

The complaint

Ms R complains that TF Global Markets (UK) Limited t/a ThinkMarkets (TFGM) wrongfully voided the trades she made so that she lost the profit in her account.

What happened

Ms R opened an account with TFGM in September 2017 under which it provided an execution only brokering service and through which she traded Forex on its platform until TFGM suspended her account in November 2017. It then voided trades she had made and closed her account which resulted in her losing the profit standing in her account at the time of £18,000. She complained to TFGM about it voiding her trades.

In its initial response to her complaint TFGM said that it had identified a number of orders trading in an 'arbitrary' manner and referred to what it could do when trades were placed due to price latency or where accounts used arbitrage strategies. It said that it deemed the orders investigated by it were based on non-market prices and that, as such, under its terms it could void the trades.

In its subsequent final response letter, TFGM repeated the reasons set out in its initial response as to why it had voided Ms R's trades, referencing arbitrage trading, off-market trading and taking advantage of price latency. It said its terms and conditions prohibit such trading and that she had been trading in breach of the terms.

Ms R then referred her complaint to our service. We asked TFGM for further information about what had happened. It said that the client's account was being accessed through multiple IP addresses and that this was a breach of its terms and that it was targeted by a gang of 'arbitrary' traders – which I assume should be a reference to 'arbitrage'.

It said that the agreement it had was only between it and the client and the terms make clear that no one else can access the account. It provided a document headed 'Individual Client Analytics' which has a list of IP addresses - all but one of which is identified as being in London. There is then a list of 'correlated' accounts.

One of our adjudicators considered the complaint but didn't think it should be upheld. In short he thought that the evidence did support TFGM's conclusions that Ms R was trading in collusion with other correlated accounts from shared IP addresses, using the same external price latency arbitrage EA.

Ms R didn't agree with the investigator. In short, she said that TFGM has never provided evidence she was trading using arbitrage but has picked out a few trades from thousands and presented them as arbitrage. She explained that her profits hadn't come from short term trades and that accessing her account from multiple IP addresses isn't a breach of the terms and conditions and if it was no trader would qualify because of dynamic IP address changes due to Dynamic Host Configuration Protocol (DHCP).

The adjudicator responded and explained that he had not upheld the complaint because he was of the view that Ms R was using a price latency arbitrage EA which identified when

TFGM's prices were lagging the market and this gave her an advantageous price on entry.

Ms R provided a further detailed response setting out why she didn't agree with the adjudicator including an explanation of her 'pyramid' trading strategy and arguing, amongst other things, that if the prices were lagging then this was deliberate on the part of TFGM.

As Ms R didn't agree with the adjudicator the matter was referred to me for decision. I issued a provisional decision not upholding the complaint the findings from which are set out below.

"My role is to determine Ms R's complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case 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.

Ms R has made detailed and helpful submissions in this complaint which I have considered and taken into account but which I have not set out in full.

Before I consider what TFGM did I think it might be helpful to clarify the basis of the execution only service it provided to Ms R, as she has put forward arguments in support of her complaint on the basis that TFGM was an Electronic Communications Network (ECN) broker, when I don't think it is.

An ECN broker matches buyers and sellers in the market and as such Ms R argues that the trades she made were executed on the open market and were between her and the other party to the trade and nothing to do with TFGM. She said there was nothing in the terms and conditions that suggested she was trading with TFGM rather than the market.

However, TFGM acted as a matched principal broker - as made clear in its order execution policy and its licence with the FCA.

The FCA defines matched principal trading as follows:

"a transaction where the facilitator interposes itself between the buyer and the seller to the transaction in such a way that it is never itself exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction."

In short TFGM deals as principal to fulfil customer orders, which in simple terms means that it acts as the buyer to the seller and as the seller to the buyer in any trade. Contrary to what Ms R has said, the terms and conditions do make it clear that she was trading with TFGM, as clause 7.6 states that in transactions it will always act as principal.

Turning to TFGM's voiding of Ms R's trades, the explanation it put forward in its final response letter was that trades carried out by Ms R trading had taken advantage of price latency on its system and as such involved arbitrage trading/non-market trading. It said these practices weren't permitted by its terms and conditions and referred to clauses 7.9 and 7.10 of its terms in this regard. It also in other correspondence referred to clause 7.8. I have set out the clauses below and highlighted in bold what I believe to be the key parts.

Terms relied on by TFGM

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 7.9

“ As a client of ours you hereby accept that the prices quoted by other companies may not be relied upon by you in respect of your Account(s) with us and that we reserve the right to decline any quote or refuse to be bound to any contract, including those arising from any manipulation of the quoting mechanism or our Services generally, notwithstanding our undertaking to provide a clear and fair service to you without barriers at all times.”

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.”*

In addition to the specific terms TFGM relied on in correspondence with Ms R there are other clauses that I think are relevant to this complaint consisting of warranties and representations made by Ms R that allow TFGM to take action in the circumstances set out. Those clauses include:

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 7.8 gives TFGM the right to void a trade that it ‘judges’ is outside the prevailing market price such that they are deemed to be non-market prices. Trades that involve price latency or arbitrage are trades that would be outside the prevailing market price and as such would fall within clause 7.8.

Clause 7.10 specifically prohibits arbitrage and taking advantage of price latency and gives TFGM the right to revoke transactions which rely on either of those practices, as well as the right 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 and/or market manipulation.

Ms R has argued that she cannot cheat or manipulate the market with an account of £2000 and that Forex trading is an open market which needs both buyers and sellers who cannot manipulate or cheat the market. But as I have explained, she wasn’t trading directly with the open market but with TFGM as principal.

Ms R has questioned the legality of the above terms. She has said that arbitrage is part of the ‘Forex ecosystem’ and legal and that as such the terms that TFGM seek to rely on are illegal. She has referred to arbitrage being legal in the US and statements made about its importance in terms of liquidity.

I acknowledge what Ms R has said about the legality of arbitrage trading in the US and I am not aware of any law or regulation that prohibits the practice of arbitrage in the UK either. However, the fact there is no law or regulation that prevents arbitrage trading doesn’t then make TFGM’s terms illegal.

It is for TFGM to decide the terms on which it is prepared to provide its services, so long as these are compliant with existing law and regulation. I am not aware of any law or regulation that would render the terms relied on by TFGM in some way unlawful and I have not been directed to any such law or regulation.

I am also aware that other brokers have similar terms that allow them to take action when trades involve arbitrage or latent pricing. In the circumstances I have no reason to think

TFGM can't rely on the terms I have set out above. It was for Ms R to decide whether she wanted to use TFGM's services based on its terms - which she clearly did as she agreed to the terms on opening her account.

Having determined that TFGM was entitled to impose the terms referred to above, I then need to consider whether these allowed TFGM to take the action it did in relation to Ms R's account – namely to void all her trades and as such the profit standing in her account that resulted from those trades.

Contractual discretion and Braganza duty

The wording of the above terms at clauses 7.8, 7.10 and 18.2, does not require that TFGM establish that Ms R has in fact traded using price latency or arbitrage or otherwise carried out non-market trades before taking the action permitted by the terms. They allow TFGM a contractual discretion where it judges that trades were placed outside the prevailing market price, or using the practices of price latency or arbitrage, to take a number of steps including treating those trades as void and making corrections or adjustments to the account.

TFGM must exercise its contractual discretion honestly and in good faith without arbitrariness, capriciousness, or irrationality – what 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's more likely than not that the trades made by Ms R did, or didn't, take advantage of price latency, arbitrage or were otherwise non-market trades or involved market abuse or manipulation. I just need to decide whether TFGM exercised its contractual discretion rationally, in accordance with its Braganza duty.

Therefore, whilst I have noted Ms R's various arguments as to why TFGM were wrong to conclude she was trading in breach of the terms I have referred to, I am not going to make findings on whether her trading actually involved price latency or arbitrage practices, as that isn't the question I need to determine.

Ms R has raised a couple of arguments which I think brings into question TFGM acting in good faith in the exercise of its contractual discretion. She has said that if TFGM was the counterparty to her trades this would explain why it took her profit – in that her profit would be its loss so it would have an incentive to void her trades. In other words, she is suggesting it might have voided her trades simply to recover its own losses and not because it reasonably thought she had traded in breach of the terms.

I have already set out the basis of the service provided by TFGM above – namely that it acted on a matched principal basis – and what this means. As such I am not satisfied that the profit of £18,000 standing in her account at the time TFGM voided her trades were its losses. In any event, I would need to have seen some persuasive evidence that its decision to void her trades was so that it could benefit financially to find it hadn't acted in good faith, and I have seen no such evidence.

Ms R has also argued that if the price lagged then this was deliberate and for the benefit of TFGM so it could increase its profits. Again, given the capacity in which it acted I don't think TFGM benefitted from latent pricing. And, in any event, as with the argument above, there is no evidence by which I could reasonably find it was deliberately providing latent pricing on its platform so it could benefit from this.

In terms of TFGM judging Ms R's trades had involved price latency or arbitrage, it says that it voided Ms R's trades after comparing prices she had executed orders at against independent market prices that it obtained from Reuters. It has provided some of the price

evidence it has relied on where it can be seen there is a difference between the price the trade executed at and the price shown by Reuters.

TFGM has also referred to certain trades that Ms R made over the course of her trading which it identified had been opened and closed simultaneously, or within a very short time, which it believes shows arbitrage trading.

It has also pointed to hedged trades where it says advantage was taken of a flaw in its system, which meant that it was possible to close one part of the hedged trade a split second before the other part, so that instead of the trades netting off as should be the case, a profit could be made.

The trades it has referred to can be seen in Ms R's account statement and I think this, along with the evidence of trades being executed at non-market prices shown by reference to the prices from Reuters provided enough information to TFGM for it to judge that the trades were outside the prevailing market price and/or relied on the practice of arbitrage or took advantage of price latency such that it rationally exercised its contractual discretion to void the trades.

In other words I am satisfied that TFGM exercised its contractual discretion in accordance with its Braganza duty and that it didn't act arbitrarily, capriciously, or irrationally in voiding her trades in accordance with its rights under the clauses I have set out above.

In addition TFGM obtained further evidence after it voided the trades which it considers supports its belief that it was being targeted by a group of arbitrage traders with similar trading patterns. It has provided evidence in the form of the analytics document referred to in the background above, which shows links between various IP addresses and client accounts – one of which is that of Ms R, although not her trading account.

Ms R has sought to argue that her account might be linked to other accounts by way of IP address because she used multiple devices to access her account when she was trading - such as her laptop and mobile phone - and has referred to the use of Dynamic Host Configuration Protocol. I don't think this necessarily explains how different client accounts trading in the same way have used the same IP address.

The analytics document was obtained after TFGM voided Ms R's trades and therefore isn't evidence it relied on when deciding to take that action. It is therefore not evidence that can be relied on as establishing that TFGM complied with its Braganza duty.

The document does, however, support my conclusion that it was fair and reasonable for TFGM to have voided Ms R's trades because it supports the allegations that she was trading in breach of the terms."

I sent the parties an email after issuing the provisional decision to clarify that transactions judged to involve arbitrage or price latency would in my view fall within clause 18.2 of the terms as market manipulation.

I gave both parties the opportunity to provide further information or argument before issuing my final decision but neither party provided a response.

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 any further information or arguments that would lead me to change the findings in my provisional decision I stand by those findings.

In short I am upholding this complaint because I am satisfied on the evidence provided that TFGM exercised its contractual discretion to void Ms R's trades honestly and in good faith and 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 explained.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 16 October 2023.

Philip Gibbons
Ombudsman