DRN-3625886

The complaint

Mr N complains about actions taken by Saxo Capital Markets UK Limited (Saxo) on his CFD account. He complains that Saxo didn't allow him to receive a scrip dividend in shares instead of cash. And he complains that Saxo closed all of his open positions after a margin call, when it ought to have only closed a small number of his trades. He says if it had done so he'd have lost less money.

What happened

Mr N held a range of CFD positions in his account with Saxo. In November 2020 these included a long position based on the price of a share I'll call A. The company A announced a dividend which shareholders could elect to receive as a scrip dividend (which meant being allocated more shares) or as cash. Mr N wrote to Saxo to say he wanted to take up the scrip dividend on his holding.

Saxo explained to Mr N that it didn't offer scrip dividends for holders of CFDs, and it simply paid him the cash dividend as a credit to his account.

Around the same time Mr N exchanged emails with his account manager at Saxo, which included Saxo offering a *"partial stop out"* facility – which it said meant if Mr N reached 100% Margin Utilisation on his account, initially Saxo would only close a small portion of his open positions, rather than its usual practice of closing all of a client's trades. Mr N asked to make use of this facility.

Just under a month later, at the start of the trading day Mr N's positions moved against him. He tried to close some trades to keep his Margin Utilisation under 100% but wasn't able to do so. His account breached the 100% level and Saxo closed all Mr N's open positions, crystallising a large loss.

Mr N complained, saying that under the partial stop out option he'd signed up for, Saxo should only have closed a few of his positions. He said if had done that, the market soon moved in his favour and he'd have suffered much lower losses.

Saxo didn't think it had done anything wrong. It said Mr N hadn't been moved to the partial stop out profile, and that because it hadn't confirmed the change, Mr N should have known it hadn't happened and it was his responsibility to manage his positions. Mr N then brought his complaint to our service.

Saxo continued to say it shouldn't be held responsible for any losses Mr N suffered. Although it did acknowledge it hadn't moved Mr N to the partial stop out profile when he asked, and offered to pay him £1,000 to say sorry.

Our investigator gave an initial assessment of the matter. She thought it was reasonable for Saxo not to have allowed Mr N to receive a scrip dividend, and Saxo explained on its website it didn't offer that facility for CFD positions.

Regarding the margin call, the investigator said Saxo should have actioned Mr N's request to change profiles. She said it should compensate him if he'd suffered a loss by not having his account subject to a partial close out.

Saxo reiterated its position that it didn't need to have carried out a partial close out. It said the overall account terms, and the terms of the partial stop out facility, say that Saxo can still close all open trades when Margin Utilisation breaches 100%.

It went on to say that it had nevertheless carried out an analysis of what would have happened had Mr N's account been subject to the partial stop out profile. It explained its algorithm would have closed small portions of Mr N's holdings to reduce his margin utilisation. But it explained that given the market conditions at the time, Mr N would have experienced 6 consecutive partial stop outs in a very short space of time – because after each one his margin utilisation would quickly have exceeded 100% again. And it went on to say that the way its partial stop out profile worked was that the sixth close out would have been a full closure of all Mr N's remaining open positions.

Saxo provided data to show that in its view, had Mr N's positions been dealt with in this way, not only would all his trades have still ended up being closed a few minutes after they were, but that his overall losses would have been a few thousand pounds more. So Saxo argued that Mr N had in fact not been disadvantaged by the fact his account hadn't had a partial close out.

Our investigator issued another assessment. She said she was now persuaded that Mr N hadn't suffered a financial loss by being deprived of the partial close out facility. So she didn't think Saxo needed to do anything further. But she noted Saxo's offer to Mr N to pay him £1,000 to settle things remained available.

Mr N didn't agree with the investigator's conclusions and asked for an ombudsman to decide the matter. In summary, he said that Saxo's explanation of what would have happened under a partial stop out was wrong. He said that the orders Saxo placed in order to fully close all his positions distorted the market. He said had it closed smaller amounts the market wouldn't have fallen as far, and so he wouldn't have repeatedly experienced margin utilisation over 100% - and all of his trades wouldn't have been closed.

As the investigator wasn't persuaded to change her mind the complaint's been passed to me.

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.

There are two distinct issues here. I'll first address the scrip dividends part of Mr N's complaint. Mr N held a long position in A, but he didn't hold A shares themselves. His CFD was a bilateral contract between him and Saxo whose value was linked to the share price of A. This didn't confer any rights of share ownership of A onto Mr N. I would of course expect the value of Saxo's CFD to reflect any changes in the value of the underlying quantity of shares – whether that be through market movements or corporate actions. But I don't think holding the CFD meant Mr N had any right to expect to choose what ought to be done as a result of a corporate action on A shares where there were different options. I say this whether or not Saxo had in fact bought A shares to hedge its own exposure to Mr N's CFD. Any such shares it held weren't something Mr N had any rights or direct interest in.

Here, Saxo has explained that in circumstances where underlying shareholders are entitled to allotments of shares (such as in a scrip dividend) it will simply credit accounts with the cash equivalent. I don't think that's unreasonable. Mr N wasn't deprived of the economic impact of the corporate action in the sense that it affected the value of his CFD derived from the value of the A shares. And I note that Saxo makes the fact it will apportion cash in the event of a scrip dividend clear on its website. So in this matter I don't find Saxo to have acted unfairly or unreasonably towards Mr N, and don't require it to do anything.

I now turn to the margin call Mr N experienced in late 2020 and the way Saxo closed his positions.

It's common ground between the parties that Mr N had to maintain a margin requirement on his account, subject to the Margin Utilisation limit Saxo set out on its website, which was 100%. In other words, the value of Mr N's account (made up of cash and the running profit or loss on open positions) needed to remain at or above the level of margin required to support his open positions. The mechanism of this, or the values ascribed to Mr N's account and the required margin calculations, aren't in dispute.

What's in dispute is the type of action Saxo ought to have taken once Mr N's margin utilisation breached 100% on the day in question. Mr N argues it ought to have applied a partial close out policy he'd signed up for.

Saxo does seem to acknowledge it was an error that Mr N's request to have the partial close out policy applied to his account wasn't actioned. It said Mr N filled in the required form but *"it was not picked up by his relationship manager and applied to his account"*. It doesn't seem to have argued there was a question about whether it would have been applied had it been picked up.

Saxo has instead argued that the overall account terms gave it the discretion to close all of Mr N's trades in a margin call situation, and that in any event the terms of the partial close out policy say that *"Saxo retains the right to close all margin positions fully"*. It therefore argues it has acted within the scope of its contractual discretion to fully close Mr N's trades when his margin utilisation passed 100%.

I don't find these arguments particularly persuasive. By Saxo's own admission, it didn't exercise any discretion here. It hasn't suggested it thought about whether or not to fully close Mr N, and decided that was the right course of action. It simply defaulted to that course because it hadn't applied the partial close out policy. As Saxo said itself *"no 'decision' was made to fully stop [Mr N] out. It was an automated process"*.

Saxo is correct to say that within its terms it explains in a few places that there's a chance a client's positions will all be closed in various margin related scenarios. But again these are explained at being at Saxo's discretion. Of particular relevance I find clause 12.8 of the terms which say that:

"Unless otherwise agreed in writing, the Client acknowledges that […] Saxo Markets may initiate, on the Client's behalf, compulsory close-out of any and all open Margined positions when the level of Margin Utilisation for the Account reaches or breaches the maximum level provided on the Website".

Here, I think matters were *"otherwise agreed in writing"*. Mr N's relationship manager had emailed him Saxo's partial close out policy. And said *"Currently when you reach 100% Margin Utilization all margin positions will be liquidated. If you'd like to amend this to scale back positions if/when you reach 100%, then please respond to this email stating "I have read and understood the terms stipulated in the Partial Close out document" (attached)"*.

Mr N replied to this email giving the required statement. I'm therefore satisfied Saxo had agreed with Mr N, in writing, to take a different course of action under margin breaches.

The partial close out policy document itself says that *"If the client has elected that they prefer a partial stop-out, then Saxo Bank will employ an algorithm designed to calculate a reduction percentage […] Once the calculation is complete, the system will place orders to reduce all net margin positions"*.

As noted above, the policy did reserve Saxo's right to close all margin positions. But the starting point it gave was that after electing to take up the policy, Saxo *"will"* carry out a partial close out, rather than a full one. Taking all this together, I find that Saxo had agreed with Mr N that it would employ a partial close out in the event of margin breach. It had given itself the option of still closing all Mr N's trades – but this wasn't positioned as the default option. I would therefore have expected Saxo to explain why it had deviated from the agreed partial close out path. It hasn't done that, it's simply said the policy wasn't applied to Mr N's account so he was automatically closed out fully.

It is obviously impossible to say with certainty what would have happened if the policy had been correctly applied. I acknowledge there is a possibility Saxo would have applied its discretion to still fully close Mr N's positions. But I've seen no evidence or arguments as to why it would have done so. I therefore find it fair and reasonable to proceed on the basis that, but for Saxo's error in failing to pick up Mr N's request, his account would have been subject to a partial close out when his margin utilisation breached 100%.

This leads us to the crux of what's in dispute. Saxo has argued, and our investigator agreed, that even had the partial close out algorithm been used, Mr N would have been left no better off. It's said that all his positions would still have ended up being closed out, and in fact his losses would have been slightly larger than they ended up being. To support this Saxo has provided a detailed analysis. It has shown what would have happened at each partial close out, and how much of the orders would have been filled in the market. It's explained how in its view Mr N would have remained above the margin utilisation limit after each close out, and that the partial close out algorithm would have then continued to kick in every ten seconds until after five attempts it would have fully closed Mr N's positions on the sixth close out.

Mr N has disputed this, saying it was precisely the large orders generated by fully closing his positions that have led Saxo to its conclusions. He believes that a partial close out would have successfully reduced his margin, while retaining the majority of his positions, which would subsequently have moved in his favour and substantially reduced his losses.

I've considered this very carefully. It's impossible to be completely certain what would have happened had events transpired differently. So I have to decide, on the balance of probabilities, what I think is more likely than not to have happened.

I've given weight to Mr N's arguments. He's said that it was Saxo's own orders to close his positions which depressed the market and mean Saxo think he'd have remained in breach of his margin requirement. In effect, he says without the weight of those orders, his smaller partial close orders would have been filled, and the market would have risen, which would have negated the need for further close outs.

The market at the time was very illiquid, and Mr N's positions were large. I can see the way these orders could potentially have impacted on the market levels, but I don't agree they have likely done so here to the degree it's changed what would have happened.

Saxo has provided persuasive evidence that the lack of liquidity was such that even the partial close out orders to cut 10% of Mr N's positions wouldn't have been fully filled. I'm persuaded by the analysis it has provided which shows that with even those smaller unfulfilled orders in the market, Mr N would have remained in margin deficit for at least the 60 seconds (six sets of ten) which it would have taken to eventually result in orders to fully close his trades. I'm mindful that in reality it took around 17 minutes to close all Mr N's trades.

This means that overall, I'm satisfied that on the balance of probabilities, even if Mr N's account had been subject to partial close out, within a minute he'd have been in the same position he's in now in the sense of having had all his trades forcibly closed by Saxo. And that it would have been fair and reasonable for Saxo to do that. I'm not persuaded Mr N would have been any better off financially by having had a partial close out. I also find that any distress Mr N suffered as a result of the closure of his positions would have happened anyway, and therefore wasn't caused by Saxo's failure to apply the partial close out. So it follows that I don't think it would be fair or reasonable for Saxo to pay Mr N any compensation.

I note that since Mr N brought his complaint to our service, Saxo has offered him £1,000 by way of apology. Mr N should contact Saxo directly if he now wishes to accept this.

My final decision

For the reasons I've given, I don't think Saxo Capital Markets UK Limited needs to do anything to settle the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 8 December 2023.

Luke Gordon
Ombudsman