DRN-4222768

The complaint

Mrs A complains she was mis-sold an investment into a minibond held in an ISA wrapper by EGR WEALTH LIMITED (formerly EGR Brokers). She says she was led to believe the investment was secure but interest due hasn't been paid or her capital returned.

What happened

In February 2020, Mrs A invested around £20,000 in a bond. She was due to receive interest at a rate of rate 8.1% per annum, with payments to be paid twice a year in June and December. She also took out an ISA wrapper at the same time that the investment was placed within. She was initially introduced to the opportunity by a third party before being referred on to EGR. She completed the required application paperwork provided by EGR – this included a suitability and appropriateness test. Mrs A invested a further £20,000 in May 2020 into the same product, which was to be held in her ISA. Again, she completed an application process through EGR.

In January 2022, Mrs A received notice from the bond issuer of continued delayed payments of interest. In May 2022, EGR sent Mrs A an update from the bond issuer, which again apologised for the lack of communication regarding interest payments and explaining further issues with the performance of the investment.

Following this Mrs A contacted our service, and we forwarded her complaint to EGR to provide her with a response.

EGR issued a final response letter. It didn't uphold the complaint. In summary it said:

- The person who introduced Mrs A to the investment wasn't an agent of EGR. The role of the introducer is to provide the clients with the EGR documentation with all its disclosures and warnings.
- EGR was always the execution only broker and platform provider for the transaction and did not advise Mrs A. As such EGR never did any "selling". It only provided administrative services, and all of this was clearly stated on the documents signed by Mrs A.
- Mrs A filled in all of the relevant sections of the account opening documentation and signed acknowledgment of risk warnings. The allegation of being "mis sold" is patently contrasted by every document that EGR provided.
- EGR clearly and expressly stated that the investment was high risk and not protected by the FSCS. The allegation of being "safe or protected" is contrasted by every document it provided and Mrs A signed.

Mrs A didn't agree and asked this service to complete an independent review of her complaint. One of our investigators considered Mrs A's complaint and concluded it should be upheld.

He said, in summary:

- Mrs A didn't meet the criteria of a "restricted investor" and EGR didn't take the appropriate steps to ascertain she met the criteria as per the regulatory requirement.
- The assessment of the appropriateness of the bond for Mrs A didn't gather sufficient

information to comply with the FCA's rules.
- Overall, EGR didn't comply with its regulatory obligations. Had it done so, Mrs A wouldn't have decided to invest or EGR should have concluded that it shouldn't allow her to invest. For these reasons, both cumulatively and individually, it was fair to uphold the complaint and for EGR to put Mrs A as close to the position she would probably now be in if she had not invested in the bond.

EGR didn't agree with the investigator's conclusions. In summary it said:
- EGR provided execution only services to Mrs A where it did not make any personal recommendation for the purposes of COBS 9. Therefore, there was no requirement to assess her suitability for the bond. She was also provided with numerous warnings confirming this and that she did not benefit from any protections as a consequence.
- It satisfied the requirement to assess Mrs A for her appropriateness for the product and had gathered sufficient information to do so through the application process.
- Based on the information received at the time Mrs A appeared appropriate for the product and since then insufficient evidence has been produced to contradict this view.
- At no point between her initial investment and complaint, has Mrs A attempted to request a disinvestment. To date it is unclear whether she has suffered any loss – and it is noted she has received a total of £4,751.73 in dividend payments, which EGR forwarded to her nominated bank account.

As no agreement could be reached, the complaint has been passed to me to reach a 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.

What role did EGR play in the sale of the investment?

I've firstly considered EGR's involvement in the arrangements of Mrs A's investment. It says it provided an execution only service and it didn't did not make a personal recommendation or assessment of suitability. I've considered the submissions EGR make on this point. I accept there isn't evidence of regulated advice being provided by EGR. This isn't an allegation made by Mrs A either. So, I've looked at the evidence available to show what EGR's involvement was.

Mrs A refers to a third-party introducer telling her about the investment opportunity. From the evidence available she was then referred on to EGR to complete the transaction. I've seen details of the application process and what EGR was involved in. There is evidence of an application form provided by EGR that consisted of two stages, designed to meet the rules restricting who the bonds could be promoted to and on how to test whether the investments were appropriate for the potential investor. There are application forms for both tranches of the investment Mrs A made – February 2020 and May 2020. Within these Mrs A completed a certification and was categorised as a restricted investor. There was also an appropriateness test which asked questions about Mrs A's knowledge and experience. There is also evidence of EGR notifying Mrs A of receipt of funds notification and also included confirmation of issuing a contract note when the investment had been successfully placed.

It's clear that EGR played an active and significant role in the arrangements of Mrs A's investments. I am satisfied Mrs A's complaint relates to a regulated activity. The bond was a security or contractually based investment specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). At the time Mrs A made her investment, the RAO said regulated activities include arranging deals in investments. Acts such as obtaining and assisting in the completion of an application form and sending it off, with the client's payment, to the investment issuer would come within the scope of Article 25(1), when the arrangements have the direct effect of bringing about the transaction. So I am satisfied the application process falls within the scope of Article 25(1). It involved making arrangements for Mrs A to invest and had the direct effect of bringing about the transactions.

Did EGR meet its obligations to Mrs A in the arrangement of the investments?

Mrs A's complaint concerns what she considers to be a mis-sale of the bond. I'm satisfied that this includes EGR applying relevant tests regarding investor categorisation and appropriateness. Therefore, I will first set out the relevant considerations when looking at the application process EGR conducted before allowing Mrs A to invest.

Relevant considerations

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint. In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

In my view the key consideration as to what is fair and reasonable in this case is whether EGR met its regulatory obligations when it carried out the acts the complaint is about. I consider the following regulatory obligations to be of particular relevance here.

The Principles for Businesses, which are set out in the FCA's Handbook "are a general statement of the fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G). I think Principles 6 (Customers' interests) and 7 (Communications with clients) are relevant here.

Principle 7 overlaps with COBS 4.2.1R (1) (A firm must ensure that a communication or a financial promotion is fair, clear and not misleading), which I also consider to be relevant here.

The bond Mrs A applied for was a non-readily realisable and therefore there were rules restricting who this type of product could be promoted to and how to test whether the investment was appropriate for the potential investor.

These rules were set out in COBS 4.7 and COBS 10. I have set out below what I consider to be the relevant rules, in the form they existed at the time.

COBS 4.7 - Direct offer financial promotions

COBS 4.7.7R said:

"(1) Unless permitted by COBS 4.7.8 R, a firm must not communicate or approve a direct-offer financial promotion relating to a non-readily realisable security a P2P agreement or a P2P portfolio to or for communication to a retail client without the conditions in (2) and (3) being satisfied.

(2) The first condition is that the retail client recipient of the direct-offer financial promotion is one of the following:
(a) certified as a 'high net worth investor' in accordance with COBS 4.7.9 R;
(b) certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;
(c) self-certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R; or
(d) certified as a 'restricted investor' in accordance with COBS 4.7.10 R.

(3) The second condition is that the firm itself or:
(a) the person who will arrange or deal in relation to the non-readily realisable security; or
(b) the person who will facilitate the retail client becoming a lender under a P2P agreement or a P2P portfolio, will comply with the rules on appropriateness (see COBS 10 and COBS 10A) or equivalent requirements for any application or order that the firm or person is aware, or ought reasonably to be aware, is in response to the direct offer financial promotion."

COBS 10 – Appropriateness

At the time COBS 10.1.2 R said:

"This chapter applies to a firm which arranges or deals in relation to a non-readily realisable security, derivative or a warrant with or for a retail client, other than in the course of MiFID or equivalent third country business, or facilitates a retail client becoming a lender under a P2P agreement and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion."

COBS 10.2.1R said:

"(1) When providing a service to which this chapter applies, a firm must ask the client to provide information regarding her knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client.
(2) When assessing appropriateness, a firm must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded."

COBS 10.2.2R said:

"The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:
(1) the types of service, transaction and designated investment with which the client is familiar;
(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
(3) the level of education, profession or relevant former profession of the client"

COBS 10.2.6G said:

"Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for her to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience."

COBS 10.3.1R said:

"(1) If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client."

COBS 10.3.2R said:

"(1) If the client elects not to provide the information to enable the firm to assess appropriateness, or if she provides insufficient information regarding her knowledge and experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him."

COBS 10.3.3G said:

"If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances."

Having taken careful account of these relevant considerations, to decide what is fair and reasonable in the circumstances, and given careful consideration to all EGR has said, I'm satisfied the complaint should be upheld. I'll explain my findings below.

Certification

The first condition set out in COBS 4.7.7R required a retail client, such as Mrs A, to be certified as being in one of four categories of investor in order to receive promotional communications relating to the bonds. In this case, Mrs A was certified as a "restricted investor".

The detail of this category and the process by which an investor can certify themselves as belonging to it is set out in COBS 4.7.10R

4.7.10R requires the prospective investor to agree to all of the following:

- In the twelve months preceding the certification date, not to have invested more than 10% of their net assets in non-readily realisable securities.
- To undertake that in the twelve months following the certification date, they will not invest more than 10% of my net assets in non-readily realisable securities.
- To accept that the investments may expose them to a significant risk of losing all of the money invested.
- To be aware that it is open to them to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

During our investigation we have asked Mrs A about her circumstances at the time. Mrs A has explained that she had limited savings and the money invested in these bonds was effectively most of her savings – meaning more than the 10% requirement. I note EGR's point that the May 2020 application records that Mrs A had £250,000 in investable assets. It says is not inconceivable to assess that the amount invested by Mrs A would fall under this threshold. This level of assets is contrary to the information provided by Mrs A about her circumstances. So, I accept there is some uncertainty whether she met the 10% threshold or not.

I've also thought about whether it is clear that Mrs A did have a full understanding of the risks based on her circumstances. I haven't seen anything that suggest to me that her

experience and knowledge would have given her the required understanding of the risks she was taking by investing.

The February 2020 application form did ask Mrs A questions about her knowledge and experience. These include whether she had been in a position that requires financial knowledge relevant to the product – this was answered "No". It was then asked whether she currently held this type of investment or a similar one – this is answered "Yes", but no further detail is given on what this might be in relation to. The next question asked whether she had made an investment in this type of instrument in the last 12 months – her answer to this question was "No". She also has answered "Yes" to say she had the experience and knowledge in order to understand the risks in relation the product offered.

Having considered this evidence, I'm not persuaded that I should place significant weight on it when considering Mrs A's knowledge and experience. In my view there are inconsistencies with the answers, and as they are tick box yes or no answers, there is lack of detail to understand what this actually tells us about her Mrs A's knowledge and experience. On the one hand it seems possible Mrs A could have invested before, despite her testimony within this complaint saying she hadn't. But on the other hand, I note the assumption made by the investigator that this likely refers to the investment Mrs A's husband took out a couple of months earlier in the same product. It appears Mrs A and her husband viewed their investments as being held under a joint portfolio as throughout the complaints they've made they refer to joint losses. I'm not persuaded that this answer in the application form is sufficient to persuade me Mrs A had knowledge and understanding of the product she was investing in.

Mrs A also signed to say she qualified as a restricted investor. I note this declaration did largely mirror what is set out about in 4.7.10R, but it is unclear that this is an accurate declaration. In my view, I think it unlikely Mrs A knowingly gave a false statement, rather I think it is more likely she did not consider the detail or relevance of what she was being asked to agree to.

This means all means I have significant concerns about whether EGR certified Mrs A correctly and therefore acted fairly and reasonably to meet its regulatory obligation. In this situation Mrs A could not have gone passed this stage. But even if I'm wrong about this and Mrs A would have met the certification requirements, I have other concerns that mean Mrs A hasn't been treated fairly - I will now consider the appropriateness test.

Appropriateness test

The second condition set out in COBS 4.7.7R required EGR to comply with the rules on appropriateness, set out in COBS 10 and quoted earlier in my findings. The rules at the time (COBS 10.2.1R) required EGR to ask Mrs A to provide information regarding her knowledge and experience – and for this information to be relevant to the product offered (the first limb of the rule). The rules required that information to then be assessed, to determine whether Mrs A did have the necessary experience and knowledge in order to understand the risks involved (the second limb of the rule).

As set out above, COBS 10.2.2 R required EGR, when considering what information to ask for, to consider the nature of the service provided and the type of product (including its complexity and risks). It needed to think about asking questions on:

- the types of service, transaction and designated investment with which the client is familiar;
- the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
- the level of education, profession or relevant former profession of the client.

Having reviewed the appropriateness test Mrs A was directed to complete during the her initial application in February 2020, I'm not persuaded EGR, asked for an appropriate amount of information about Mrs A's knowledge and experience, as required by COBS 10.2.1R and COBS 10.2.2 R.

As explained above, the questions asked were limited and the answers given by Mrs A do not demonstrate the necessary experience and knowledge in order to understand the risks. Whilst I accept that, depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for her to understand the risks involved in a product or service (COBS 10.2.6G), I'm not persuaded Mrs A had the sufficient knowledge here.

I note when Mrs A came to make the top up a few months later more questions were asked. But again, these were tick box answers and no details is given beyond Mrs A's yes or no answers. There was a further request to give details but these were left blank. So, for the same reasons already mentioned, it seems likely the previous experience she had was linked to the bond her and her husband had taken out only months earlier. I haven't seen any other evidence that she held investments of this type prior.

Taking all of the evidence into account, I'm not persuade EGR did adequately test whether Mrs A had the knowledge to understand the risk associated with the bond – I think this is particularly relevant for the initial sale as this appears to be the first time she has invested in this type of complex investment. The evidence available all supports that her experience and level of knowledge was limited. The risks of the bonds were complex and multifactorial. It was not, for example, a question of whether Mrs A simply understood money could be lost – but whether she was able to understand how likely that might be and what factors might lead to it happening.

As the first limb of COBS 10.2.1R was not met EGR was unable to carry out the assessment required under the second limb. EGR should have been confident, from the information it asked for, that it was able to assess if Mrs A had the necessary experience and knowledge in order to understand the risks involved with investment in the bond. But it was not in a position to make such an assessment, based on the information it obtained. I accept that taking Mrs A's appropriate test answers in isolation would suggest she knew her capital would be at risk, But as mentioned, I've not seen that this would demonstrate an understanding of how likely it would be that she could lose her capital and/or what factors might lead to it happening.

Had EGR followed its obligations, I think the most likely conclusion it would have reached, was that Mrs A E did not have the necessary experience and knowledge to understand the risks involved with the bond. And for the avoidance of doubt, I don't think the fact Mrs A had taken at the first bond gave her the experience required or means that a different conclusion should be met about the second sale. As previously mentioned, COBS 10.2.2 R required EGR to consider the "nature, volume, frequency of the client's transactions in designated investments" and I don't think one previous investment is sufficient for it to have determined Mrs A had the required knowledge and experience – especially as this forms part of the same mis-selling complaint.

If EGR assessed that the bond was not appropriate, COBS 10.3.1R said a warning must be given and the guidance at COBS 10.3.3G said a business could consider whether, in the circumstances, to go ahead with the transaction if the client wished to proceed, despite the warning. I've explained my concerns about the testing of Mrs A's knowledge and experience, and had it adequately tested this, EGR would have come to the conclusion that the bond wasn't appropriate for her in the first place (so the later top up would not be either).

A clear, emphatic statement would have left Mrs A in no doubt the bond was not an appropriate investment for her. And she ought to have been privy to such a warning, had her appropriateness been tested in line with the requirements of the rules. Even if Mrs A still said she wanted to proceed after being given a warning, I still think there is more EGR needed to do if it had asked for appropriate information about Mrs A's knowledge and experience. In these circumstances, I think it would have been fair and reasonable for EGR to conclude it should not allow Mrs A to proceed. Had Mrs A been asked for appropriate information about her knowledge and experience this would have shown she may not have the capacity to fully understand the risk associated with the bonds. I've seen no evidence to show Mrs A had anything other than a basic knowledge of investments. So, it would not have been fair and reasonable for EGR, to conclude it should proceed if Mrs A wanted to, despite a warning (which, as noted, was not in any event given).

In summary, I'm satisfied EGR did not act fairly and reasonably when assessing appropriateness. By assessing appropriateness in the way it did, it was not treating Mrs A fairly or acting in her best interests. If it had acted fairly and reasonably to meet the relevant regulatory obligations when assessing appropriateness, Mrs A would not have got beyond this stage.

I have noted the comments EGR make about the risk warnings contained in the Information Memorandum (IM). As the second condition set out in COBS 4.7.7R could not be met and things could not have proceeded beyond this, this means Mrs A shouldn't have received the IM at all. And so, any information within that cannot now reasonably be relied on to show she was aware of the risks associated with the bond. I acknowledge it is unclear at what point (if at all) Mrs A receive the IM. But in any event, I've also not seen sufficient evidence to show Mrs A had the capacity to fully understand the IM – a lengthy and complex document – given her limited knowledge and experience. As such, EGR can't fairly rely on any possible reading of this as a means to correct the failings set out above.

Is it fair to ask EGR to compensate Mrs A?

EGR says during the application process Mrs A was informed that capital is at risk, and full capital loss is possible and despite this evidence Mrs A proceeded to invest in the bond regardless of what it did. However, I do not think it would be fair to say Mrs A should not be compensated on this basis.

Firstly, Mrs A should not have been able to proceed if EGR acted fairly and reasonably to meet its regulatory obligations. I acknowledge that other parties may have caused or contributed to Mrs A's losses but, notwithstanding that, I'm satisfied it is fair to ask EGR to compensate Mrs A as the appropriateness test was a critical stage, for which it was responsible for.

Secondly, for the reasons I have given, I am not in any event persuaded Mrs A did proceed with a full understanding of the risks associated with the bond. I am not persuaded she looked at the full detail of the acknowledgements she gave, given what Mrs A has said about her understanding of the bond and her lack of investment experience. I am not persuaded Mrs A had the capacity to fully understand the risks associated with the bond – and she was in this position because EGR did not act fairly and reasonably to meet its regulatory obligations at the outset. I'm therefore satisfied it is fair to ask EGR to compensate Mrs A for the losses she claims.

I note EGR has questioned whether Mrs A has actually suffered a loss on her investment. Based on my understanding of the situation, it seems the investment is illiquid and the likelihood of any return of capital is remote. But I have covered this scenario in the section below setting out what EGR needs to do to put things right. I also note that EGR raise a

point that Mrs A has received dividends from the investment that were paid to her bank account. These payments should be considered as part of the loss calculation and, where appropriate, a deduction made from any loss identified. Again, I cover this in the section below setting out what EGR needs to do.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mrs A as close to the position she would probably now be in if she had not invested in the bond – both initially and the top up.

I take the view that Mrs A would have invested differently. It is not possible to say *precisely* what she would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mrs A's circumstances and objectives when she invested.

What must EGR do?

To compensate Mrs A fairly, EGR must:

- Compare the performance of each of Mrs A's investments with that of the benchmark shown below.
- A separate calculation should be carried out for each investment.
- EGR should also add any interest set out below to the compensation payable.
- Pay to Mrs A £350 for upset caused by the total loss of the investment.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
February 2020 Access Bond	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)
May 2020 Access Bond	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant'

					s acceptance)

For each investment:

Actual value

This means the actual amount paid or payable from the investment at the end date.

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mrs A agrees to EGR taking ownership of the investment, if it wishes to. If it is not possible for EGR to take ownership, then it may request an undertaking from Mrs A that she repays to EGR any amount she may receive from the investment in future.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, EGR should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

As noted, I understand dividend income has been paid out of the investments. This should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if EGR totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mrs A wanted to achieve a reasonable return without risking any of her capital.

- The average rate for the fixed rate bonds would be a fair measure given Mrs A's circumstances and objectives. It does not mean that Mrs A would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.

My final decision

I uphold the complaint. My decision is that EGR WEALTH LIMITED should pay the amount calculated as set out above.

EGR WEALTH LIMITED should provide details of its calculation to Mrs A in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 7 December 2023.

Daniel Little
Ombudsman