

Before the Arbiter for Financial Services

Case No. 143/2018

AS et.

(‘the Complainants’)

vs

FXDD Malta Ltd. (C48817)

(‘the Service Provider’ or ‘the Company’)

Sitting of 9 September 2019

The Arbiter,

Having seen **the Complaint** which relates to the deductions made by the Service Provider from the trading accounts held by the Complainants involving trades undertaken in Contracts for Differences (CFDs)¹ on stock/stock indices. The deductions relate to dividend adjustments made on short positions² in CFDs.

The Complainants submitted that at the beginning of April 2018 the Service Provider deducted undocumented charges on their accounts with respect to the CFD trades done during the first quarter of 2018.

The Complainants emphasised that the charges were debited retrospectively and without any notice. It was explained that when the Complainants contacted

¹ ‘A contract for differences (CFD) is an arrangement made in financial derivatives trading where the differences in the settlement between the open and closing trade prices are cash settled. There is no delivery of physical goods or securities with CFDs. ... CFDs allow traders to trade in the price movement of securities [and other instruments including stock indices] ... Essentially, CFDs are used by investors to make price bets as to whether the price of the underlying asset or security will rise or fall ... Traders who expect an upward movement in price will buy the CFD, while those who see the opposite downward movement will sell an opening position.’ <https://www.investopedia.com/terms/c/contractfordifferences.asp>

² A sell position

the Service Provider the Company claimed that its Terms & Conditions included a clause in respect of the said charges.³

The Complainants presented two versions of the claimed Terms & Conditions document, one dated April 2018 and another dated January 2018. The Complainants claimed that the one dated April 2018 reflected a new clause which was used by the Company as a basis for the deduction of the charges. The Complainants highlighted that the other document dated January 2018 did not include such clause.⁴

The Complainants pointed out that the Terms & Conditions document dated April 2018 was subsequently removed by the Company after a few days and replaced once again with the one dated January 2018, which version excluded the new clause featured in the April 2018 document. The Complainants believed that the Company tampered with the documents just to support their case.⁵

The Complainants further submitted that the Company never bothered to explain the reasons why the new clause featured in the April 2018 document was never part of the Terms & Conditions of January 2018. The Complainants claimed that the Company deducted money from their account despite that it did not have anything else in its Terms & Conditions which justified such deductions.

In addition, the Complainants submitted that the deduction of charges retrospectively on which a client could not have been aware was in itself an unfair practice.⁶

The Complainant explained that he had been trading with the Company for over 2 years and claimed that in the past the Company never did any such debit or credit adjustments to the client accounts. It was submitted that the problem appeared to commence when the Company started to lose money. The Complainants further claimed that it was accordingly not common practice for such adjustments to be made as claimed by the Company.⁷

³ A fol. 4

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ A fol. 6

The Complainants further highlighted that prior to and up to the day of the deductions from their two trading accounts,⁸ they received no communication from the Company about any change in practice or charges despite that such change in approach was *'of outmost significance to the contracts' specifications'*.⁹ The Complainants explained that they only received an email communication from the Company about the matter after they realised that the money was already deducted from their accounts.

The Complainants requested the Company to pay back the full amount deducted amounting to EUR159,796.42.¹⁰

In its reply, the Service Provider, in essence, submitted the following:¹¹

That the adjustments made to the Complainants' accounts reflect debits and/or credits made to accommodate corporate actions in line with industry market conventions.

That the positions on CFD's are adjusted to reflect such corporate actions and that in case of a long position on securities, the account would be credited whilst in case of a short position on securities the account would be debited accordingly.

That the Company has a Category 3 Investment Services Licence granted from the Malta Financial Services Authority. In accordance with the terms of its licence the Company does not provide any advisory services to its customers with the Company providing execution only services to its customers on a variety of products, including, but not limited, to CFDs on single stocks.

That the subject matter of the complaint relates to CFDs on single stocks which essentially consist of trading on the value of an underlying stock. The Service Provider submitted that by its nature this particular product includes the obligation of investors for the cash settlement of the dividend due on the dividend payment date. The payment date for the cash settlements are pre-

⁸ Account number 737590 & 737866 – A fol. 6

⁹ A fol. 6

¹⁰ A fol. 4

¹¹ A fol. 21; 32-35

defined in the description of the underlying stock and is public information available to all investors that trade such products.

By way of additional information, the Service Provider explained that, as per market rules for all securities, the accrual of the dividend or coupon is settled separately on its payment date.

Therefore, it was argued that investing in CFDs on single stocks includes, as part of the product per se, the obligation to make a cash settlement for the dividend. The Service Provider submitted that this was an intrinsic part of the product and cannot be detached, refused or ignored by investors of such products and that, therefore, when the Company's clients trade CFDs on single stocks they are trading the total value of the underlying stock plus the obligation for the cash settlement of the dividend once it matures.

The Company explained that when executing CFDs on single stocks the broker will take into consideration the value of the stock plus any cash settlement due on any such dividend. This will eventually result in a credit or debit on the customer's account based on the long or short position of the client which will be applied and calculated in accordance with the internal operational procedures of the particular broker.

The Service Provider further explained that it debited the Complainants' accounts in accordance with its internal operational process for such cash settlement once the dividends on the single stock of CFDs that were being traded matured and the customer had a net open position on the due payment date.

The Service Provider further submitted that the Complainant is an experienced trader and has been a customer of the Company since January 2015. The Company explained that it conducted an appropriateness test as required by the applicable investment services rules of the MFSA.

It was further pointed out that at the time of on-boarding, one of the Complainants had advised the Company that he had been trading stocks for over 24 months prior to becoming a client of the Company. It was further submitted that the Complainant's account activity with the Company of over three years confirmed that he was a frequent and experienced trader and there was thus

awareness of the intrinsic properties, risk and benefits of trading in the products in question.

With respect to the Complainants' claim that the Company debited their account retrospectively and without notice, the Company confirmed that it had debited and credited the accounts of all its customers after the payment date of the said dividend attached to the stocks became due (or matured) with this being done in accordance with its internal operational procedures.

The Service Provider pointed out that there is, in fact, no industry standard which dictate specific times that such credits/debits are to be applied as this depends on the specific payment dates of the said dividends and referred one to notices of other brokers on the same matter.

The Service Provider submitted that it enters into a customer agreement with all its customers and that in their complaint, the Complainants are actually referring to the online manual (not Terms and Conditions), which the Company provides to its customers by way of guidance and education and which is not a contractually binding document. The Company submitted that the Customer Agreement is the only contractually binding document between it and its customers. The Company confirmed that the Customer Agreement entered into with the Complainants does not refer to the settlement of the dividends because this is an internal operational process and not a contractual matter.

The Company further submitted that over the past year it had been in the process of updating and reviewing all its customer facing materials (both online as well as physical forms/documents) to reflect the regulatory changes to which it is subject including MiFID II, GDPR and EMIR, and that the manual referred to by the Complainants formed part of such general review.

Furthermore, the Company indicated that it was migrating to a brand-new website during the period in question, so it was highly probable that the web development team was in the process of uploading updated manuals, documents and forms.

The Company strongly rejected the allegations made by the Complainants in their complaint and claimed that as an execution only broker, the Company does not make or lose any money on the settlement of the dividends with this forming part of the '*price*' and being an intrinsic characteristic of the product that the investor bears or gains.

Having heard the parties and seen all the documents and submissions

Considers:

The Merits of the Case

The Arbitrator will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.¹²

Profile of the Complainants

According to the Account Information Sheet presented by the Service Provider, the Complainants are indicated as spouses born in 1977 and 1978 respectively.¹³ The section titled '*Financial and Trading History Information*', in the joint Account Information Sheet indicates that the trading and investment experience was *inter alia* of 24 months or more with respect to stock equities and stock options; commodities and futures and futures options; and foreign exchange with such trading being in the range of \$500,001 and over in the indicated instruments.¹⁴

As confirmed by the Service Provider during the hearing of 28 January 2019, the classification of the client was as a retail customer.¹⁵

Trading Accounts held

The Service Provider indicated three trading accounts with the oldest one opened on 03/30/2015 and another two accounts opened on 11/23/2016 and

¹² Cap. 555, Art. 19(3)(b)

¹³ A fol. 37 & 38

¹⁴ A fol. 41 & 42

¹⁵ A fol. 96

12/13/2016. The two accounts opened in 2016 are the ones from which the contested deductions were made.¹⁶

Other aspects

Nature of the Products traded & other Aspects raised by the Complainants

During the proceedings of the case, one of the Complainants pointed out that CFDs are synthesized Over-the-Counter (OTC) transactions and part of a non-regulated market where the service provider can set its own specifications for the contracts with varying differences existing between different providers.

The Complainant indeed stated that:

*'... while brokers themselves may be regulated, CFDs are not covered by the rules applicable to exchange-traded contracts. By their nature, CFDs do not have an established liquid market with numerous participants. If I want to exit my contracts, I rely solely on the broker's ability to close out at the time and price I wish, which may not match the underlying market's liquidity or market price. Moreover, I cannot transfer my trades to another broker/provider nor can I request the broker to change his policy in my favour; he sets the rules and clients simply choose to trade or not by what they see. In other words, each broker provides its own specs/liquidity and over the years I have traded with numerous brokers and way different specs.'*¹⁷

As part of the explanations provided, it was *inter alia* highlighted by the Complainant that:

'... the service provider (who holds a market maker's license and can actually make a profit from a customer's loss) started to lose a lot because of my profitable trades. A decision was thus made to change the rules of the game and, at the same time, take back some of the loss they incurred. And while the service provider's management claims that they got charged by their liquidity provider and then passed the charges to me, they actually failed to provide any substantial evidence to back up their claim. Even if they got charged by a third party the responsibility still remains with them; they have the regulatory

¹⁶ A fol. 6 & 21

¹⁷ A fol. 91

*obligation to provide the correct trading environment instead of applying retroactive charges to cover any losses because of their errors or omissions.*¹⁸

The Complainant had also *inter alia* stated that:

*'To conclude, if this case is decided in favour of the service provider then clients cannot be possibly protected from any case of wilful misconduct. When a service provider or their liquidity provider starts to lose money they will not hesitate to claim that they simply made an error and come out clean. Always at the expense of the client.'*¹⁹

Other Aspects raised by the Service Provider

During the proceedings of the case, the Service Provider explained that:

*'... dividend adjustments have nothing to do with profit or loss that a broker like FXDD incurs but are third party costs calculated independently from the broker.'*²⁰

The Service Provider explained that the dividend is determined by the company which issued the shares/stock, and this is in turn charged or credited to the Service Provider who then debits the accounts of those clients who have short positions and credits the accounts of clients having a long position.

The Company *inter alia* stated that:

'In the interest of clarity, dividend payments received or due are not fees. Dividends due on short positions are a cost charged to FXDD which FXDD recovers from its clients, as is done by other investment service providers offering CFDs on stock indices as this is the industry standard'²¹

The Company claimed that:

¹⁸ A fol. 143

¹⁹ *Ibid.*

²⁰ A fol. 106

²¹ A fol. 103

'All dividend adjustments by definition are retroactive and we re-charge or re-credit within a reasonable amount of time as is industry standard practice'.²²

The Company explained that dividend adjustments were not applied previously due to a system error. It indicated that it has offered CFDs on stocks and indices from 2016 and that it *'applied the first dividend adjustments in January 2018 after the system error was discovered'.²³*

In its explanations to the Complainants, the Service Provider explained *inter alia* that:

'Due to a system error, dividend adjustments were not made prior to Q1 2018 in your account. However, though dividend adjustments for 2017 should have been made in the amount of \$1,515,582.27, the dividend adjustments in your account were only made beginning with Q1 2018'.²⁴

The Company indicated that this benefited the Complainant as it allowed him to open more trades and stated that:

'If the dividend charges were applied during that period you would not have been able to place more trades as you would have been margined called'.²⁵

The Company highlighted that it started applying dividend adjustments in terms of the provisions in its Customer Agreement²⁶ highlighting Clauses 9, 11 and the paragraph before last on page 22 of its Customer Agreement as the most relevant clauses to the case in question.²⁷

Clause 9 of the *'FXDD Customer Agreement, Risk Disclosure and Trading Rules & Regulations Documents'* ('the Customer Agreement') which deals with *'Customers' Monies' inter alia* provides that:

'The Customer accepts and hereby authorises FXDD to effect withdrawals from the Customer's Account with FXDD as may be required in order to settle any

²² A fol. 105

²³ A fol. 103

²⁴ A fol. 104

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ A fol. 97

charges and/or fees that may become due by the Customer to FXDD from time to time.²⁸

Clause 11 of the Customer Agreement which deals with 'Margin Requirements' *inter alia* specifies that:

*'FXDD reserves the right to withdraw or transfer funds from the Customer's account without notice to ensure that posted Marked-to-Market Margin (defined as Margin plus or minus marked-to-market P/L) equals or exceeds Required Margin on Opened Positions **and/or to satisfy any payment obligation to FXDD, including fees and charges in respect of Customer's Account***'.²⁹

The paragraph before last on page 22 of the Customer Agreement provides that:

*'Customers are responsible for any reporting errors. In case of Reporting and Confirmation errors or omissions, and/or errors in details of transactions including but not limited to the price at which deals were executed, the currency pair traded, the market direction (i.e. "buy" or "sell") of order, the type of order and/or any errors in fees, charges or credits to the Customer's Account, including but not limited to charges for executing a transaction, wiring funds, rolling over position, and/or sweeping Foreign Currency balances into the home currency, the Customer shall notify FXDD immediately upon discovery for review. In addition, the Customer is responsible for submitting details of any errors in writing to FXDD and sending the complete details to ...'*³⁰

With respect to the investment strategy adopted by the Complainant, an official from the Risk Management Team of the Service Provider noted, during the hearing of the 12 March 2019, that:

'In looking at Mr AS's investment strategy we noticed that for a very long time, years, in fact, his positions were only on one side. He was only short'.³¹

The same official further noted during the same sitting that:

'Based on my experience, it would be very unlikely that a client would sit with the same position for days, weeks and months. In this case, the client had the

²⁸ A fol. 117

²⁹ A fol. 119

³⁰ A fol. 131

³¹ A fol. 108

*same position for a period of years. This position was at the same time we had a technical issue with the CFD charges; almost three years’.*³²

It was further noted that:

*‘It is difficult to believe that the client was unaware that he was not being charged for his positions given his investment experience’.*³³

Overview of Position on Dividend Adjustments by some other Brokers

A search of the position on dividend adjustments disclosed by other regulated brokerage companies indicates that adjustments are done by brokers with respect to CFDs on stocks/stock indices where in the case of dividend payments on a stock or underlying stock forming part of the index, a client’s account is debited for short positions and credited for long positions.

One UK broker, for example, indicated *inter alia* on its website that if

‘... you hold a CFD position in a company and that company announces a dividend, your account will be credited or debited on the day the stock goes ex-dividend’,³⁴ explaining that:

*‘If you were long, you would have been disadvantaged by the drop in the market caused by the pay out of the dividend, so we would credit your CFD account with the dividend amount, less any applicable dividend withholding taxes. If you were short, you would benefit from the drop in the price, so the equivalent amount would be deducted ...’*³⁵

Another UK broker, also described how the dividend adjustments affect a CFD position explaining *inter alia* that:

‘If you have an open position through a dividend adjustment, we’ll ensure that there is no material impact on you by either crediting or debiting your ledger with the exact amount you have incurred as additional running loss/profit due

³² A fol. 108

³³ *Ibid.*

³⁴ <https://www.cmcmarkets.com/en-gb/learn-cfd-trading/corporate-actions>

³⁵ *Ibid.*

The following link also refers: <https://www.cmcmarkets.com/en-gb/support/faqs/price-adjustments#how-do-company-dividend-announcements-affect-my-trades>

to the dividend adjustment',³⁶ with the broker also publishing forecast dividend adjustments for major global indices.

The website of another UK brokerage company also provided an explanation of the impact of dividends on the CFD trades where it was described *inter alia* that:

'Dividends may impact the amount of overnight costs you pay or earn on your Index CFD position. Index CFD's are made up of a group of stocks that may pay dividends throughout the year. When a dividend is paid on a stock, the value of the stock will drop and therefore so does the value of the index.

Short positions will be positively impacted by the drop in Index Price, while long positions are negatively impacted.

Dividend adjustments are applied on Index CFD products to negate the impact of the drop in Index Price.

...

If you are long an Index CFD, you are credited a dividend adjustment. If you are short, you will be debited a dividend adjustment'.³⁷

Similarly, the 'Terms and Conditions of Service' document of another UK brokerage company included provisions on dividend adjustments providing *inter alia* that:

'We will either credit or debit your Account with a dividend adjustment if the Underlying Instrument for your Contract is a stock, share or index which pays a dividend, and your Contract is open prior to the ex-dividend day for that Underlying Instrument',³⁸ whilst the website of another regulated broker explains *inter alia* that:

'When any underlying stock that is part of an Index CFD goes ex-dividend, the Index CFD will be price adjusted to reflect this dividend. The weighted proportion

³⁶ <https://www.ig.com/uk/help-and-support/spread-betting-and-cfds/market-details/how-do-dividend-adjustments-affect-my-spread-betting-of-cfd-posi>

³⁷ <https://help.fxcm.com/uk/Product-Guide/Overview/CFD-Trading/955240643/What-are-Index-CFD-Dividends.htm>

³⁸ https://files.pepperstone.com/legal/UK_EU/UK_Ts_and-Cs.pdf

of the applicable dividend within the Index CFD will be credited to the client's account for long positions and debited for short'.³⁹

Various articles can also be found over the internet on the application of dividend adjustments in relation to CFDs.⁴⁰

Final Observations and Conclusions

In essence, the Complaint revolves around the claim that in April 2018 the Service Provider made unlawful deductions without warning or justification from the Complainants' trading accounts with respect to the trades on CFDs undertaken in the first quarter of 2018.

The Complainants claimed that this occurred when:

- a) such deductions were not reflected or provided for in the Company's documentation;
- b) such adjustments for the same type of trades and in the same type of instruments were never done in the previous years the Complainants had been trading with the Company;
- c) the Complainants received no prior notifications regarding the change in the Company's approach and the adjustments that were going to be carried out and, thus, the Complainants were not aware that the Company was going to carry out adjustments from a specific date;
- d) no explanations were provided as to the reasons why such adjustments were made at the end of the quarter and not done on time, nor that the Service Provider was charged for the deductions by their liquidity providers;
- e) the Company has set its own specifications and not applied universal practice crediting long trades with a fraction of what short trades were debited with;

³⁹ <https://www.home.saxo/rates-and-conditions/cfds/trading-conditions>

⁴⁰ <https://www.contracts-for-difference.com/CFDs-dividends.html>

<https://thebull.com.au/28678-do-i-get-dividends-from-cfds-and-how-does-the-process-work/>

- f) there was no transparency about all the costs associated with the CFDs products entered into with the Service Provider.

The adjustments that were applied by the Service Provider relate to dividend adjustments on CFD trades involving stock/stock indices. The Service Provider, in essence, explained that the said adjustments to the trading accounts of the Complainants reflect industry practice and are an intrinsic part to the nature of such CFDs.

The Company further highlighted that such adjustments were not done previously due to an error on their system, and that it decided to start applying such adjustments on the Complainants' trading accounts from the first quarter of 2018. The Service Provider also explained that its documentation, namely the Customer Agreement, includes clauses enabling the said adjustments to be made.

The following are considered to be the key considerations relevant to the case in question:

- a) *Experience/Awareness* - It has clearly emerged that the Complainant who was taking the investment decisions on the trading accounts was an experienced trader who had been trading in the same type of instruments for a number of years. As confirmed by the Complainant during the proceedings of this case he had been *'trading for about 7 years now, mostly CFDs on indices, commodities, ETFs and forex'*.⁴¹

The Complainant had also stated that:

'I was trading with other brokers before FXDD, as well as concurrently with FXDD, every time I found that different products/specs suited me better'.⁴²

Given the experience in trading for a number of years and with different brokers, it is clear that the Complainant, who was taking the investment decisions, was aware of the concept of dividend adjustments.

⁴¹ A fol. 89

⁴² A fol. 90

During the proceedings of the case, the Complainant indeed confirmed *inter alia* that:

'... over the years I have traded with numerous brokers and way different specs. For example, some were make dividend adjustments both ways (long and short) but with different amounts, others were making only dividend charges (but never dividend credits), some were charging daily swaps, others were charging no swaps at all, some were charging 10 times more swaps than the median, others were paying daily swaps to keep short or even long trades. That is why it is imperative and a regulatory obligation for each broker to include the exact specifications that govern his specific offering in the terms & conditions'.⁴³

- b) *Nature of trades* - The transaction history for the two trading accounts opened in 2016 indicate numerous transactions undertaken on both accounts since 2016, where the majority of the trades are 'sell' type transactions.⁴⁴

The transaction account history for Account 737590 and Account 737866 indeed do not indicate any long positions taken by the Complainants in 2018, but indicate numerous positions taken on the sell side.⁴⁵ Hence, the focus and the matter in question relates to the adjustments made on the short positions.

The possibility that the trading strategy adopted by the Complainants was one to also take advantage of the lack of dividend adjustments made by the Service Provider with respect to the CFDs on stocks/ stock indices is a plausible and concrete one. In reply to the question as to whether the Complainant had entered into long positions in CFDs on the same underlying stock on other platforms, the Complainant indeed stated *inter alia* that:

*'I may have entered long positions on some other indices, ETFs, commodities, forex or stocks ...'.*⁴⁶

⁴³ A fol. 91

⁴⁴ A fol. 47 - 72

⁴⁵ A fol. 57-58; 71-72

⁴⁶ A fol. 90

Hence, a strategy of purposely taking short positions with the Service Provider and long positions with other brokerage companies to take advantage of the situation is not excluded.

- c) *Inaction by the Complainants* - Despite the experience in trading CFDs and awareness of dividend adjustments, the Complainants have themselves never queried the dividend adjustment policy of the Service Provider, something which could have reasonably been done from their end.
- d) *Market practice* – The application of dividend adjustments for positions in CFDs involving stock/stock indices is a common practice by other brokerage companies as evidenced by the disclosure publicly available on the website of a number of EU regulated brokers as indicated in the section titled '*Overview of position on dividend adjustments by some other brokers*' above. There are also well-documented justifications for the application of dividend adjustments in case of CFDs on stock/stock indices.
- e) *Benefits gained by the Complainants* - The trading accounts of the Complainants were not being debited by the Service Provider in respect of the dividend adjustments on the short positions in CFDs.

The Complainants stood to benefit on their short positions from the drop in value of the shares/stock indices underlying the CFD as a result of the dividends declared by the issuers of the stock, as well as the lack of dividend adjustments which typically apply on the short positions, theoretically, leading the Complainants to make higher gains on their short positions due to the lack of dividend debit adjustments.

It is clear that there was a tangible benefit gained by the Complainants from the lack of dividend adjustments made by the Service Provider which benefit resulted '*due to a system error*'⁴⁷ as confirmed by the Company. There is no reason to believe that the Company would have not applied

⁴⁷ A fol. 104

the dividend adjustment earlier had it discovered such system error in the previous years.

- f) *Extent of adjustments* - The Complainants had been taking short positions with the Company since 2016. The Service Provider started applying dividend adjustments in 2018, declaring that '*dividend adjustments were made from Q1 2018 onwards*'⁴⁸ only. After the first quarter of 2018, the Service Provider debited the Complainants' accounts in respect of the short positions taken since beginning 2018.

The amount of dividend adjustment for the trades undertaken over the first quarter 2018 is a substantial one as emerging from the amount of claim made. Indeed, the Complainant noted that '*almost all of my funds were removed from my trading accounts without any prior notice*'.⁴⁹

Dividend adjustments, thus, had a material bearing on the trading accounts.

- g) *Contractual provisions* – The relationship between the Complainants and the Service Provider was governed by a Customer Agreement signed by the Complainants on 27 January 2015.⁵⁰

The Company claims that on the basis of the provisions of the Customer's Agreement, it was authorised to withdraw money from the Complainants' trading accounts to reflect the dividend adjustments on the short positions undertaken.

Clauses 9, 11 and the paragraph before last of page 22 of the agreement were indicated by the Service Provider as the most relevant clauses.⁵¹

Whilst the paragraph before last of page 22 of the Customer Agreement⁵² relates to the customers' responsibility for reporting errors, Clause 9 and

⁴⁸ *Ibid.*

⁴⁹ *A fol. 94*

⁵⁰ *A fol. 141*

⁵¹ *A fol. 97 & 146*

⁵² *A fol. 131*

11 of the Customer Agreement respectively titled as '*Customers Monies*'⁵³ and '*Margin Requirements*'⁵⁴ include relevant general provisions authorising the Service Provider to withdraw money in certain circumstances. Whilst Clause 9 provided *inter alia* that:

'The Customer accepts and hereby authorises FXDD to effect withdrawals from the Customer's Account with FXDD as may be required in order to settle any charges and/or fees that may become due by the Customer to FXDD from time to time',⁵⁵

Clause 11 provided *inter alia* that:

'FXDD reserves the right to withdraw or transfer funds from the Customer's account without notice to ensure that posted Marked-to-Market Margin (defined as Margin plus or minus marked-to-market P/L) equals or exceeds Required Margin on Opened Positions and/or to satisfy any payment obligation to FXDD, including fees and charges in respect of Customer's Account'.⁵⁶

The dividend adjustment is considered to be tantamount to a charge to the trading account in the case of a short position as it involves a debit adjustment on the account with such debit adjustment reflecting practices undertaken by various other regulated brokerage companies.⁵⁷

Whilst the provisions in Clause 9 and 11 are general, they are considered to provide the Service Provider with certain authority to withdraw funds in indicated justifiable circumstances.

- h) *Other considerations* - The Complainant had understandably highlighted in his complaint that the dividend adjustments were done without ever receiving any notification for the change in approach by the Company.

The fact that the dividend adjustments were not made by the Company in previous years for the year 2016 and 2017, or that there was no prior

⁵³ A fol. 117

⁵⁴ A fol. 119

⁵⁵ A fol. 117

⁵⁶ A fol. 119

⁵⁷ The section titled '*Overview of position on dividend adjustments by some other brokers*' above refers.

notification is, however, not considered as a sufficient basis to justify the non-application of dividend adjustments for the trades done in the first quarter of 2018. This is when a position was taken by the Company to start applying such adjustments from this date.

The Arbiter has also taken into consideration that the Complainant, who took the trading decisions, was himself an experienced trader; was aware that other brokers applied dividend adjustments and was, or should have been aware, that he was taking an advantage on the lack of adjustments made by the Company; never queried the Company's policy on dividend adjustments; and the Complainants were receiving material benefits on their short positions from the lack of adjustments made by the Service Provider where such extraordinary benefits, however, only arose as a result of the system errors acknowledged by the Company.

The Complainants are, in the circumstances, not considered to have an entitlement for the disapplication by the Company of the dividend debits from their trading accounts with respect to the short positions taken as from 2018.

The Company could, however, have handled the matter of dividend adjustments in a more adequate manner.

It was only reasonable and proper for the Company to provide a due explanation and notice about the dividend adjustments as soon as it discovered the error; also, in light of what had been allowed to occur in previous years.

The Company's position on dividend adjustments could have also been more adequately and clearly documented. The online manual on CFDs provided by the Company as a guide to investors did not have any disclosures on dividend adjustments in early 2018 with a disclosure about '*Corporate events*' only introduced at a later stage.

Even such disclosure which, to date, is reflected in the Company's '*CFD Product Guide*'⁵⁸ posted on the Company's website, includes scope for improvement by

⁵⁸https://assets.ctfassets.net/l6zxjz2hffuo/47WAzn7aCkkEkyoogUgO8s/fbacc908a244c0ce048d7b183ba72e3e/FXDD_CFD_INFO_2019.pdf

way of a better explanation of the adjustments that would be made on short and long positions.

Proper details would also be typically expected to feature in the client's transaction history and account statements with a relevant breakdown of the total amount of dividend adjustments provided as necessary.

The Conduct of Business Rulebook issued by the MFSA on 20 December 2017, which applied to the Company at the time and for the period during which the deductions from the Complainants' trading accounts were made, include various client disclosure requirements on costs and associated charges related to a product or service.

It is only proper, reasonable and in the best interests of the clients, for there to be specific and comprehensive disclosure on dividend adjustments in relevant documentation and information made easily available to investors.

The disclosure on dividend adjustments should be one which makes it strongly unequivocal as to what, when and how such dividend adjustments are to be made rather than keeping certain information as an *'internal operational process'*.⁵⁹

In the same manner that investors who have short positions on CFDs on stock/stock indices would know about the debit adjustments that would apply on short positions, investors would know what is due to them in respect of the credit adjustments applicable in the case of long positions.

Dividend adjustments need to also indeed be done within a reasonable time and in line with industry practice and, hence, relevant disclosure as to the timings when such adjustments are to be made need to be likewise clearly disclosed.

With respect to the Complainants' claim, and despite that certain deficiencies of a regulatory nature are apparent with respect to the manner in which dividend adjustments were handled, the Arbitrator, however, does not consider, in the very particular circumstances of this case, for there to be sufficiently convincing fair,

⁵⁹ A fol. 33 & 34

reasonable and justifiable grounds on which to determine that the Complainants were entitled to have the contested dividend adjustments disappplied even with respect to their trades in 2018 and be refunded the deducted claimed amount.

During this case it has also not emerged nor any evidence provided that the Complainants experienced a net loss on their original investments following the trades undertaken in the first quarter of 2018, as a consequence of the dividend debit adjustments that were applied from 2018.

Decision

For all the above-stated reasons, the Arbiter is of the opinion that the complainants' request for compensation is not just, fair and reasonable in the particular circumstances of the case and is, therefore, rejecting it.

Given the particularities and novelty of the case in question each party is to bear their own legal costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**