complaint

Mr V's complaint is about a managed trading account he held, under a corporate name, with ITI Capital Limited (formerly known as FXCM and referred to as FXCM in this decision). Both parties are legally represented. In the main, Mr V's representative alleges, on his behalf, the following:

- Between 2013 and 2014 FXCM inappropriately promoted to Mr V its Protected Index Options Strategy (also known as PIOPT) service.
- In 2014 FXCM's recommendation, to Mr V, of a PIOPT based account was unsuitable because it was not a low risk strategy/service and it lacked the liquidity necessary to allow an exit. FXCM also, or initially, did not assess/properly assess suitability of the strategy/service/account for Mr V.
- FXCM did not provide the service in the account that it was supposed to provide.
- FXCM committed contractual and regulatory breaches in the matters alleged above.
- FXCM reneged on a guarantee to restore Mr V's capital regardless of trading losses.
- Mr V invested a total initial capital of around the equivalent of £50,000 (around £40,000 in 2014 and then £10,000 in 2015) and recovered only £4,200 in March 2016 when the account was closed. During the course of trading in the account, profit was made and lost. FXCM should pay compensation to Mr V in the form of either the profits lost during trading or, based on the guarantee, the balance (around £45,000) required to restore his initial capital.

background

FXCM disputes the complaint. In the main, its position is as follows:

- Mr V was introduced to FXCM by an introducing broker who had no role in FXCM and for whom FXCM had no responsibility. Mr V's company was its client and account holder – not Mr V himself – so it queried whether (or not) the complaint had been made by an eligible complainant.
- Specific documentary evidence shows that the circumstances in 2014, relevant to suitability of the strategy/account, were sufficiently assessed, that Mr V was given sufficient information about the PIOPT service alongside information about its terms and conditions for the account and that he was given sufficient risk warnings.
- FXCM did not unlawfully compromise Mr V's best interests in the venture and it did not encourage him to retain the strategy/account against his will, he was able to withdraw from and close the account at any point, but he chose not to.
- Mr V was not given a guarantee to restore his capital. The evidence he relies upon is an email dated after his account was closed and sent by his broker after the broker had left FXCM. The email was not binding on FXCM.

One of our adjudicators looked into the complaint and concluded that it should not be upheld. In the main, he said:

- Evidence supports the conclusion that the corporate entity account holder was/is a micro enterprise, is an eligible complainant and, as the corporate entity's sole owner and representative, Mr V is eligible to pursue to the complaint.
- Evidence does not support the assertion that FXCM guaranteed to restore Mr V's initial capital. There were also no guarantees in the PIOPT strategy/service. There is a lack of formal documentation about the assessment of suitability of the strategy for Mr V and "… *there are matters which are unaccounted* for …" but, overall/on

balance, these do not mean the strategy was unsuitable for Mr V. Sufficient information about the strategy and its risks was given and Mr V's overall profile did not mismatch the venture.
- There appears to have been no unreasonable obstruction to Mr V's ability to withdraw from the account.

Mr V's representative disagreed with this outcome. It argued that the adjudicator did not address the specific contractual and regulatory aspects within the complaint; that his conclusions were either erroneous or in conflict with evidence; and that his conclusion on the guarantee argument was "*astonishing*" as there is evidence to support the argument – contrary to what the adjudicator said. The matter was then 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.

Jurisdiction

I have considered FXCM's query about Mr V being (or not being) an eligible complainant. I have considered available evidence related to the matter and my conclusions are that the corporate entity that was used to open Mr V's account was/is a micro enterprise, it was/is wholly owned by him, it was/is not a typical going concern because it existed only for the purpose of ownership/holding of Mr V's investments and he is eligible to pursue the complaint on behalf of what is his own micro enterprise entity.

Core Arguments

Mr V's complaint is distinct, but it is worth noting that his complaint was presented to this service alongside a number of other complaints about the same PIOPT strategy, about broadly the same promotion of the strategy around roughly the same time and about promotion of the strategy to what seems to have been a specific cluster of investors – based on introductions from one to another. The complaints have had the same representative.

I have already determined one of the other complaints. Each complainant had individual circumstances but their representative appears to have presented a set of core arguments that have been reflected in each complaint. I consider that the conclusions I reached, in the other complaint, about some of its core arguments applies to Mr V's complaint. I repeat/summarise those conclusions as follows:

- The issues (including the alleged breaches) about promotion of the PIOPT strategy/service appear to be duplicated by the issues about suitability or unsuitability of the PIOPT service for Mr V. It does not appear to be in dispute that use of the PIOPT strategy was recommended as the basis for Mr V's managed account. It follows that whether (or not) it was appropriately promoted, the fact remains that it was also subsequently recommended by FXCM. The compensation that Mr V seeks arises from the assertion that the PIOPT was an unsuitable investment/strategy recommendation, so (un)suitability appears to be the main issue. To put it another way, even if Mr V can show that FXCM's promotion of the strategy was flawed or unlawful, the loss he claims for arose from recommendation and use of the strategy so the pursuit for compensation depends wholly or mainly on showing that the recommendation and use of the strategy was unsuitable.

- It is beyond this service's remit to consider punitive awards based on a firm allegedly breaching its regulatory obligations. Our remit, in the context of investment cases, is to consider the merits (or otherwise) of compensating a complainant for a financial loss that has been incurred from an investment(s). I have noted the references made by Mr V's representative to the regulatory principles and rules. Those that relate to FXCM's duty to make suitable recommendations will of course be relevant to my consideration of the complaint. However, it is arguable that those that go beyond the issue of (un)suitability also go beyond the considerations that are required in order to determine Mr V's claim for compensation.

- The other issue arising from Mr V's complaint and distinct from the matter of (un)suitability, is his assertion that he did not receive the type of service that he ought to have received from the account. Our approach for complaints about alleged failed services is to consider whether (or not) there is merit in the complaint and, if so, to consider an order for a refund of the charges or fees incurred by the complainant for the relevant service. The idea is that the complainant should be entitled to a refund of all such relevant fees given that the service, as promised/contracted, was not delivered. In Mr V's case no management or performance related fees appear to have been applied to his account. This is re-affirmed by the literature for the PIOPT strategy/service which confirms that no such fees will apply and by the fact that Mr V has not claimed for a refund of any fees. It follows that any issue about *service* lacks a basis for potential additional compensation to Mr V.

- Mr V's representative presented *additional claims* related to damages under section 138D(2) of the Financial Services and Markets Act 2000 (FSMA), alleged negligent misstatement, alleged professional negligence, alleged breach of fiduciary duty and alleged fraudulent and/or negligent misrepresentation. The first additional claim, related to section 138D(2) of FSMA, is about a firm allegedly breaching a regulatory rule and causing a loss to a client. This duplicates Mr V's claim for compensation for loss arising from FXCM's allegedly unsuitable PIOPT strategy. I consider that the other additional claims might or might not lend themselves to the consideration of the issue of alleged unsuitability, but no separate financial loss (or claim for compensation) has been presented in relation to them. The crux of the complaint remains Mr V's pursuit for compensation for loss arising from the allegedly unsuitable PIOPT strategy.

Suitability

Mr V's representative has quoted, accurately, the regulator's Conduct of Business Sourcebook (COBS) for this issue. It cites COBS 9 which, in straightforward terms, means that FXCM was required to know enough about Mr V's investor profile in order to ensure that the PIOPT strategy was suitable for him.

The level of available record about FXCM's assessment of suitability in Mr V's case could be better. FXCM has given reasons why the documentation that is available is not as comprehensive as we would consider it could have been. I am not persuaded that it is necessary to determine the merits of its explanation, the fact remains that this service appears to have been given the documentation that is available and I have not seen evidence to suggest that more is available than we have been given. The question that arises is whether (or not) there is enough to consider the suitability (or otherwise) of the

PIOPT strategy for Mr V. Overall and on balance, I am persuaded that there is enough evidence in this respect. I have considered the following:

- Mr V held an interest in the strategy even before it was promoted to him. Email evidence shows that he did not know what it entailed but his interest arose when the director of his micro enterprise entity introduced him to an introducing broker (IB) and to FXCM – the IB was independent of FXCM. Mr V followed up the introduction with a request, to FXCM, for more information and eventually the PIOPT based account was recommended to him and was managed by FXCM on a discretionary and then advisory basis. I have mentioned this background because it is noteworthy that the strategy was something Mr V wanted to be involved in from the outset and, it appears, before any contact with FXCM. Undoubtedly, FXCM still had the responsibility to ensure that the strategy was suitable for him and his circumstances, but with the initial interest that he had in it FXCM's assessment would mainly (and reasonably) have related to his understanding of the PIOPT strategy, his attitude towards risk (ATR), affordability and his capacity for loss. It is arguable that his interest in the strategy made his objective implicit – that is, to make money from the strategy – and I do not consider that other or wider aspects of suitability (such the consideration of asset class(es) or diversification, for example) would have been as relevant as they could have been in a case with different circumstances.

- No guarantees were given with the PIOPT strategy or account. FXCM says information about the strategy, about the account and about risks (risk warnings) can be found in the introducing broker disclosure form (which Mr V signed), in the PIOPT presentation (which he received), in the PIOPT data sheet (which he also received) and in FXCM's terms of business for the account. I agree and, overall, I consider that the body of information that was made available to Mr V about the strategy, the account and the associated risks was sufficient. In terms of risks, I can understand his representative's view that the strategy's presentation focused on its *selling points*, but the presentation did not give guarantees and Mr V had enough information about the risks in the venture (including within a risk warning/disclaimer section in the presentation document) to give him a balanced view on those *selling points*.

- In 2014, Mr V could reasonably and broadly be described as a high net worth investor (around $850,000 net worth) with substantial liquid assets (around $450,000). In terms of affordability, I do not consider that Mr V could not afford the allocation of around £50,000 (around $70,000 at the time) from his liquid assets to the PIOPT based account. I consider that this point also applies to his capacity for loss at the time. For the sake of clarity, I do not suggest that the loss of the equivalent of £50,000 would have been inconsequential for Mr V. The point is that he had capacity, within his overall wealth and especially in his liquid wealth, to absorb such a loss. The introducing broker disclosure form mentioned above, which Mr V signed, gave notice that he should only deposit funds he could afford to lose.

- The lack of suitability assessment documentation has not helped my consideration of what Mr V's ATR was in 2014 – but, given wider available evidence, I am persuaded that I have enough information to draw a conclusion in this respect. The assessment would (or should) have taken place based on the corporate entity that Mr V used for the account (plus his private capacity alongside that). I have seen evidence of FXCM requesting additional information from Mr V – which he appears to have provided – specifically because the account was being set up for a corporate entity. A questionnaire Mr V completed and returned to FXCM made it clear that the entity

was wholly owned by him, that its principal activity was "*Consultancy services and private investments*" and that the money to be used for investment was his/his company's money. In addition, Mr V wrote to FXCM on 22 October 2014, as part of the account opening process, and said the corporate entity "… *provides consultancy services on a range of sectors … Separately, it is intended to be used as a vehicle to invest in specific and specialised investment opportunities for the benefit of its shareholder One of these opportunities is the options strategy … which is the primary purpose of opening this account*." The ideal would have been record of a straightforward and reasonably detailed ATR assessment but, in its absence, I am persuaded that the notion of a hybrid corporate/private investor with a pre-determined objective to invest in "specialised investment opportunities" like the PIOPT strategy – as opposed to standard or mainstream investments – suggests a high ATR more than it suggests a balanced or low ATR. Mr V subsequently affirmed a high ATR within emails in 2016 which show that even after he had experienced lost profits and lost almost all of his capital, and even after he had closed his FXCM account on seemingly bad terms, his interest in the strategy remained and he was in discussions about pursuing that interest in a new fund that was to be set up. Overall, I consider that Mr V/his corporate entity had the ATR to match the PIOPT strategy.

- Mr V's representative argues that the word "protected" within the strategy's name was misleading. I consider that the risk warnings and absence of a guarantee made it reasonably clear that the strategy was not risk free; I have not seen evidence of the word "protected" being defined, at the time, in relation to Mr V's capital; the word "protected" appears to have related to the strategy's approach in which loss exposure was predetermined in order to know the maximum potential loss in a trade at the outset; as I mentioned above, Mr V was given notice that he should deposit only money he could afford to lose so this, amongst the other risk notices, would have informed him that his capital was not protected.

- In terms of Mr V's ability to withdraw or exit from the account, I agree with the adjudicator's conclusion that Mr V does not appear to have been unreasonably hindered in this respect. In addition, the strategy does not appear to have had a withdrawal or exit penalty.

Overall and on balance, I am persuaded that that the strategy/account was not unsuitable for Mr V and I also do not consider that FXCM acted against his best interests in this respect.

Guarantee

I consider the argument about a guarantee from FXCM to restore Mr V's capital to be somewhat misguided, for the following reasons:

- The account was opened around October 2014 and closed in March 2016. There appears to be no evidence from the time the account was opened, or preceding the opening of the account, that supports the argument about a guarantee. In contrast, and as mentioned above, there is a body of evidence showing that Mr V was made aware of the risks in the venture and made aware that his capital could be lost.

- Evidence (in the form of emails) which Mr V might rely upon in support of his argument appears to arise only in 2016. However, none of the emails feature FXCM. There is an exchange of emails in January 2016 only between IB and Mr V, and FXCM does not even appear to have been copied into the emails. The exchange

shows the IB telling Mr V that the capital he lost in his FXCM account could/would be recovered in a new fund (based on the same or similar PIOPT strategy) that the IB and Mr V's FXCM broker was planning to set up – after the FXCM broker's planned departure from FXCM and after Mr V closed his FXCM account. The point is that, at best, this exchange suggests perhaps a personal promise (not necessarily a guarantee) from the IB to Mr V that was defined outside of FXCM and unrelated to FXCM. It was not a promise from FXCM and the IB did not represent FXCM; it was dependent on a new fund that was to be set up after the broker left FXCM, so it relied upon the broker's departure from FXCM; it was dependent on Mr V closing his FXCM account and moving to the new fund; in simple terms, the email exchange and its contents appear to have been remote to FXCM.

- Reference has also been made, in support of the alleged guarantee, to email correspondence in May 2016 – which continued into June 2016. I consider that the same conclusion applies in this respect too. By this time the broker had left FXCM so, even though he features in the correspondence, he did not represent FXCM.

my final decision

For the reasons given above, I do not uphold Mr V's complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 17 February 2019.

Roy Kuku
ombudsman