict or stop the trading (and losses); and by encouraging a professional client account upgrade in 2018, ahead of the incoming rules (that year) from European Securities and Markets Authority ('ESMA') designed to protect retail clients (as he was prior to the upgrade).

Mr D concedes majority of the responsibility for his trading and losses but asserts that "... as an FSA regulated firm [CMC] should have done more to stop [him] from [himself]" and that CMC neglected its client's best interest obligation towards him. He also accepts signing and agreeing account documentation presented to him by CMC, but mainly asserts the following:

- The reckless and time consuming nature of his trading (and losses) in the account was very obvious, upon any form of monitoring, and would/should have been identified by CMC. It should also have realised his losses were unmanageable and that his use of substantial time in trading made it unlikely he had time to earn a living – combining into a grave state of affairs that should have prompted its intervention.
- CMC was irresponsible to have provided him with a form of credit facility for his negative balances – as opposed to suspending or closing his account until the negative balances were cleared. Instead, it temporarily cleared the negative balances and gave him rebates to encourage continuation of his trading and then recovered the losses when he was able to fund the account.
- On numerous occasions he desperately asked CMC for rebates – any possible rebates available – and this should have been an indication of his gambling problem and an indication that his trading was unaffordable. This too should have prompted CMC's intervention.
- Despite CMC's awareness of the history of substantial losses in his account, of his negative balances, of his repeated needs for rebates and of attempts to fund his account being declined, it nevertheless encouraged him towards the professional client account upgrade in 2018. It was obvious that such an upgrade was inappropriate for him, yet CMC encouraged and granted it – in order to continue profiting from his losses.

CMC's position – which it has presented alongside detailed documentation – is mainly as follows:

- It disputes the complaint and disputes Mr D's claim that it has or shares responsibility for his trading and/or losses. It also notes that it did not profit from his losses as it did not fill all trades from its balance sheet.

- Mr D had two execution only online trading accounts – a spread-bet account opened in July 2013 and a Contract for Differences ('CFD') account opened in March 2018. At both times he was provided with, acknowledged and agreed detailed documentation about the accounts and detailed risk warnings. Based on information provided by him, both accounts were also properly assessed as appropriate for him. In 2016 and in relation to an account funding issue CMC sought updated information on his finances and he confirmed source of funding as being personal wealth (in the amount of £25 million, inclusive of his family's wealth and his business); annual business income of £250,000; and annual income of £500,000 from other sources.
- He was fully aware of the execution only basis for his accounts and of his sole responsibility to manage and monitor all aspects of the account and his trading. CMC had no part to play in this responsibility – which he knew – it was not engaged in monitoring his account activities, it did/does not analyse trade sizes or profits and losses in accounts and it did/does not hold information about account holders' wider assets. Aside from the fact that it did/does not comment on trading activities in accounts, due to the lack of such information, monitoring and analysis it could not comment on such activities anyway.
- He was given and had access to all relevant account activities that arose from his trading – including, but not limited to, losses, liquidations, statements (daily, weekly and monthly) and balances. He continuously funded his account in order to continue trading. He did this 5,419 times and his account was liquidated a total of 1,837 times, with notice to him each time.
- He was always aware of his losses and negative balances; he negotiated debt write-offs five times and many early rebate payments (before he was entitled to them) on the basis of threats to move his account elsewhere if his demands were not met.
- Telephone call recordings show he was given information about the professional client account upgrade in a factual manner, without any pressure upon him and that his response was initially that he was not interested in it (which shows the absence of pressure). He thereafter became interested – and even put pressure on CMC by suggesting (in an email) that a competitor firm could offer him a better professional account. CMC followed the regulator's rules in COBS 3.5.3 R, with regards to assessing his eligibility for the upgrade so the assessment did not relate to the profit/loss state of his account (which it did not monitor). Appropriateness was also assessed and approved for the upgrade based on information he gave.
- Rebates were not given as an incentive for the upgrade, they were always given in response to his requests for them – this extended to the loyalty/welcome bonus he asked for (and was given (in the amount of £1,000)) as part of the upgrade. ESMA prohibited such rebates and promotional bonuses to retail clients from 1 August 2018, this information was known to Mr D before it became effective and there is email evidence of him seeking to exhaust particular rebates before they stopped. This defeats his claim that he was threatened with the loss of rebates if he did not upgrade his account.
- Upon being granted the upgrade he was given express notice that he retained the right to revert to a retail account at any time and that he was obliged to update CMC on any occurrence that might affect his eligibility for the upgraded account. He did neither. Information upon which the upgrade was granted included his confirmation of average frequency of over ten significant sized transactions per quarter over the previous four quarters, around 176,000 trades in his account up to the point of the upgrade and a savings account bank statement for him dated 8 May 2018 which showed savings of £546,016. He requested the upgrade on 24 January 2018 and was granted the upgrade on 9 May 2018.

- In terms of Mr D's reference to the ESMA rules, because of the dramatic potential changes they would make to margin arrangements in retail accounts it was important to give account holders early notice – including notice about the elective professional client account upgrade option if any account holder was interested in this.
- At no time prior to 8 October 2018 did Mr D ever disclose to CMC that he had a gambling problem, or that his trading and losses were out of control or that he was in debt. He revealed these on the above date, essentially after-the-event and after his complaint.

One of our investigators considered the complaint and concluded that it should not be upheld. In the main, she broadly agreed with most of CMC's position on the complaint and the evidence it had presented. She was satisfied with evidence that the account was properly assessed as appropriate for Mr D; that the execution only service meant CMC was not obliged to monitor his account, trading or losses; that he was properly assessed, based on the regulator's rules, as eligible for the professional client account upgrade (and the upgraded account was appropriate for him); that even if the information he provided in the process was exaggerated CMC was entitled to rely upon it in the absence of cause to doubt it at the time; and that overall, he did not make CMC aware that he was struggling with funds, instead he gave it the impression (and information) that he had significant savings and a high income.

Mr D requested an ombudsman's decision.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I do not uphold Mr D's complaint.

Appropriateness

In light of relevant supporting evidence, it should not be in dispute that Mr D's accounts with CMC were based on an execution only service. That service meant the appropriateness assessment only needed to establish his knowledge, experience and understanding of trading and risks; and that they made the accounts appropriate for him because, in simple terms, they were transferrable to what he would be trading in the accounts.

I am satisfied that – based on information provided by Mr D and upon which CMC was entitled to rely (especially as there does not appear to have been cause for it not to) – the account opened in 2013 was properly assessed as appropriate for Mr D. I am also satisfied that detailed and sufficient risk warnings were given to him at all relevant times.

There is no ongoing responsibility upon a firm to continue reviewing appropriateness after the initial assessment. The judgment in *QUINN v IG INDEX* [2018] EWHC 2478 (Ch) gives guidance to this effect. In Mr D's case, the implication is that the account remained appropriate for him from 2013 onwards. The regulator's rule at COBS 10.4.2 R reinforces this and says a firm "... *is not required to make a new assessment* [of appropriateness] *on the occasion of each separate transaction ...*" by its client(s), and that a firm complies with the rules for assessing appropriateness "... *provided that it makes the necessary appropriateness assessment before beginning that service.*"

Based on what appears to be credible and detailed evidence the account opened in 2018 and the professional client account upgrade in that year were also properly assessed as appropriate for Mr D. The regulator's rules do not require a firm to assess a client's expertise, competence or trading success rate in the context of appropriateness.

The losses (or, lack of trading success) in Mr D's account by 2018 – and the associated issues he has highlighted about funding problems and his need for rebates – were not supposed to be a part of CMC's appropriateness assessment. On balance, I also consider it plausible that it did not monitor, and lacked monitoring related information about, profit/loss and trading analysis for his accounts. Its execution only service meant it was not required to conduct such monitoring and analysis, so with no obligation to do so (and no associated payment/revenue in this respect) I consider it unlikely that CMC would have done so.

Elective Professional Upgrade

The investigator correctly quoted, to Mr D, the contents of the regulator's rules for assessing eligibility for this upgrade. CMC appears to have done the same previously. As such, I do not consider it necessary to quote the same.

The upgrading of Mr D's account complied with the relevant rules (under COB 3.5.3 R). The *qualitative* test under the rules was akin to, but was also a slight extension of, the appropriateness test – given that, unlike for the latter, the former included consideration of the account holder's 'expertise'. However, this falls short of capturing Mr D's argument that his trading performance should have been a key factor. The rules expressly provide that the assessment – including that of expertise – is to establish whether (or not) “... *the client is capable of making his own investment decisions and understanding the risks involved* ...” The rule did/does not extend to establishing whether (or not) the client was a competent and/or profitable trader.

At least two out of the rules' three *quantitative* tests had to be met, and were met by Mr D; and the rules' application procedure requirements were also met by the events featured in the upgrading of his account.

Mr D's arguments appear to relate more to what he views as wider elements that meant the upgrade should not have been allowed; and on his assertion that he was unduly encouraged (and coerced) to pursue the upgrade. With regards to the latter point, the balance of available evidence does not support him, especially as there is evidence of pressure from him – not upon him – to get the upgrade.

Furthermore, and as was relevant to his eligibility, he expressly requested the upgrade and had reason for doing so as he viewed the impending ESMA restrictions as a prospect that went against the sort trading he conducted. There is also a lack of evidence of coercion by CMC – with regards to rebates or in any other respect – upon him in this matter. As CMC says, the rebates were always initiated by his requests, and evidence of some of those requests show that he was sometimes forceful in asking for them.

With regards to the former point – about wider elements – as stated above, the elements that were supposed to be assessed for the appropriateness of the upgraded account and with regards to his eligibility for the upgraded account were prescribed by the regulator's rules, were properly established and did not include the wider issues Mr D has referred to.

CMC's overall responsibility for Mr D's best interests

The remainder of Mr D's arguments can reasonably be addressed under his reference to the regulator's client's best interests rule.

The regulator's Handbook includes a principle for businesses – under Principle 6 – to “... *pay due regard to the interests of its customers and treat them fairly*”. COBS 2.1 then says the client's best interests rule is about the requirement upon a firm to “... *act honestly, fairly and professionally in accordance with the best interests of its client* ...”

Firms provide clients with a variety of services, so the above rule is to be applied in the context of the relevant service. In Mr D's case, his account was based on an execution only service, in which CMC provided him with the trading facility but did not give him advice, did not manage his account, did not monitor his account and had no obligation to undertake or share responsibility for his trading (or trading outcomes). Unless CMC was made aware of Mr D's gambling problem – or ought reasonably to have been aware of it – I do not consider there is a basis to establish that it should have acted honestly, fairly and professionally to address it.

Available evidence suggests that Mr D did not disclose his problem to CMC until late 2018, as he complained or thereafter. Previously, he presented a different and somewhat mixed picture to CMC whereby he repeatedly sought rebates, had some negative balances but also gave CMC the impression that he was significantly wealthy and was a high value client that CMC should appreciate and must consider worth keeping – as opposed to losing him to a competitor firm. This can be gathered from a number of his contacts and correspondence with CMC. I do not accept that CMC ought reasonably to have concluded that there was a gambling or an unaffordability problem – or that his trading was out of control – from such a picture.

It must be noted that CMC was not responsible for assessing 'suitability' of Mr D's trading. Affordability usually arises in the consideration of suitability, not necessarily in the context of providing an execution only trading service (as CMC did). For firms like CMC and in the sector, the notion of account holders accumulating significant losses (or having negative balances) is not uncommon. Many of them include in their promotions, and account information, notices about the percentage of clients that make trading losses (and that most clients make losses). The fact that Mr D was making significant losses (and/or had negative balances), in isolation, would not have been enough for CMC to automatically conclude there was a gambling problem.

The same applies to the rebates Mr D repeatedly sought and the account funding issues he experienced. Primarily, CMC was not monitoring his trading habits and was not required to do so. Without being told he had a gambling problem, such a problem was not the obvious conclusion for it to draw in relation to the rebate requests and funding issues. For example, and based on evidence, the former probably indicated to CMC that he wanted to ensure that it acknowledged and gave him benefits for his importance as a high value and loyal customer. Some of his emails to CMC – including about rebates – express this. The latter – the funding and negative balance issues – should be viewed in the context of Mr D successfully funding his account numerous times over the years and doing so in high value amounts.

In this context, I am not persuaded that the incidents of funding and negative balance issues were enough to indicate to CMC that there was a gambling problem. Furthermore, as stated above, considering affordability was arguably beyond its responsibility.

Conclusion

Overall, on balance and for the reasons given above, I am not persuaded to uphold Mr D's complaint.

my final decision

For the reasons given above, I do not uphold Mr D's complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 15 June 2020.

Roy Kuku
Ombudsman