

The complaint

Mr T complains that TF Global Markets (UK) Limited t/a ThinkMarkets (TFGM) wrongfully voided his trades.

What happened

Mr T opened an account with TFGM in 2017 through which he could trade Forex on its platform. In November 2017 TFGM suspended his account, along with several others, and voided his trades with the effect that he lost €75,930.

Mr T complained to TFGM but it didn't uphold the complaint. It explained that it had voided Mr T's trades because he had made off-market trades using an algorithmic system that took advantage of price latency on its system. It said this was a breach of its terms and conditions and referred to clauses 7.9 and 7.10 of those terms.

Mr T referred his complaint to us and one of our adjudicators considered it but didn't think it should be upheld. In short, on the evidence he thought it was more likely than not that Mr T operating in collusion with other correlated accounts operating from shared IP addresses using the same latency Arbitrage Expert Adviser (EA) system.

The adjudicator wasn't persuaded that because Mr T held positions for an average of just over two hours and also made a lot of loss-making trades this meant his trading was legitimate as he argued. The adjudicator said that if he was using a latency pricing EA system he could select prices from TFGM's platform that were lagging behind the actual market price and he could enter either a buy or sell trade in the trend direction he chose at an advantage over the actual market price the second he placed the order.

Mr T didn't agree with the adjudicator. In summary he said he didn't understand why it had been stated he was colluding with other account holders he didn't know. He also said that he hadn't allowed a friend to trade for him as stated and had simply told a friend about his own trading.

Mr T said that TFGM had unjustifiably deducted €75,930 from his account and that it needed to show the basis for this deduction. He said that TFGM had only shown some trades he had made which may have involved price latency and the adjudicator had made a wrong decision based on this.

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

"My role is to determine Mr T'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.

I have considered what happened carefully and whether TFGM did anything wrong in suspending Mr T's account and voiding all his trades, thereby deducting the profits he had made through his trading.

It is TFGM's case that it voided Mr T's trades because he took advantage of price latency and the trades were off-market trades. It relied on its terms and conditions in doing so. In its FRL it referred to clauses 7.9 and 7.10 which it said allowed it to take the action it did in respect of Mr Ts account. I set out the clauses below and have highlighted in bold the key parts.

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.”*

There are other clauses within the terms and conditions which also gave TFGM the right to void trades in certain circumstances, which I set out below.

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 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, no 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 a trade 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 would be outside the prevailing market price and as such would fall within the clause.

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 or market manipulation.

The above clauses don't require that TFGM establish Mr T has in fact traded using price latency or arbitrage or otherwise carried out non-market trades before taking action under the clauses. Rather, they provide TFGM with a contractual discretion to take a number of steps – including treating trades as void and making corrections or adjustments to the

account - where it judges such practices were being used.

It has to exercise this 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, in making my findings I don't need to decide whether it is more likely than not the trades Mr T made 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 in accordance with its Braganza duty.

Mr T has said that TFGM has only shown some trades that might have involved price latency. He analysed his trades based on the length of time they remained open. For those trades held for less than 30 seconds his overall position was shown as negative with the majority of his profit being shown as resulting from holding trades open for more than one hour.

Mr T argues this shows he wasn't trading using arbitrage. I acknowledge that arbitrage is typically referred to where there is simultaneous or near simultaneous opening and closing of a trade to take advantage of a difference in price between markets. However, regardless of this the terms I have set out above don't limit TFGM to taking action only where there is arbitrage. They allow it to take action where it reasonably thinks trades have taken advantage of price latency, were non-market trades or involved market manipulation.

In short, the point it makes is that if a trade was opened with the benefit of latent pricing on its system and was kept open longer to take advantage of the price continuing to move in the right direction, Mr T benefitted from the latent pricing at close regardless of the length of time the position was held.

The evidence that TFGM had available at the time that led it to void Mr T's trades was based on an analysis of his trades and of the IP addresses used for his account at the time. It has provided a spreadsheet that provides a snapshot of one day's trading in GBPUSD with the open and close prices compared to the market price.

The trades themselves show a mix of winners and losers and varying times for how long positions remained open for both. I can see no obvious pattern in the trades, with reasonably significant losses and profits resulting from trades held for varying lengths of time. TFGM's says that Mr T used a sophisticated and malicious system of trading that disguised his trading so that it didn't look like standard arbitrage but instead had extended hold times and a mixture of winners and losers.

Having extended hold times and a mixture of winners and losers would also be the case if a client was trading in accordance with the terms, but the spreadsheet also shows open and close prices based on non-market prices. It is the fact that Mr T took advantage of non-market prices together with TFGM identifying that his account was being accessed through different IP addresses in various locations that led TFGM to exercise its rights under the terms and conditions to void his trades.

I think in the circumstances, based on the information it had at the time, TFGM complied with its Braganza duty – in other words it didn't exercise its contractual discretion arbitrarily, capriciously, or irrationally. I therefore think TFGM acted fairly and reasonably in voiding Mr T's trades when it did.

TFGM has also provided expert evidence it obtained in May 2018 which I have considered. The opinion of the expert is that the accounts it analysed, which included Mr T's account,

were using a latency arbitrage strategy designed to exploit a weakness in TFGM's platform.

It identified that Mr T's account was accessed from various IP addresses in multiple locations, as TFGM had already identified. However, it goes further and established that other accounts, which also took advantage of price latency on TFGM's system, were linked to the same IP addresses.

This information was obviously obtained after TFGM had taken the decision to void Mr T's trades, so wasn't information that was taken into account by it in the exercise of its contractual discretion and as such can't be relied on by it in support of it having complied with its Braganza duty. It does, however, support my conclusion that it was fair and reasonable for TFGM to have voided Mr T's trades because it supports the allegation TFGM made that he was trading in breach of the terms."

I subsequently wrote to the parties to clarify that I considered that transactions that were judged to be arbitrage or involve price latency would also be transactions falling within clause 18.2 as market manipulation. I gave the parties the opportunity to provide further evidence or information they wanted me to consider before making 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, which form part of this final decision.

In summary I am satisfied that TFGM exercised its contractual discretion to void Mr F's trades 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 T to accept or reject my decision before 16 October 2023.

Philip Gibbons
Ombudsman