



<b><u>Decision Ref:</u></b>	2021-0463
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Online Share Dealing
<b><u>Conduct(s) complained of:</u></b>	Mis-selling (investment) Failure to provide accurate investment information Failure to provide warning re. Nature of investment Misrepresentation (at point of sale or after)
<b><u>Outcome:</u></b>	Partially upheld

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

The Complainant has an online trading account with the Provider. In **March/April 2018**, the Complainant availed of one of the Provider's VIP account promotions for enhanced trading. Amongst the benefits of this promotion was a \$12,500 trading bonus. The Complainant's bonus expired after 6 months as he had not performed the required number of trades to maintain the bonus. The Complainant disputes the Provider's decision to cancel the bonus and believes the VIP account was mis-sold.

**The Complainant's Case**

The Complainant explains that in **March 2018**, the Provider's Senior Account Executive approached him "... with an offer of a bonus in exchange for certain cash amounts deposited to my [Provider] account before the policies of bonus' will be withdrawn from the market." The Provider's executive spoke of the benefits of a bonus however, failed to mention the trading conditions attached to the bonus; even though, during a telephone conversation the Complainant asked "... there must be a catch to this." The Complainant states that he was led to believe he would receive a bonus once he deposited the relevant cash amount.

It is submitted that the Provider's Senior Account Executive failed to follow "... *several points key to presenting financial products ...*" The Complainant points out that the trading conditions and retraction of the bonus are important factors in considering the value or benefit of the bonus.

The Complainant contends the bonus was mis-sold for the following reasons:

*"Even though I asked for conditions, I was not presented or informed of the level of trading conditions to affect the bonus. I could not have traded with full intention with the bonus without prior knowledge of the trading level conditions - I was not informed or warned of this.*

*[The Senior Account Executive] stated or led me to believe that taking out a bonus was a final settlement of depositing an agreed cash amount. The word used was always 'give' not 'access to' or 'loan' or 'facility'.*

*In 2018 when I telephoned to cancel the bonus, [the Senior Account Executive] painted a scenario where I would be protected by the Financial Services Ombudsman if he was not truthful.*

*During the six months before the bonus was withdrawn [the Senior Account Executive] did not warn of low levels of trading would invalidate the bonus.*

*... did not inform me of the date the bonus would be withdrawn affecting the margin and levels of the trading account.*

*[The Senior Account Executive] did not explain the trading level conditions and its exclusions to me even though I had requested the conditions."*

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

The Provider states that in **March 2018**, clients were offered the opportunity to upgrade to a VIP account. It was confirmed on **4 April 2018** that the Complainant was availing of the promotion. On **25 April 2018**, a bonus of \$12,500 was credit to the Complainant's account. The bonus was cancelled on **28 October 2018** and removed from the Complainant's trading account as the minimum trading volume was not met in accordance with the *Bonus Terms and Conditions*.

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Bonuses are offered within the industry to provide additional leverage and trading funds to clients. It is submitted that clients trading in contracts for difference are fully aware they cannot receive/withdraw bonuses without meeting the trading volume conditions. It is also the case that even if clients do not meet the trading volume to withdraw bonuses, they can still benefit from the bonus for leverage purposes.

The Provider explains that it is an online broker and requires its terms and conditions to be accepted electronically during the online registration process. Clients are required to click a checkbox acknowledging they have read, understood and accepted the terms and conditions. The terms and conditions are also hyperlinked to allow clients to access and review them.

The Provider states that the bonus terms and conditions clearly state that a bonus can only be withdrawn after the volume is met and if it is not met within 6 months then it is cancelled. It states that although the Complainant did not meet the required trading volume to withdraw the bonus, he still benefited from its use for leverage purposes when trading. The Provider also states there is no requirement to notify clients of the cancellation of bonuses.

### **The Complaint for Adjudication**

The complaint is that the Provider mis-sold the VIP trading account.

### **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.

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 25 November 2020, outlining my preliminary determination 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.

Following the issue of my Preliminary Decision, the parties made further submissions, copies of which were exchanged between the parties.

Having considered these additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

**Background**

The Senior Account Executive wrote to the Complainant on **21 February 2018** in respect of the VIP trading account as follows:

*“So as we spoke earlier I will now give you the requirements in order to get the better trading conditions.*

*[The Provider’s] requirements for VIP trading account are:*

- every amount from 50,000 USD to 1,000,000 USD will get you:**
- \* Spread reduction on products of your choice (if possible)**
- \* Modified leverage for some products of your choice**
- Bonus of 12,500 USD**

*The thing is that when you make an investment with our company, you are not only going to get those conditions, but you will have enough liquidity to trade with more expensive products (stocks/shares/bonds) combined with regular FX trading (currency pairs, commodities, indexes).*

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*You will have enough to trade whatever you like with a bigger amount so you can make bigger profits + you will be more safe while trading. ...”*

The VIP promotion document appears to have been attached to this email which states:

**“For an investment of 50,000 USD you get the following package:**

- Spread reduction for Forex (CP)
- Customer support 24/7
- Subscription for Online courses and Webinars
- Tailored educational programs
- Weekly Technical/Fundamental analysis
- Bonus of 12,500 USD”

The Complainant wrote to the Senior Account Executive on **2 March 2018** in respect of the VIP account as follows:

*“Ok, I am considering depositing 50,000USD in order to gain better trading conditions and open a [Provider] VIP trading account. Before I do, I need to know the levels of trading not just goodwill. ...”*

Responding, the Senior Account Executive wrote:

*“I will show you the VIP conditions of the company for amounts in between 50 k to 205 k of investments. Are you now available to talk or do we need to schedule an appointment for a little later today?”*

On **4 April 2018**, the Complainant confirmed that he would arrange for a transfer of \$50,000 to the Provider in order to avail of the enhanced trading conditions and bonus. However, six months later, the Complainant wrote to the Senior Account Executive on **30 October 2018** advising that the bonus had been cancelled.

The Complainant wrote to the Senior Account Executive on **15 April 2019** and copied a number of other recipients including the Provider’s Complainants Department, in essence taking issue with the cancellation of the bonus and requesting that a formal complaint be logged. The Complainant wrote to the Senior Account Executive and copied the Complaints Department on **17 April 2019** advising that he had not heard from the Complaints Department and requested a final response letter.

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On **17 April 2019**, the Senior Account Executive told the Complainant to *"... stop putting dealers and compliance or whatever in CC, they won't help you. Send your emails to me only."* In a further email to the Complainant on the same day, the Senior Account Executive explained that: *"... there's nothing that can be done. The bonus has been given a long time ago – the conditions weren't completed hence it was cancelled."*

In an email exchange between **14 and 15 May 2019**, the Senior Account Executive stated:

*"... Tell me one thing – have I ever told you the bonus was infinite?"*

*I am now sending all the email correspondence to be checked and if anywhere was written that the bonus was going to be given unlimitedly, we will correct ourselves. ..."*

Replying, the Complainant stated:

*"... Regarding the bonus unfortunately, you withdrew to mention the trading conditions attached to the bonus, even though during a telephone conversation I asked 'there must be a catch to this.' These trading conditions and retraction of the bonus are important factors ..."*

In response, the Senior Account Executive wrote:

*"... I've never told you it was money that we just give to our clients forever and money they can withdraw. I'm pretty sure I've even said that the bonus is not withdrawable and it could become if the basic requirements are being kept. Everything have always been written on the official web page - ..."*

The Provider issued a Final Response letter on **20 May 2019**, which recorded the date of complaint as **18 April 2019**. The letter states: *"... [the Provider] has investigated your complaint and concludes that we acted in accordance with our Terms and Conditions, which you stated you read, understood and accepted as part of our registration process."* The letter then quotes clause 9 of the terms and conditions.

Clause 9 of the Provider's *General Terms and Conditions* states:

**"9. Bonuses**

9.1 *[The Provider] may elect to grant a benefit to Customer by depositing bonus amounts in Customer's trading account, subject to certain terms and conditions as shall be determined by [the Provider], at its sole discretion.*

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9.2 *If [the Provider] suspects or has reason to believe that Customer has attempted fraudulent activity in order to claim a bonus, or any other promotion, [the Provider] reserves the right to: ...*

9.3 *If [the Provider] suspects or has reason to believe that Customer has abused the terms and conditions of a bonus offer by hedging positions internally ... or externally ... [the Provider] reserves that right to cancel bonuses, and any trades or profits associated with Customer's account(s).*

9.4 *Bonus promotions may be restricted in certain jurisdictions.*

9.5 *[The Provider] reserves the right to cancel or reject bonus promotions at its sole discretion."*

The Provider's Bonus Terms and Conditions state:

1. *This promotion is valid for existing clients on their eligible deposits during the promotion period only.*
2. *Bonus will be credited into your trading account on completion of your deposit, and after identification documents are submitted and verified.*
3. *Bonuses will be credited according to the trading platform's base currency.*
4. *...*
5. *In order to withdraw your bonus, you are required to execute a minimum trading volume of 10,000 base currency for every 1 base currency bonus within 6 months. If you fail to trade the required amount during this time frame – your bonus will be cancelled and removed from your account.*
6. *This promotion can be added to past awarded promotions by [the Provider]; their required trading volume will be combined, and you will need to trade the total volume within 6 months of the first promotion. Should you fail to complete the total required volume, the first bonus will be removed from your account, the combined volume will remain unchanged and the count will continue.*
7. *Bonuses are eligible on all CFD and FX trades except for cryptocurrency trades. ...*
8. *Clients from the following countries are not eligible for this promotion: ...*

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9. *[The Provider] reserves the right to cancel or reject bonus promotions at its sole discretion.*

10. *Skrill deposits are not eligible for this promotion."*

### **Analysis**

Prior to agreeing to avail of the VIP trading account, there was email and telephone communication between the Complainant and the Senior Account Executive. While certain telephone call recordings have been provided for **2019**, none have been provided for **2018** and no explanation as to why this is the case has been given. These recordings are important because the Complainant maintains that he asked for the conditions of trading or *the catch* associated with the bonus during these calls.

It is clear from the email correspondence that the benefits of the upgraded account were outlined to the Complainant. However, no terms and conditions associated with the upgraded account or bonuses were every referenced or mentioned either by the Senior Account Executive or on the promotion document outlined above. In particular, the availability of the bonus appeared to be unqualified. This was not the case however, as the General Terms and Conditions and the Bonus Terms and Conditions in particular, contain important provisions regarding bonuses.

Having considered the evidence, I am satisfied the Complainant accepted the General Terms and Conditions. However, I am not satisfied the Bonus Terms and Conditions were accepted by the Complainant when he opened his trading account with the Provider or when he agreed to the VIP trading account. The Provider has not demonstrated the Complainant's acceptance of these conditions either.

While the Provider appears to rely on clause 9 of the General Terms and Conditions in its Final Response letter, it points to the Bonus Terms and Conditions in support of its entitlement to cancel the bonus in its Formal Response to this complaint. Further to this, in the correspondence between the Complainant and the Senior Account Executive, the Senior Account Executive appears to reference the Bonus Terms and Conditions as the basis for cancelling the bonus.

Taking the foregoing into consideration, I do not accept that the Provider was or is entitled to rely on the Bonus Terms and Conditions to cancel the Complainant's bonus. There is no evidence of these terms and conditions being accepted by the Complainant or brought to his attention prior to, or at the time of, agreeing to the VIP trading account.

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Additionally, there is no evidence of any qualifications or conditions attaching to the bonus being brought to the Complainant's attention. The Provider's correspondence and the promotion document are both silent in this regard. Equally, it is not acceptable for the Senior Account Executive to say that simply because he did not mention any trading conditions associated with the bonus that none existed. It is reasonable to expect these to have been, in some way, identified or referenced to afford the Complainant the opportunity to consider them before agreeing to the VIP trading account.

In terms of clause 9 of the General Terms and Conditions, I am satisfied the Complainant was, or ought to have been aware of this clause, as part of his acceptance of the General Terms and Conditions, and as a result, that the bonus was subject to certain conditions or was likely to be subject to certain conditions.

However, clause 9 (particularly clause 9.1) it is too vague and imprecise to seek to impose the specific conditions contained in the Bonus Terms and Conditions on the Complainant. Further to this, given the wording of clause 9, it is reasonable to expect the Bonus Terms and Conditions to have been expressly brought to the Complainant's attention or, at the very least, making the Complainant aware the bonus was subject to certain trading conditions. Insofar as clause 9.5 is concerned, and the Provider's entitlement to cancel a bonus at its sole discretion, this discretion must be exercised reasonably. In the circumstances of this complaint, I am not satisfied that it was. It is also disappointing that the Provider did not seek to notify the Complainant firstly, that his bonus was due to expire due to the level of trading activity and secondly, that his bonus had in fact expired.

Finally, the Provider records a formal complaint having been made on **18 April 2019** in its Final Response letter. However, the Complainant first appears to have copied the Complaints Department and advised the Senior Account Executive of his instruction to log a formal complaint on **15 April 2019**. Furthermore, there is no evidence of the Provider writing to the Complainant to acknowledge his complaint within 5 business days or updating him on the progression of his complaint within 20 business days as required by section 10.9 of the *Consumer Protection Code 2012*. It was also inappropriate for the Senior Account Executive to request that the Complainant not address his correspondence regarding the cancellation of the bonus to the Complaints Department for example.

In my Preliminary Decision I indicated my intention to direct the Provider to pay a sum of €5,000 to the Complainant. The Complainant, in his post Preliminary Decision submission, expresses his disappointment with this amount of compensation and sets out the reasons why he believes an additional sum of compensation is merited. Having considered the matter fully, including the post Preliminary Decision submissions made by both parties, I remain of the view that a sum of €5,000 compensation is appropriate.

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For the reasons outlined in this Decision, I partially uphold this complaint and direct that the Respondent Provider pay the sum of €5,000 to the Complainant.

### **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)(b), (d), (f) and (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 Complainant in the sum of €5,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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**

1 December 2021

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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.