

The complaint

Mr M complains about Trading 212 UK ('Trading 212') Limited. He complains that Trading 212 did not inform him that the positions he had with exchange traded products would be closed as the instruments were delisted. He also complains that Trading 212 did not conduct an appropriateness test before it allowed him to trade in the investments.

What happened

Mr M opened an account with Trading 212 in May 2020, and he started trading in 2021. I've seen Mr M's trading account and he regularly traded in similar investments over this time. As part of this trading Mr M had taken positions in exchange traded products ('ETP') in leverage shares three times Shopify and leverage shares three times Zoom.

The objective of these ETP's was to provide three times the value of the daily performance of the index they were linked to, which in this case was the iSTOXX Leveraged three times indices linked to Shopify and Zoom shares. These ETP's invested directly in the underlying stocks and used financial instruments and methods, such as borrowing, to purchase additional shares to increase the return to match that of the indices.

Both of these ETP positions were closed on 28 April 2023 and very shortly afterwards they were delisted. Mr M says he has made a significant loss following this as he needed to sell the investments at a much-reduced value.

Mr M has made his complaint about the investments to Trading 212. Trading 212 has responded to Mr M's complaint, but it has not upheld it. It said that:

- It is an execution only broker, and so it only acts on the instruction of the investor. It does not provide information to the customer about investments and so it would not be able to warn Mr M about the delisting.
- The onus was on Mr M to be informed about, and manage, his investments. He was aware of the risk of them and that he could suffer a loss due to investing in them.
- It did not have to conduct an appropriateness test as the investments were not complex enough for this.

Mr M didn't agree, and he brought his complaint to the Financial Ombudsman Service. One of our Investigators considered the complaint but didn't think that it should be upheld. Our Investigator noted that, as the investments Mr M made were ETP's they were regularly traded and realisable. They were not derivatives. So, they didn't satisfy the regulators criteria for complex investments. And so, Trading 212 didn't need to conduct an appropriateness test before it allowed Mr M to invest. Mr M had made the decision to invest himself without advice from Trading 212 and it hadn't undertaken to monitor the investment for him.

Mr M disagreed and there was some further correspondence. He said that whilst the investment may not entirely have met the regulatory requirements for an appropriateness test. They were leveraged and used complex instruments, they had a much higher risk because of this. They were essentially derivatives and could be highly illiquid and speculative.

Mr M provided some information from questions he had asked Trading 212's automated chat service. This confirmed that if he was to invest in these products now, they would be considered complex, and he would need to complete an appropriateness test. Mr M says it would have been best practice and the responsible thing to have offered one to him in any event.

Our Investigator wasn't persuaded to change their opinion about the complaint, for essentially the same reasons. And so, it has been passed to me to consider and issue my final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

This dispute centres on whether this investment should be considered complex under the industry regulator, the Financial Conduct Authority's ('FCA') rules. If it is a complex investment, under FCA rules, then Trading 212 should have performed an appropriateness test. The regulations about which products an appropriateness test should be applied to are given in the FCA's Conduct of Business Sourcebook ('COBS').

COBS 10.1.2R 01/02/2023R gives information about which products the business needs to conduct an appropriateness test for. It says these are where a business

'arranges or deals in relation to a:

- (i) non-readily realisable security;*
- (ii) speculative illiquid security;*
- (iii) derivative; or*
- (iv) warrant.'*

These are the applicable rules in 2023 when Mr M made this investment. They weren't materially different in 2020 and 2021.

The ETP was a ready realisable product as it was traded on a UK stock exchange. It isn't a speculative illiquid security, a derivative or a warrant. So, under the regulatory rules of the time, Trading 212 did not have to conduct an appropriateness test. And from reading the correspondence I think Mr M has accepted that this may be the case. In response to the Investigator's opinion, and later, he did acknowledge that the ETP's may not meet the regulatory definition of a complex product and therefore be products that Trading 212 would need to have conducted an appropriateness test before allowing him to invest.

I have thought about what Mr M has said about how he thinks the ETPs are complex in any event. And that the investments themselves use leverage, and other complicated financial instruments, to generate the return. But whilst this is the case, Mr M's investment itself isn't leveraged or derived from another asset. He could buy and sell the ETP in the same way he could buy an ordinary stock or share as it was listed. And he hasn't, for example, borrowed to purchase more shares himself. Any leveraging takes place within the investment. Which is a similar situation to many investments which can use leveraging and derivatives, and so on, to manage the risks or improve on returns. I accept that his investment did this in a way that probably increased the risks (and the corresponding potential return). But this doesn't mean they are categorised as complex under COBS10.1.2R. As I've said above, I don't think this investment meets the criteria for this.

Mr M has provided evidence of a 'conversation' he had with an automated chat function on Trading 212's website. He's provided Trading 212's responses on this that say these investments are complex and it would now require Mr M to have completed an appropriateness test before he invested in it.

It's not clear if this automated chat has provided correct answers here, Trading 212 says it's not necessarily representative of the answers one of its representatives would have given him (knowing something about his circumstances). And an investment can be complex, and most are to some degree, carry significant risk, but not meet the regulators definition for an investment that requires an appropriateness test. As I've talked about above.

But even if Trading 212 would now ask Mr M to complete an appropriateness test, it doesn't mean that it must do so under the rules and regulations. It could be that it has now decided that this good business practice, which it may be. But it doesn't follow that its earlier practices were wrong or that it has acted outside of the regulations it must have followed at the time.

And if Trading 212 required that that Mr M undergo an appropriateness test before making this investment it's not certain that he would have failed this test. And even if he had failed the test it's likely that Trading 212 would still allow him to invest after providing further information to him about the risks of the investment.

I've seen the information that Trading 212 has provided about its platforms and risks of this type of investment in general. And I think this is reasonable and would have allowed Mr M to have made a decision about the risks of using the platform. Overall, I think Trading 212 has provided reasonable information to Mr M.

Trading 212 is an execution only broker and so it would have provided information only to Mr M and acted on his instructions. So, Trading 212 wouldn't have provided specific information about the investments that Mr M made. As an execution only service this was something Mr M would have done himself. And it wouldn't have been able to inform Mr M that his investment was being delisted, as it would not monitor his investment. I don't think Trading 212 should have provided any further information to Mr M about the ETP's he invested in.

I can't uphold Mr M's complaint on the basis the Trading 212 had a moral duty to act in his interests. Trading 212 didn't have any input into Mr M's decision to invest and so I don't think it would be right for it to compensate him for the losses he suffered.

Having considered everything, I'm not upholding Mr M's complaint.

My final decision

For the reasons set out above, I don't uphold Mr M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 16 May 2024.

Andy Burlinson
Ombudsman