

The complaint

Mr F complains that TF Global Markets (UK) Limited t/a ThinkMarkets (TFGM) wrongly suspended his trading account and voided his trades.

What happened

In 2017 Mr F opened an account with TFGM through which he could trade Forex on its platform. In November 2017 TFGM suspended several client accounts, one of which was Mr F's. It subsequently voided trades he had made with the effect that he lost the profits he had made.

Mr F complained to TFGM but it didn't uphold the complaint. It said its risk and trading team had identified some unusual trading behaviour on his account. It referred to its terms and conditions prohibiting certain trading practices, including arbitrage, taking advantage of price latency and off-market trading.

It said where such practices are identified it can take action in accordance with its terms and conditions and that having concluded he traded in breach of its terms it acted within its rights in voiding the trades and removing the profits.

Mr F responded and said that it had illegally withdrawn funds and this was now an issue of fraud. He said he had never carried out latency arbitrage and said all his trades had been held for a very long time and that he hadn't benefitted from any swift fluctuation in price. He demanded that it pay him the €14,952 profit that it had removed.

TFGM didn't agree with Mr F and he referred his complaint to our service. When providing information to the adjudicator about the complaint TFGM said, in short that:

- It has evidence that multiple IP addresses have been used by different account holders and this clearly indicates the users are different people and they are in different locations.
- The other IP addresses have also traded using a latency arbitrage system.
- Most of Mr F's trades are very short term – a few seconds or minutes - and in assessing the open versus close time it's clear that scalping/latency trading is taking place as well as others using Mr F's account without permission.
- Mr F was part of a network that targeted TFGM between September and November 2017 using latency arbitrage, in breach of its terms.

TFGM provided a document titled Individual Client Analytics which provided a graph showing Mr F's increasing profit between October and November 2017 and details of the accounts that were linked by way of several IP addresses.

The adjudicator didn't uphold the complaint, in short she made the following key findings:

- Having carefully considered Mr F's trading history and transactions there were a total of 28 trades between 25 October 2017 and 14 November 2017 that were opened and closed immediately. She isn't persuaded that this is something an ordinary retail trader could physically achieve.
- Between opening the account with a stake of €4,000 and it being closed by TFGM Mr F made a total of €20,346 and profit of €14,873 after accounting trading losses and costs, in a period of 34 days.
- There is nothing wrong with making profits from the use of high frequency trading algorithms and trading systems but the high level of profits is unlikely to be consistent with fair trading and it is her view he was trading with an unfair pricing advantage and had not acted in good faith or in line with the terms and conditions.
- TFGM was entitled to withhold and void the trading profits obtained resulting from the unfair trading advantage Mr F had.

Mr F didn't agree with the adjudicator's findings and, in summary, said the following:

- Whilst statistically most retail traders lose money, not all do.
- He has been trading successfully for years and has his own strategy which works for him, as he has refined it over many years of trading.
- To generalise him as a retail trader is inaccurate when you consider the leverage he was offered.
- There is no substance behind the generic statements that have been made and the statements are inaccurate when considering him as an individual trader, rather than generalising him with all traders.

As Mr F didn't agree with the adjudicator the matter was referred to me for decision. I issued a provisional decision explain why I didn't think the complaint should be upheld the findings from which are set out below..

"My role is to come to a fair and reasonable decision based on the information provided by the parties and taking into account relevant; law and regulations; regulator's rules, guidance, and standards; codes of practice; good industry practice at the time - where I consider it appropriate to do so.

The main issue I need to decide in this complaint is whether TFGM did anything wrong in voiding Mr F's transactions made between October and November 2020. Its reasons for taking the action that it did comes down to it concluding that Mr F had practised arbitrage and taken advantage of price latency on its platform when trading.

TFGM's terms and conditions include provisions that don't allow such trading and allows it to take action where it has reason to think such trading has taken place. Such terms and conditions are not uncommon in broker agreements and there is nothing wrong with TFGM imposing such terms on its clients.

The relevant provisions of TFGM's terms and conditions are set out below. I have highlighted in bold what I consider the key parts are in terms of my findings.

Clause 7.8:

“We reserve the right to refuse any trades placed by you that we judge to be clearly outside the prevailing market price such that they may be deemed non-market price Transactions, whether due to manifest error or stale, incorrect, or broken price feeds. Where we have opened or closed a trade before becoming aware of the price disparity, we may at our absolute discretion either treat that trade as void”

‘Manifest error’ is defined as:

“An error, omission or misquote (including any misquote by our dealer) which by fault of either of us or any third party is materially and clearly incorrect when taking into account market conditions and quotes in Markets or Underlying Instruments in the prevailing market at that time. It may include an incorrect price, date, time, Market or currency pair or any error or lack of clarity of any information, source, commentator, official, official result or pronouncement.”

Clause 7.10:

*“Internet connectivity delays and price feed errors may create a situation where the prices displayed on the trading platform do not accurately reflect market rates. **ThinkMarkets does not permit the practice of arbitrage, nor does it allow Client to take advantage of price latency. Transactions that rely on price latency or arbitrage opportunities may be revoked at our discretion. ThinkMarkets reserves the right to make the necessary corrections or adjustments on the Account(s) involved, including, but not limited to, withholding any profits made by Client while using these trading tactics.** Accounts that rely on arbitrage strategies may at the sole discretion of ThinkMarkets be subject to ThinkMarkets intervention and approval of any Transactions.”*

Clause 18.2.1:

“When ThinkMarkets executes a Transaction on the Client’s behalf, ThinkMarkets may buy or sell on securities exchanges or directly from or to another financial institution shares or units in the relevant instrument. The result is that when the Client places Transactions with ThinkMarkets the Client’s Transactions can have an impact on the external market for that instrument in addition to the impact it might have on ThinkMarkets price. This creates a possibility of market abuse.”

Clause 18.2.2:

“You represent and warrant to ThinkMarkets and agree that each such representation and warranty is deemed repeated each time you close and open a Transaction and each time you place or cancel an Order that:

- (a) You will not place and have not placed a Transaction with ThinkMarkets or otherwise behaved, nor will you behave in a manner that would amount to market abuse and/or market manipulation by you (or by you acting jointly or in collusion with other persons).*
- (b) You will not have placed a Transaction or order that contravenes any primary or secondary legislation or other law or regulatory rule including in relation to insider dealing or any corporate finance activity.”*

Clause 18.2.3:

“In the event that you place any Transaction or order in breach of any of the representations or warranties given above, or ThinkMarkets has grounds for

suspecting that you have done so, ThinkMarkets may, in our absolute discretion (and with or without giving you notice): (i) close the Transaction or order and any other Transaction or orders that you may have open at the time; (ii) enforce the Transaction against you; or (iii) treat all your Transactions as void, unless and until you produce conclusive evidence that you in fact have not committed the breach of the representations and warranties above.

Clause 18.2.4:

“The exercise by ThinkMarkets of its rights under this clause shall not affect any other right of ThinkMarkets, under this Agreement or law, whether in respect of that Transaction or order, or any other Transaction or order.”

Contractual discretion

In summary clause 7.8 gives TFGM the right to void trades it ‘judges’ are outside the prevailing market price such that they are deemed to be non-market prices. Trades that involve price latency or arbitrage would be outside the prevailing market price and so would be covered by this clause.

Clause 7.10 specifically prohibits arbitrage and taking advantage of price latency and gives TFGM the right to revoke transactions which rely on such practices and to make corrections or adjustments to the account.

Clause 18.2 also allows TFGM to void all transactions where it has ‘grounds for suspecting’ that a client has placed a transaction that would amount to market abuse or market manipulation.

The wording of the above terms doesn’t require that TFGM establish that Mr F has in fact traded using price latency, arbitrage or otherwise carried out non-market trades, or placed a transaction that amounts to market abuse or market manipulation. They provide TFGM with a contractual discretion, where it judges that he traded in such a way, to take a number of steps including treating trades as void and making corrections and adjustments to the account.

The contractual discretion under clauses 7.8 and 7.10 allows TFGM to void the transactions it judges have been made using arbitrage or price latency. The contractual discretion under clause 18.2 is wider, as under that clause TFGM can void all transactions where it judges a transaction involved market abuse and/or market manipulation.

I have seen nothing that makes me think that ‘market manipulation’ cannot include arbitrage or price latency and as such if TFGM judges transactions did involve such practices it can then exercise its contractual discretion under clause 18.2 to void all transactions.

TFGM must exercise its contractual discretion honestly and in good faith without arbitrariness, capriciousness, or irrationality. This is commonly referred to as the ‘Braganza duty’ set out in the case of Braganza v BP Shipping Limited (2015) UKSC 17.

So, I don’t need to decide whether it is more likely, than not, that the trades placed by Mr F meant he practiced arbitrage and/or took advantage of price latency and/or involved market abuse or manipulation. I just need to decide whether TFGM exercised its contractual discretion in accordance with its Braganza duty. In other words, whether, when TFGM judged that Mr F’s trades used those practices, it exercised its judgment honestly and in good faith, without arbitrariness, capriciousness, or irrationality.

In this regard, whilst I have summarised the points made by Mr F in response to the adjudicator's opinion to show I have considered these, I don't think it is necessary for me to address what he has said as this doesn't go to the issue of whether TFGM exercised its contractual discretion under the relevant clauses in line with its Braganza duty. Having considered what the parties have told me and the overall evidence I am satisfied that TFGM exercised its contractual discretion in accordance with its Braganza duty.

TFGM's conclusion that Mr F's trades had involved price latency and arbitrage followed its consideration of the prices he opened and closed trades at on its platform as compared to the market price as provided by Reuters. It has provided a snapshot of Mr F's trades between 25 October 2017 and 2 November 2017 which shows the open and close prices on the platform as well as the market price. It can be seen from this that the open and close prices on the trades weren't in accordance with the market price.

TFGM also identified multiple trades which were very short term, measured in seconds or minutes, whereby it says the latent pricing on its system was exploited. TFGM also says that it identified other account holders using the same IP addresses which traded in the same way.

Therefore, I am satisfied that TFGM exercised its contractual discretion under the relevant clauses in accordance with its Braganza duty and that it didn't act arbitrarily, capriciously, or irrationally - given the information available to it at the time – in voiding Mr F's trades in accordance with its rights under the clauses I have set out above.

In addition TFGM obtained expert evidence in May 2018, after it voided the trades, which it considers supports its actions. That expert evidence concluded, based on an analysis of the trading account, that Mr F, was using a latency arbitrage strategy which was designed to exploit a weakness in TFGM's platform – i.e. its prices lagging behind the market price.

The expert also noted that Mr F's account was accessed from various IP addresses in various locations in the world - as already identified by TFGM at the time it voided his trades -and identified other account holders using a similar latency arbitrage strategy to Mr F using the same IP addresses as his account.

This expert evidence supports my conclusion that it was fair and reasonable for TFGM to have voided Mr F's trades, because it supports TFGM's allegation that Mr F was trading in breach of its terms."

I gave both parties the opportunity of providing any further information or evidence they wanted me to consider before reaching my final decision but neither party responded.

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.

As neither party has provided a response to my provisional decision there is no basis for me changing the findings I made therein, which form part of this final decision.

In summary I am satisfied that TFGM had a contractual discretion which allowed it to void Mr F's trades and it exercised that discretion in accordance with its Braganza duty – without arbitrariness, capriciousness, or irrationality – and as such it didn't do anything wrong.

My final decision

I don't uphold this complaint for the reasons I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 18 October 2023.

Philip Gibbons
Ombudsman