complaint

Mrs P's complaint is that CMC Spreadbet Plc (CMC) had a responsibility to address indications that her trading and/or loss accumulation was out of control but it did not do so. She says CMC's failure to do so resulted in her excessive gambling, which created a significant financial loss.

background

Mrs P opened her account with CMC around June 2011. CMC says that based on the information she provided at the time it "… *deemed a trading account to be appropriate* …" for her. The account was based on an execution only service. With regards to the opening of her account and the time period that defines her complaint, Mrs P says:

"*I agree that I looked suitable for spread betting but it was evident that I wasn't in every year since 2011*."

There appears to be no dispute that Mrs P's account was appropriate for her at the outset in 2011 and she says her complaint does not assert otherwise. Her complaint is about the period thereafter, during which she says CMC's knowledge that her trading (and losses) had become out of control meant it should have known that the account and trading had become inappropriate for her; and meant it should have put a stop to both.

CMC provided information to this service summarising the profit and loss activity in Mrs P's account as follows:

- 2011 - £344,309.40 trading profit.
- 2012 - £496,636 trading loss.
- 2013 - £96,177.40 trading loss.
- 2014 - £78,642.20 trading loss.
- 2015 - £13,542.50 trading loss.
- 2016 - £3,746 trading loss.
- 2017 - £17,113.50 trading loss.
- 2018 - £150,185 trading loss.

CMC also noted that over the years Mrs P's trades were liquidated 67 times and she had to fund her account 251 times.

Mrs P first raised her concerns to CMC in May 2018. CMC addressed it as a complaint and did not uphold its merits. After the matter was referred to this service in July it asserted that the complaint was made outside the regulator's time limits. This point was addressed in a separate decision about our jurisdiction and it was concluded that Mrs P's complaint had been made in time. One of our investigators then considered the merits of the complaint. In the main, she concluded as follows:

- The complaint should not be upheld.
- The regulator's Conduct of Business Sourcebook (COBS) rules, under COBS 10.2, address the requirement for a firm to assess appropriateness of a financial product or service for a consumer.
- Mrs P's complaint is not about appropriateness of her account at the outset, so that is not the dispute. The dispute is about whether (or not) CMC had an obligation to review appropriateness of her account thereafter. The judgment in QUINN v IG INDEX [2018] EWHC 2478 (Ch) – "the Quinn case" – gives guidance on how to

consider such a dispute. Based on this guidance, a firm does not have an ongoing responsibility to review appropriateness after a financial product or service has been correctly assessed to be appropriate at the outset.

- In terms of the wider argument about the out of control nature of Mrs P's trading and losses being against her interest, the judgement notes that COBS 2.1 requires a firm to act honestly and fairly in the best interest of its client but it does not require a firm to prevent its client from engaging in an execution only transaction.
- Based on the execution only basis for Mrs P's account, it could not be said that CMC were obliged to monitor the account, unless it had been made aware of an underlying problem. Mrs P notified it of her problems in May 2018 and CMC took action to avoid her situation worsening by first limiting the account and then closing it.
- There was a time when CMC offered to upgrade Mrs P's account, but evidence suggests that this was part of a general invitation to its clients to apply for such upgrading and that those who did apply were assessed against a set of eligibility criteria. Mrs P's application failed because it did not meet the criteria. If a change, such as an upgrade, had happened to the account CMC would have been required to reassess appropriateness, but no such change happened in Mrs P's case.

Mrs P had presented arguments to assert that CMC's business model was such that it benefitted from the out of control trading and loss accumulation that took place in her case and that it was aware of the increasing losses in her account but allowed it to continue in its interest – and against her interest. The investigator's view noted that an assessment of CMC's business model is beyond her remit and beyond the core issue – about reviewing appropriateness – that needs to be addressed in the complaint.

Mrs P did not accept the investigator's conclusion and she repeated her arguments about CMC's business model and about its knowledge of her losses. She also said that she never received a rejection to her application for an upgrade and that instead CMC called her to discuss how her application could be progressed if she produced certain documents. The matter was referred to an ombudsman.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I have reached the same conclusion as the investigator's for broadly the same reasons.

It is agreed and settled that Mrs P's account was appropriate for her at the outset. I have not seen evidence that casts this conclusion into doubt. One of the issues in dispute is whether (or not) CMC had an ongoing obligation to review appropriateness of Mrs P's execution only account service (and the traded products within it) and I consider that the investigator's conclusion has correctly been guided by the applicable rule(s) and case law. I acknowledge Mrs P's assertions about CMC being aware of her losses, benefiting from her losses and putting its interests above hers by doing nothing to address the gambling problem that, she says, it could see she had. This relates to the other issue in dispute – that is, whether (or not) CMC breached the regulatory *client's best interests* rule. In this respect, I also consider that the investigator's conclusion correctly reflects the applicable rule(s) and guidance from case law.

Appropriateness Review

- For the sake of clarity, it might be helpful to begin with the acknowledgement that the execution only service in Mrs P's account meant CMC's appropriateness assessment only needed to establish her knowledge and experience and understanding of risks, all in relation to the product to be traded in the account. It must be noted that the regulator's rules under COBS 10 do not require a firm to assess a client's expertise, competence or success rate in terms of the traded financial product. Guidance in the Quinn case supports this. It follows that even if CMC had a duty to review appropriateness – which, for reasons given below, I do not consider it had – it would not have been required to review Mrs P's expertise, competence or success rate.

- COBS 10.4.2 (R) 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 providing clients with a regulated service complies with the rules for assessing appropriateness "… *provided that it makes the necessary appropriateness assessment before beginning that service.*" This confirms a firm is not required to review appropriateness after the initial assessment.

- As the investigator noted, a change in Mrs P's account – which would arguably have involved a change in service – could have given rise to the need to review appropriateness. The duty to assess appropriateness must be discharged by a firm at the outset of providing a service to a client, so it follows that if a change of account creates a new service to the client the duty to assess the appropriateness of the new account/service arises at its outset. Mrs P disputes CMC's claim about her application for an account upgrade being declined and she says it discussed with her ways of progressing the application. It does not appear necessary to go further into this dispute. Whatever might have happened with the application, evidence appears to be that her account was not upgraded and did not change. So the idea of a review of appropriateness based on a change of account/service falls away.

Client's best interests rule

- This rule exists in COBS 2.1.1 (R), which says "*A firm must act honestly, fairly and professionally in accordance with the best interests of its client."*

- In straightforward terms, Mrs P says CMC was aware that her trading and losses had gone out of control, aware that it was not in her best interest and that it should have intervened to stop her trading. She says it did not intervene because accumulation of her losses was in CMC's interest and it prioritised that.

- CMC has disputed Mrs P's assertion with a rebuttal of its own. Mrs P says CMC would have been monitoring her account sufficiently to know that her trading and losses were out of control and not in her best interests. CMC essentially says that the execution only service defined the account and meant that it did not monitor the account as Mrs P asserts. I have not seen enough evidence to uphold Mrs P's assertion. CMC's system held and compiled records about her account and activity within it, but that does not automatically mean it was monitoring the account in the way that has been asserted or that would probably have been necessary to acquire knowledge of a potential gambling/trading/loss accumulation problem. It cannot be ignored that it would have been in the normal course of business for CMC and/or its system to record different types and sizes of losses and profits across its clients' accounts and in the non-advisory context CMC would not have been monitoring affordability for those clients. I do not suggest that awareness of a client's significant

net loss position or of one that spans and/or increases over a significant period of time cannot create notice of a gambling problem. It is arguable that it could, but it remains necessary to have a level of monitoring that identifies and translates raw trading loss information into cause for concern about a potential gambling problem. I am not persuaded that CMC applied such a level of monitoring to Mrs P's account or that it was obliged to do so.

- It does not appear to be in dispute that CMC acted correctly after it became aware of the problem in May 2018. In terms of a general duty upon a firm to protect a client from self-*inflicting economic harm*, guidance from the Quinn case says that in the absence of a contractual term, in "… *very clear express words spelling out such a duty* …", no such duty is to be read from COBS 2.1.1 (R). Without such a general duty, it remains arguable in Mrs P's case that CMC's awareness of her problem created a duty upon it – not a general duty but a duty qualified by that awareness – to take protective action. After all, that is what it did after its awareness in May 2018 and guidance from the Quinn case suggests that a duty in this context is arguable. However, Mrs P would need to show that the actions taken by CMC after May 2018 should have been taken earlier based on an earlier point of awareness. I do not consider that this has been established because, as I said above, I have not seen enough evidence to conclude that CMC was monitoring the account in the way Mrs P asserts or in a way that gave it an earlier point of awareness of her problem.

my decision

For the reasons given above, I do not uphold Mrs P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 11 February 2019.

Roy Kuku
ombudsman