



<b><u>Decision Ref:</u></b>	2020-0438
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Cash Investment
<b><u>Conduct(s) complained of:</u></b>	Dissatisfaction with final fund value Delayed or inadequate communication Misrepresentation (at point of sale or after) Failure to consider suitability
<b><u>Outcome:</u></b>	Rejected

## **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

### **Background**

The Provider, against which this complaint is made, supplies a service which allows clients to trade in various financial instruments. Investments are made by way of an online trading platform.

The Complainant deposited funds with the Provider for the purposes of investing.

### **The Complainant's Case**

The Complainant's position is that the Provider failed to explain any details in relation to the meanings of such concepts as "*margins*", "*closing*" or "*leverage*". In addition, when she sought to make contact with the Provider's representative (Mr. HR), as her personal financial analyst, he was not available to her on the telephone to give support. The Complainant contends that because of the lack of information made available by the Provider, the Provider is responsible for the loss of the full amount of her investment, from the time when she started trading through the Provider in or about 2 February 2017. It is the Complainant's position that over a period of 4 weeks she had lost approximately €214,000.

The Complainant's position is that she made profits in the beginning. The Complainant says that after some time the profits started to be losses and Mr. HR asked her to put

more money into her account. The Complainant states that Mr HR told her that he would help her to make profits again and he even gave her some monetary bonuses, when she would put money in. The Complainant submits that after being a victim of the Provider she started doing research about online brokers and online trading and she found out that this is part of the strategy the Provider is using. The Complainant notes that the Provider would deny this.

The Complainant says that leverage effect and the margin calls are not for beginners in trading and were not possible to understand. The Complainant submits that because of the losses many clients made, and the misleading terms and conditions for small investors, The *European Securities and Markets Authority* (ESMA) changed the rules from the beginning of 1.07.2018. The Complainant states that Binary options trading is now forbidden in the whole of Europe and the leverage effect is changed. The Complainant's position is that the leverage effect the Provider is using is one of the main reasons small investors will lose their money without understanding why they lost. The Complainant says that if you ask the Provider about the risks, the Provider tells you that there is no risk.

The Complainant's position is that the Provider purposely leaves small investors without knowledge, and even worse, tells the clients the opposite – *“that they cannot make losses, it is very easy and in the beginning this always works”*. The Complainant states that the result is that small investors like herself start to invest more and lose all their money, like she did. The Complainant submits that this is a very clever system with only one purpose, which the Complainant says: *“make small investors lose their savings”*.

The Complainant states that it is not possible for her to check the prices without having access to the Provider's trading platform system. The Complainant says other trading platform companies make it possible that online brokers can manipulate the prices for every single trader.

The Complainant states that the Provider is a market maker and can make its own prices. The Complainant says that as a beginner she did not know what this meant, but this is the main approach to the business activities. The Complainant states that a client has no chance to make profits, because the Provider as a market maker makes the prices, and says that the Provider does not want to make losses. The Complainant submits that a client is trading against the company of which he/she is a customer. The Complainant says that this policy is, according to her understanding, incorrect and makes "cheating" on customers necessary, even if the Provider says the long or short position of clients is not relevant. The Complainant says that if you look to the trading volume and the profits from these companies you can only assume that traders have to make very big losses.

The Complainant states that from the outset she indicated that she does not have experience with trading.

The Complainant's complaint, is that the Provider opened an account without providing her with the correct information, and permitted her to enter into Contracts For Difference (CFD) trading, without an adequate explanation as to the risks involved.

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### **The Provider's Case**

In relation to the Provider's role regarding the facilitation of the investment and the role of the Provider and Complainant in relation to the fund choice or the investment strategy, the Provider states that it does not provide investment advice.

The Provider states that it has complied with the General Principles of the Consumer Protection Code.

The Provider states that it does not give investment advice, but does attempt to provide all information necessary for its clients to be able to trade using its trading platform. The Provider says that the Complainant successfully traded her account and generated significant profits which is evidence that the Provider did act with due care and diligence in the best interests of the Complainant. The Provider submits that the Complainant lost her funds because of a fall in the price of the Dow Jones.

The Provider says that the terms and conditions, including its Risk Disclosure expressly state the risks associated with trading contracts for difference. The Provider says that under no circumstances has it misled the Complainant regarding advantages or disadvantages of trading.

The Provider states that it has in place systems and controls to monitor trading activity to ensure accurate prices are provided to its clients. The Provider states that it is not disputing the execution of the Complainant's trades.

As regards its regulatory obligation to avoid conflicts of interest, the Provider states that as a market maker it is the counterparty to the client trades. And that this is a noted conflict of interest in its Conflicts of Interest policy on its website.

The Provider submits that as a Markets in Financial Instruments Directive (MiFID) investment firm, it is required to assess the appropriateness of trading for all potential clients. The Provider states that to this effect its registration page contains a number of questions which are designed to assess appropriateness. The Provider says that as part of the Complainant's registration she did indicate that she had no experience in trading contracts for difference. The Provider states that on the basis of this information its website created a popup message to advise the Complainant that: *"Based on the information provided, trading contracts for difference may not be appropriate for you"*. The Provider says that in order to complete the registration the Complainant was required to click to confirm her agreement to continue despite the warning.

The Provider says that this is set down in its Terms and Conditions under section 6 "Appropriateness of Trading".

*"6.1 Although [the Provider] issues general market recommendations, these should not be construed as personal recommendations or advice to trade with [the Provider]."*

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*As such we are under no obligation to assess the suitability or otherwise of the Customer trading Forex, CFDs, Options and Spread Betting with [the Provider].*

*6.2 All trades entered into by Customer represent an independent decision by the Customer to trade with [the Provider].*

*6.3 However, where the customer decides to trade with [the Provider] we are required to assess your knowledge and experience of trading Forex, CFDs, Options and Spread Betting in order to determine the appropriateness of trading with respect to the financial instruments which [the Provider] provides. This information is captured on our application form.*

*6.4 If we consider on the basis of the information that you provide that trading in the contracts we offer is not appropriate for you, we shall warn you of this. Any such warning is not intended as investment advice and must not be relied upon as such.*

*6.5 Our obligation is to assess your knowledge and experience and not to assess the suitability of a given investment in your circumstances”.*

The Provider states that the Complainant was trading on her own account without advice. The Provider states that the Complainant was warned that trading may not be appropriate for her, but chose to complete her registration nonetheless. The Provider says furthermore, the Complainant continued to trade up until the point where her trading positions went against her. The Provider states that it has not provided any advice or instruction to the Complainant nor has it made statements regarding the level of risk associated with trading CFD's. The Provider states that the Complainant was provided with the same risk warnings and terms and conditions as all its clients.

The Provider states that it is the counterparty to its client's trades, and this is disclosed to clients at the outset. The Provider says that its motive is indeed for clients to trade with the Provider. The Provider states that it uses a VAR (Value at Risk) system to aggregate its clients trading position and it hedges the exposure generated by clients with its hedging counterparties. The Provider says that as such the long or short position of clients is not relevant to the Provider as it offsets this risk externally.

The Provider submits that the Complainant is arguing that it has not complied with its requirement to assess the appropriateness of trading for her. The Provider states that this is not true, as the Complainant was assessed and duly warned in this regard.

The Provider's position is that this is a unique complaint on the basis that the Complainant regardless of her level of previous trading experience upon registering an account with the Provider, had by trading with the Provider become a successful trader. In just two months the Complainant had accumulated closed profits of approx. €55,000 based on her initial deposit of €27,000. The Provider submits that the Complainant retained the choice throughout to withdraw these profits or even just her initial investment. The Provider says that the Complainant also was not required to continue to open new positions exposing her capital.

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The Provider submitted the Complainant's Account Balance & Equity statement. This indicates that on 1 March 2017, the Complainant had €82,096 in Equity. The Provider says that this means that she had no open trading positions and this amount was available to withdraw immediately.

The Provider also submitted the Complainant's trading statement. The trading statement shows that the Complainant continued to go long on the DJ30 (Dow Jones 30) on 1 March however the price of the DJ30 fell on 2 March 2017 resulting in a fall in her Equity to €41,710. The Provider's position is that again the Complainant had the opportunity to withdraw these funds. The Provider says that the Complainant continued to trade however and by 3 March 2017 her Equity had fallen to €17,456. The Provider says that at this point the Complainant had now lost part of her invested capital. The Provider says that this however was not the first time this had occurred. From January up until 7 February 2017 the Complainant lost €6,617 trading on the DJ30.

The Complainant then proceeded to deposit €10,000 on 8 February 2017 and €10,000 on 9 February 2017.

The Provider states that the Complainant's complaint suggests that she simply invested her funds which were lost and this is the Provider's fault. The Provider's position is that this is not true, and that the Complainant lost funds initially but decided of her own choosing to deposit further funds. The Provider states that the Complainant claims to have not been aware of the risk of CFD's upon registration, a statement the Provider rejects. The Provider's position is that after losing her initial funds, the Complainant must certainly have become aware in February 2017 of the risks of trading CFD's but did not choose to complain. The Provider says that perhaps €6,000 is a loss which was acceptable to the Complainant, but the loss of €27,000 is not and the further loss of €55,000 in profits was simply too much for her to accept.

The Provider submits furthermore, that the Complainant's complaint related to the loss of €240,000 can only be calculated by counting the value of closed profitable positions. The Provider states that the Complainant's trading statement proves that she did not have this amount in her trading account at any stage.

The Provider states that the Complainant was furnished the standard bonus that all clients at the time were free to choose to avail of the bonus or not. The Provider says that in this instance, the Complainant selected to avail of the bonus. The Provider submits that it does not encourage clients to further trade. The Provider says that the Complainant executed all her own trades through her account on the Provider's online platforms.

The Provider says that the Complainant solely executed all her own trades through her online account. The Provider explains that when clients place an order to enter or close a transaction, this provides an instruction to the platform to place an order on clients' account based on real time prices which is automatically derived from the market.

The Provider states that markets are subject to many influences which may result in rapid price fluctuations that can go against or in favour of positions held by traders resulting in profits or losses. The Provider submits that risks associated with trading on a market are

fluctuations in the price of the underlying market that will have an effect on the profitability of a client's position.

The Provider states that in this instance, the fluctuations in the market went against the Complainant's positions resulting in losses for the Complainant.

### **Evidence**

Recordings and translated transcripts of telephone calls between the Complainant and the Provider have been furnished in evidence. I have considered the content of the transcripts of the calls and set out below some of the relevant content.

#### **Excerpts from the transcripts of telephone calls between the Complainant and the Provider's representative of 04 January 2017**

Complainant - *"I am very experienced in shares, but no experience with CFDs and other stuff. And would like to test it out now a bit .."*

Mr. HR: *"Then please check on our website there is education. And under education please pay attention, there are webinars. 2 times a week. The Service is not so good right now in the new year. But it will run again".*

Complainant: *"I saw that, yes, okay"*

Mr. HR: *"Stay with it. It's for beginners and also for professionals. It's really good and it's for free".*

Mr. HR: *"Right and [Complainant], you have said with shares you have experience, and with CFDs less?"*

Complainant: *"Yes"*

Mr. HR: *"With respect, the most of our customers have problems with the leverage. You know that here you trade all with leverage?"*

Complainant: *"Yes"*

Mr. HR: *"Do you also know how this works?"*

Complainant: *"Not really, I am just about to... I have to learn that now. Yes, that means ...if you buy for a certain price, then it's actually a different amount. That is what you mean with leverage, right?"*

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Mr. HR: *"That's right. I will try to explain it to you in 3 minutes, and it should not be then a problem for you".* [An explanation was then given to the Complainant about leveraging and margins]

Mr. HR: *"We have German shares, approximately 12, if I remember right. And they are all shares of the DAX".*

Complainant: *"Yes, okay. I was more interested in Chinese shares".*

Mr HR: *"No, but you can trade the Chinese Index".*

Complainant: *"Yes right. The Chinese index I can take, right?"*

Mr HR: *"Right, this one you can take, we have that".*

Mr HR: *"And something else, don't trade like crazy. There are a lot of customers, that's why I am giving you this hint, they think the more they open positions the bigger is the chance they can earn money, but this is not so true. The opposite, the more positions you open, the bigger is the risk to lose the money. Watch out for opportunities. Now when you are trying with a few cents to get a feeling for it, this is not what I mean. But when you are really starting to trade then watch out not to click like crazy, but look for opportunities for chances, for entry points. Yes that is what I think".*

**Excerpt from the telephone call of 30 March 2017**

Complainant: *"Yes it's a pity. In principle I didn't think it was that bad. I also don't want to make it so bad, but ehm the support is not so good, as it should be. And I think, when you are more careful here, that you can be maybe also successful. But for a beginner..."*

**The Complaint for Adjudication**

The Complainant for adjudication is that the Provider opened an account for the Complainant without providing her with the correct information, and permitted her to enter into Contracts For Difference (CFD) trading, without an adequate explanation as to the risks involved.

**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 Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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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 **09 November 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**

In her submissions the Complainant had stated that the Provider: *“stole the whole amount of 240,000Euro”*. The Complainant referred to fraudulent activity and it was noted that the Complainant stated that she went to the police in Germany to report details of her interactions with the Provider and that she wanted: *“to report a case of fraud and theft and identity fraud”* in circumstances where she believed that *“there is some case of cyber crime behind it, because the platforms are connected”*.

The Complainant stated that she reported details of her interactions with a third party Bank, to other Financial Authorities, in the context of the transfer of funds to facilitate her trading account with the respondent provider.

The Complainant was advised by way of letter from this Office dated **26 March 2018** that I have no jurisdiction to investigate any allegation of fraudulent activity. The Complainant was advised that theft and fraud are criminal offences and that this Office is not in a position to investigate or to give the appropriate sanctions in relation to such matters. The Complainant was advised that this office is neither established nor equipped to deal with situations involving fraudulent actions.

Having considered the terms of the letter from this Office of **26 March 2018**, the Complainant confirmed that she was not in fact alleging fraud against the Provider and rather, indicated that her complaint against the Provider is that it opened an account without providing her with the correct information, and permitted her to enter into CFD trading, without an adequate explanation as to the risks involved. The Complainant indicated that the Provider failed to explain any details in relation to the meaning of

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“margins”, “closing” or “leverage”. The Complainant also indicated that when she sought to make further contact with the Provider’s representative, as her personal financial analyst, he was not available on the phone and no support was available to her. The Complainant’s view is that because of the lack of information made available by the Provider, it is responsible for the loss of the full amount of her investment.

The evidence indicates that the Complainant did not simply invest funds and then lose the funds because of a lack of awareness or experience. The evidence shows that the Complainant was aware of the size of her trading positions and the risks associated with them.

The evidence shows that on **15 February 2017** the Complainant suffered losses of €11,127.17 and €11,883.41 leaving her equity at €37,360. The Complainant’s account was still profitable. The Complainant decided to continue trading up to the point where her equity was €82,096 on **01 March 2017**. The evidence shows that on the same day the Complainant opened several new large positions which went against her resulting in her equity falling to €41,710 on **02 March 2017**. At this point the Complainant’s account was still in profit. From these transactions it can be reasonably said that the Complainant was aware of the profit and loss from trading in CFDs. The evidence shows that the Complainant then decided again on **08 March 2017** to buy the Dow Jones 30 which ultimately resulted in the loss of her initial balance.

It can be seen that on **01 March 2017**, the Complainant had circa €82,000 in equity in her account. The Complainant could have decided then to withdraw her profits, but did not. The Complainant continued to trade on her account.

Ultimately the Complainant was responsible for making the decisions as to the transactions that she executed on her account and for assessing the merits and risks of trades she entered. The Complainant decided to continue trading instead of withdrawing her funds in part or whole and eventually lost not only her profits but also her initial investment.

In an e-mail to the Provider’s representative, dated **22 February 2017**, the Complainant states that: *“Yes I am learning day by day, in the beginning I was too much guided by emotions: fear and greed (haha) and I already learned to accept bigger losses without any trouble. ... it’s really fun...”*. I accept that this demonstrates that the Complainant was aware and accepted the risks involved in CFD trading.

The transcripts of telephone calls between the Complainant and the Provider’s representative, clearly evidence that the representative explained how the trades could be made and suggested that the Complainant educate herself by viewing the training sessions. The call transcripts also show that the Provider’s representative cautioned the Complainant about over-investing.

The evidence shows that the Complainant was a knowledgeable investor, who invested based on events happening in the world. This was particularly evident in relation to the American arena, where political, employment announcements, and the occurrence of

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sporting events, were watched relative to the moves in the market. The Complainant appears to have considered that there were opportunities for investing around the occurrence of movements in these areas. The Complainant's preference for investment in global markets is also evident, where the Complainant showed a preference for investing in the Chinese markets.

It is clear that the losses experienced by the Complainant were sustained owing to market movements in the context of very high risk trading activity she engaged in. I do not consider that any of the grounds of complaint advanced provide any sufficient basis for upholding a complaint against the Provider in respect of the loss sustained by the Complainant.

Having carefully considered the entirety of the evidence in this complaint, I do not consider it establishes any breach of duty on the part of the Provider.

For the reasons set out in this Decision I do not uphold this complaint.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

**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.**



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**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

02 December 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.**