



<u>Decision Ref:</u>	2020-0290
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Misrepresentation (at point of sale or after) Delayed or inadequate communication Maladministration
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Provider offers an investment trading service covering Contracts For Difference (CFDs), Options, and Spread betting in Foreign Exchange, commodities, metals and indices, equities, bonds and Exchange Traded Funds.

The Complainants state that they had an agreement in place with a cap on the maximum equity that could be used by third parties authorised through the Provider. The Complainants claim that this cap was breached resulting in them losing a significant amount of their monies.

The Complainants submit that it is clear that this is 100% the Provider's responsibility.

The complaint is that the Provider breached the agreement by allowing losses on the investment which exceeded the equity cap (the minimum amount the Complainants were prepared to lose), without any notice to them.

The Complainants' Case

The Complainants state that on 7th February 2015 they signed a contract with the Money Manager and the Provider for trading. The Complainants say that each of them put €30,000 to be managed with a gain objective between 10% and 20%.

The Complainants state that in these contracts they also put a security limit at €23,000 to be sure that regarding risks they would never lose more than €7,000 per person.

The Complainants submit that at the beginning everything was going alright with regular check points and positive results. The Complainants state however from July 2015 things changed, and they received no answer to their requests for information. The Complainants state that finally on 15 September 2015 they received an answer from the Money Manager who told them that security limits were by-passed without their validation or any information.

The Complainants' position is that after a lot of phone calls and e-mails, the General Manager for the Provider wrote advising that the Money Manager and the Provider decided to action without any consideration regarding limits in contracts. The Complainants point to a loss on their investments, which they state is not acceptable.

The Complainants state that through different e-mails they understand that in fact, even if the Money Manager and the operator who worked on the Provider's platform are officially freelance, all decisions are made by the Provider and the Money Manager and the operator gets money from the Provider. The Complainants submits that it is clear that in fact it is 100% the Provider's business and responsibility.

As regards a remedy, the Complainants state that they are seeking €23,000 for each person – the minimum security signed in the contracts. The Complainants state however as no one explained to them the real way the trading was going to work in the business with the Provider and it never accepted its mistake, with the Provider saying "We are not responsible", the Complainants consider that the manner in which they lost out, is not a mistake. Therefore, the Complainants state that they want to get back 100% of their money, that is, €30,000 each.

The Provider's Case

The Provider submits that the accounts were first opened on 7th February 2015. The Provider states that its clients register online and by doing so explicitly agree to be bound by the Terms and Conditions.

The Provider states that the Complainants came to the Provider through their connection to the 3rd party to whom a Power of Attorney was granted.

The Provider advise that the Terms and conditions are applicable to all instruments.

The Provider states that it does not provide investment advice, nor make any recommendations to its clients in relation to trading on their account or to the appointment of Money Managers to trade on clients' accounts. The Provider submits it

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facilitates clients who wish to appoint a Money Manager of their own choosing. The Provider explains that it does so by linking the account of the client to that of the third party appointed by the client to trade on their account.

It is the Provider's position that it ensures that all clients sign the Power of Attorney so that they fully understand the conditions under which the account may be operated. The Provider states that on receipt of a signed Power of Attorney, the Provider acts in the client's interest by complying with the terms of the Power of Attorney whereby as stipulated in points 1 and 2, the Trading Agent has full control over the account.

The Provider states that the completion of the minimum equity form at the outset of the relationship allows the Provider to set a level whereby all open positions may be closed should the account equity drop to a specific level. The Provider states that under the Power of Attorney, the Trading Agent may change these levels as stipulated in points 1 and 2 of the Power of Attorney.

The Provider states that it executed all trades placed by the Trading Agent on the clients account without the need for further authorisation from the client and acting in accordance with the Trading Agents instructions with regard to the account minimum equity level.

The Provider states that the terms and conditions expressly state the risks associated with trading contracts for difference. It is the Provider's position that under no circumstances has it misled the clients regarding advantages or disadvantages. The Provider states that its internal processes were followed with regard to the operations of the clients account.

The Provider states that, it, as a market maker, is the counterparty to the client trades. The Provider states that this is a noted conflict of interest in its Conflicts of Interest policy on its website.

The Provider submits that with respect to the granting of Power of Attorney, the Provider states clearly within the terms and conditions the relationship between the Provider and third parties as well as the remuneration structure in place.

The Provider states that its relationship with the client is to act as the counterparty to its trades and to execute all trades as per its Order Execution policy. The Provider states that furthermore, it is obliged to safeguard the client's assets and to provide statements of all activity on the clients account.

The Provider submits that clients at all times had live access to the trading taking place on their accounts. The Provider explains that it is an online broker, that its business model involves internet search optimisation marketing to strategically place its advertisements, which relate to self-trading accounts, whereby clients can download its trading platform and open trading positions.

The Provider states that with respect to the Complainants, it did not market to them, they came to the Provider through their association with their Money Manager. The Provider states that it provided the Power of Attorney and minimum equity level forms.

The Provider states that once the Power of Attorney was signed by the clients it was linked to the accounts and it executed the Money Manager's instructions as received.

The Provider submits that it does not have a responsibility to monitor the trading on any clients account. The Provider states that all clients are provided with trading platform login details enabling them to view their account at any time.

The Provider refers to the Complainants' statement on the complaint form that they were expecting a gain of between 10% and 20%. The Provider's response is that it does not make any such statements in relation to investment returns. The Provider states that the Complainants had a relationship with the Money Manager and had a certain expectation of results. The Provider states that, on the contrary, it provides explicit risk warnings within its terms and conditions and on every page of its website regarding the high-risk nature of trading and that there are no guarantees of profits.

The Provider rejects the accusation that "*all decisions are made by [the Provider]*". The Provider states that it acted in accordance with the Power of Attorney in place on the clients' accounts. The Provider states that it also rejects the accusation that "*it is clear that in fact it is a 100% [the Provider] business and responsibility*". The Provider's position is that it has no affiliation with any third partners in respect of portfolio management. The Provider states that Clients wishing to have a third-party trade on their account do so at their own prerogative and at their own risk on acceptance of the terms and conditions set down in the Power of Attorney.

Evidence

Power of Attorney

The Provider submitted copies of the Power of Attorney signed by the Complainants, and refer specifically to the below sections.

"1. The Trader hereby authorises the Trading Agent and appoints the Trading Agent as the Traders lawful attorney to trade the Trading Account on behalf of the Trader, to the fullest extent permitted, subject to and in accordance with the Terms and Conditions with Trader, and to do all acts and things in connection therewith as the Trading Agent may consider necessary or desirable, on behalf of the Trader, for the Trader's Trading Account and risk and in the Trader's name or number on [the Provider] books and records.

2. Without prejudice to the above, the Trader acknowledges and understands that further to the Terms and Conditions, [the Provider] is upon receipt of this POA

authorised to follow the instructions of the Trading Agent in every respect with regard to the Trading Account.

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7.The Trading Agent represents, and Trader hereby confirms, that he/she/it has all of the required governmental approvals, licenses and permits for managing the Account and performing all the actions set forth herein.

8.The Trader acknowledges that [The Provider] has not solicited, or in any other way recommended, his/her participation in trading with [the Provider] pursuant to any particular trading system. The Trader has made inquiries and conducted research sufficient to make an informed investment decision.

9.[The Provider] will not be liable in any way for any actions taken or failed to be taken by the Trading Agent, or for any losses, costs or expenses incurred by the Trader or any other third-party as a result of the Trading Agent's actions. The Trading Agent is not an employee or agent of [the Provider] and [the Provider] does not vouch or endorse the services provided by the Trading Agent.

11. The Trader acknowledges that [the Provider] cannot and does not guarantee profits or avoid the risk of loss or, under some circumstances, even limit the extent of the potential loss to the Account, whether through a Trading Agent or otherwise.

12. The Trader further confirms that she/he understands the potential losses embodied in the aforementioned trading activities and that the only certainty is that the trading contemplated with the Account possesses a high degree of risk.

13. Notwithstanding that the Trader is hereby granting trading authority and a power of attorney to the Trading Agent, including without limitation, access to Account records and statements, the Trader acknowledges that the Account remains his/her full responsibility and hereby agrees to frequently and closely scrutinize all activity in the Account”

“MARKETING PARTNER REFERRAL DISCLOSURE

28.1 [The Provider] may engage with advertising affiliates/referrers/marketing partner ("Marketing Partners") who are wholly separate and independent from one another and from [the Provider]. Any agreement between [the Provider] and Marketing Partner does not establish a joint venture or partnership and Marketing Partner is not an agent or employee of [the Provider].

28.1.1 [The Provider] does not control, and cannot endorse or vouch for the accuracy or completeness of any information or advice Customer may have received or may

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receive in the future from [the Provider's] Marketing Partners or from any other person not employed by, or acting on behalf of [the Provider], regarding the risks involved in the trading of Forex, CFDs, Options and Spread Betting or the risks involved in such trading.

28.1.2 Since Marketing Partner is not an employee or agent of [the Provider], [the Provider] does not endorse or vouch for the services provided by the Marketing Partner. It is the Customer's responsibility to perform necessary due diligence on the Marketing Partner prior to using any of their services.

28.1.3 Customer understands that in order to trade with [the Provider] the Customer must open an account directly with [the Provider]. [The Provider] makes available appropriate risk disclosure information to all Customers when they open accounts. Customers should read that information carefully and should not rely on any information to the contrary from any other source.

28.1.7 Customer understands and acknowledges that [the Provider] may remunerate a Marketing Partner for referring Customer to [the Provider] and that such remuneration may be on a per-trade basis or other basis. Further, the Client has a right to be informed of the precise nature of such remuneration.

28.1.8 Customer acknowledges that a Marketing Partner may also, in some circumstances, be a Trading Agent. Customer understands that by using a Trading Agent, Customer may incur a mark-up, above and beyond the ordinary spread generally provided.

TRADING AGENTS

29.1 Customer acknowledges that should Customer choose to grant trading authority or control over Customer's account to a third party ("Trading Agent"), whether on a discretionary or nondiscretionary basis, Customer does so at its own risk".

The Complaint for Adjudication

The complaint is that the Provider breached the agreement by allowing losses on the investment which exceeded the equity cap (the minimum amount the Complainants were prepared to lose), without any notice to them.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's

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response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **10 August 2020**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Analysis

The Provider's services enable clients to trade in various financial instruments. It is engaged in the business of providing an online trading platform.

It is the Complainants' position is that the Provider made investment decisions with no authorisation from them and the process is so complex that it is easy for the Provider to say, it did not know. The Complainants submit that the Provider did not advise them promptly about the decision taken to bypass the security level, specified by them.

It is clear that there were specific equity caps signed off upon by the Complainants, which the Provider was aware of. It is the Provider's position that the completion of the minimum equity forms at the outset of the relationship was for the purpose of allowing the Provider to set a level whereby all open positions would be closed should the account equity drop to a specific level. It is the Provider's position that it was not responsible where those equity caps are overridden by the appointed Money Manager. However, I consider it is unreasonable that the Provider should not have in place checks and balances where such equity caps are in place, to ensure that the overriding of them is specifically evidenced in writing from the clients. I do not consider it reasonable for the Provider to ignore the equity caps merely on the basis of the word of the Money Manager or a third party. If that were the position, it begs the question as to why the equity cap forms (which are on the Provider's letter headed paper) were required to be filled out and signed off upon by the Complainants. If changes to those signed minimum equity forms were to be possible without further signed evidence from the Complainants, I consider that it would

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have been reasonable of the Provider to at least advise the Complainants that the forms could be overridden by a Money Manager or third party. I consider that the possibility that the forms could be overridden without any further communication being required by the Provider, from the Complainants, was not clearly communicated to the Complainants by the Provider. There was no evidence submitted by the Provider indicating when or in what manner the change in investment approach was communicated to the Provider by the Money Manager or any third party.

While I accept that the Power of Attorney was so broad as to allow the Money Manager to invest outside what was stated on the minimum equity forms, I do not accept that the Provider was as clear as it should have been from the outset in relation to the possibility of a change by another party to the minimum equity sum set out on the forms supplied by the Provider, and signed off upon by the Complainants, without the need for their further signature, confirming the change.

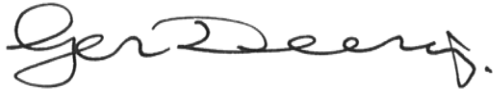
As there were third parties with responsibilities in relation to the trading of the Complainants' monies, and as this determination only relates to the Provider's role in the matter, I do not hold the Provider wholly responsible for the uncommunicated change to the minimum equity form, or the resulting losses. I must also point out the Complainants signed up to this far reaching Power of Attorney which permitted the Money Manager / third party to make investment changes on their behalf.

For the reasons outlined in this Decision, I partially uphold this complaint and I direct that the Provider pay the Complainants the compensatory sum of €8,000 (eight thousand euro).

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €8,000, to an account of the Complainants choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

01 September 2020

Pursuant to *Section 62 of the Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.