Before the Arbiter for Financial Services

Case ASF 022/2024

MT ('the Complainant')

vs

Hogg Capital Investments Limited

(C 18954)

('HCI' or 'the Service Provider')

Sitting of 21 June 2024

The Arbiter,

Having seen the **Complaint** made against *Hogg Capital Investments Limited* ('HCI' or 'the Service Provider'), regarding the investment services offered by HCI to the Complainant. HCI is an entity based in Malta and licensed by the Malta Financial Services Authority ('MFSA'), where it operates and is responsible for its online brokerage website *tier1fx.com*.[1, 2]

The Complaint involves the Complainant's managed trading account opened with the Service Provider. The Complainant, in essence, claimed that, in less than three months, he lost all his money amounting to EUR 50,000 following the high-frequency trading (which involved hundreds of trades), in Contract for Differences ('CFDs') undertaken on his trading account.[3] The Complainant blamed the Service Provider for such loss, given he alleged that:

[1] https://www.mfsa.mt/financial-services-register/
[2] https://www.tier1fx.com/company-profile/
[3] General definition of a CFD as sourced from the internet: *'A contract for differences (CFD) is a contract between a buyer and a seller that stipulates that the buyer must pay the seller the difference between the current value of an asset and its value at contract time. CFDs allow traders and investors an opportunity to profit from price movement without owning the underlying assets. The value of a CFD does not consider the asset's underlying*

(i) There was a lack of transparency in the process of opening his trading account.

In his Complaint, he primarily emphasised the claim that he was not adequately informed of the costs applicable to the trades done within his account and of the significant implications arising from such costs. He further alleged that he was told that the broker only earns from his profits and without any conflict of interest. He alleged that the commissions charged, however, undermined any balance of interests;

(ii) The broker kept EUR 36,000 in commissions from the amount lost on his trading account, with the rate of such commissions having been substantially increased (by 600%) shortly after signing his contract;

(iii) He was taken advantage of, for his lack of knowledge of the unsustainable commission fees, where he was deceived into signing for the increase in fees;

(iv) He was misled to invest a minimum of EUR 50,000 when there was no such minimum;

(v) He was not informed that a person he was interacting with was an introducer/agent acting for the Service Provider;

(vi) The Service Provider's agent deceitfully convinced him not to withdraw money from his trading account;

(vii) He was pressured to sign for a higher-risk strategy after losing over EUR 30,000 in his trading account.

The Complaint[4]

In his Complaint Form to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant explained that, on 15 August 2022, he created an account on

value, only the price change between the trade entry and exit … A contract for difference (CFD) allows traders to speculate on the future market movements of an underlying asset, without actually owning or taking physical delivery of the underlying asset. CFDs are available for a range of underlying assets, such as shares, commodities, and foreign exchange.'
- https://www.investopedia.com/articles/stocks/09/trade-a-cfd.asp

[4] Complaint Form on Page (P.) 1 - 9 with extensive supporting documentation on P. 10 - 110.

tier1fx.com,[5] where the entire introduction process was very unorthodox and lacked transparency.

He explained that he was initially sold a service with *Orizon School* for assistance and education in the world of CFDs. He signed a technical assistance contract with *Orizon School* and was advised to open an account with the broker *1market.com*. He noted that this, however, involved risk, as he later found out that the broker was unregulated.

The Complainant explained that at the time, he had made a profit of €5,800, which made him blindly trust the person who was teaching him, a certain Fernando Márquez. He noted that he had even met Fernando Márquez in person and had meals with him. The Complainant added that Fernando Márquez introduced himself as a highly experienced broker specialising in CFDs.

After making the said profit, the Complainant withdrew all his money amounting to EUR 37,577.10 from *1market.com* given that Márquez recommended that he enter into a managed account service ('MAN account') with the broker *tier1fx.com*. He claimed that the explanation given to him at the time was that this broker's goal was to earn 25% on profits, supposedly without any conflicts of interest. The Complainant further claimed that he was told the broker only earns from what the Complainant makes.

It was also claimed that Márquez described that a watermark was set every month and that a 25% fee on profits would be charged if the balance exceeded the watermark.

The Complainant explained that this seemed like a fantastic system to invest his money in. He emphasised that he was never informed about the extremely high costs per lot and operation of EUR 6. He claimed that Márquez downplayed these costs as not being significant expenses.

The Complainant submitted that he was advised to enter with a minimum of EUR 50,000, which he claimed was also false.

He explained that, according to Márquez, there was an account there with over a million euros which had been working wonderfully for many years, averaging

[5] An online brokerage website of the Service Provider - https://www.tier1fx.com/t1-brokerage

a 3% monthly profit. The Complainant emphasised that at no point was it disclosed that Fernando Márquez was a commercial agent or introducer for *tier1fx.com*.

The Complainant submitted that later, he discovered that Fernando Márquez was a partner of the Service Provider, and that the latter was registered with the *Comisión Nacional del Mercado de Valores* ('CNMV') as an investment services company in the European Economic Area and authorised to operate in Spain under the regime of free provision of services (without a permanent establishment in Spain). The Complainant claimed that he also discovered that *Orizon School* was simply a company created to increase the client portfolio of *tier1fx.com*.

The Complainant explained that he entered *tier1fx.com* by making two transfers—one of EUR 20,000 and another of EUR 30,000. He submitted that they lost all his money in less than three months. He also claimed that because of how things happened, he is certain that he had been scammed and that they were only looking to bleed the clients who entered their system.

The Complainant argued that the commissions undermine any balance of interests since the same broker decides the number of operations to be carried out and charges interest on those operations.

He claimed that the broker creates supply and demand and collects a huge amount in monthly commissions. The Complainant added that the broker contends that if the operations are positive, the commission involves no expense. He submitted this is false because, at best, they have to make more than a 30% monthly profit on the account to cover their own commission costs and leave something for their clients.

The Complainant submitted that in the worst-case scenario, as was his case, when there are losses, they would burn a EUR 50,000 account in just two months. He submitted that out of the EUR 50,000 they stole from him, *tier1fx.com* kept over EUR 36,000 in commissions.

The Complainant explained that on 4 August 2022, he signed a contract where the costs were EUR 1 per lot and operation. He continued to explain that, right at the beginning, on 19 August 2022, he received a document stating that the

commission costs were increasing from EUR 1 to EUR 6, which the Complainant observed was a 600% increase.

The Complainant claimed that he was misled at that moment, as it was falsely explained, through deceit and tricks, that an additional cost of EUR 5 per lot and operation meant almost nothing in his management expenses. The Complainant submitted that after a month of trading, he realised that this was not the case, and that the commission costs were quickly eating up his money as they did hundreds of daily operations.

The Complainant explained that on 27 October 2022, the commission costs for October amounted to EUR 26,500, and in total, since they started operating on 15 August 2022, he was charged EUR 33,820 in commissions. He submitted that they continued emptying his account, leaving it with just EUR 3.08.

The Complainant further explained that, at the end of it all, he tried to withdraw EUR 3,000 but Márquez told him that the margin was too low and that if he withdrew, the operations would be closed due to a lack of margin. He further explained that he was told that since it was a managed account, it would affect other clients and create a catastrophe. The Complainant claimed that they used all the tools and tricks at their disposal to prevent him from withdrawing a single Euro of his money.

It was also explained that the Complainant recorded certain dealings in the last few days. He noted that he, however, does not have Fernando Márquez's identity card number and doubts this was his real name. He noted that he, however, has documents and screenshots that showed the entire process of emptying his account and evidence of several contracts where the increase in operations ruined him.

The Complainant explained that after a long time and after overcoming all the psychological damage caused by this situation, he decided to report his case in December 2023 and to seek justice. He explained that on 11 December 2023, he sent an email to *XXX@hoggcapital.com*, as the email registered under the name of the Service Provider in the Financial Services Register of the MFSA.

The Complainant added that after he did not receive a reply, on 4 January 2024, he forwarded the email to all of the email addresses he had from *tier1fx.com*,

namely *support@tier1fx.com*, *compliance@tier1fx.com*, *no-reply@tier1fx.com*, *ferXXXXXX@hotmail.es*, *vfeu@teir1fx.com*, and *dpm@hoggcapital.com*.

The Complainant added that on the same day he received a response from *support@tier1fx.com*, informing him that they had 15 business days to consider and finalise customer complaints.

The Complainant added that he received another email on 8 January [2024], with the Service Provider's final response. The said response, however, only alluded that everything was Fernando Márquez's fault. The Complainant submitted that this was not true as he alleged that they were working hand in hand and lamented that the Service Provider is now talking as if it were not their concern.

The Complainant submitted that he is confident that he was deceived by an investment system that made it impossible to make money and that the costs robbed his savings in just a few months.

He submitted that they took advantage of his lack of knowledge in the matter to impose unsustainable commission costs and destroy his account. The Complainant added that, at the same time, when he was on vacation in August [2023] they seized the opportunity to send him a document that ruined him and was portrayed to him as unimportant.

The Complainant submitted that it is true that he made the mistake of signing, but he stressed that they used every possible tool for deception to make him sign the increase from EUR 1 to EUR 6 per operation. He pointed out that such an increase was his downfall.

He added that with his account losing over EUR 30,000, he was also pressured to sign the change in risk strategy to leave his account with a balance of EUR 0.

The Complainant added that, after all this, and without warning, Fernando Márquez, the only contact the Complainant had, one day stopped answering his calls/messages and disappeared. The Complainant submitted that because of all this he feels scammed and disappointed.

Remedy requested

The Complainant submitted that he had taken a long time to share his case because remembering all the deceptions that were perpetrated against him caused him a lot of anxiety and pain. He explained that after overcoming the anxiety crisis and all the psychological damage, he finally gathered the strength to seek justice.

The Complainant submitted that the remedy for justice to be served and the solution for the Service Provider to compensate for all the harm they caused him, would be to return all his money down to the last Euro of the sum of EUR 50,000, which he claimed was stolen from him.

Having considered, in its entirety, the Service Provider's reply, including attachments,[6]

Where the Service Provider explained and submitted the following:

1. That the contents of the documentation submitted by the Complainant show that HCI sought to address the issues raised by the Complainant in a clear and categorical manner. The Complainant's claims are dismissed by HCI as being entirely unfounded.

   Whilst HCI entirely sympathises with the outcome of the Complainant's trading experience, it maintains that this has no bearing upon the services provided to him. In support of its position, HCI highlighted certain facts, observations, and related documentation for the Arbiter's review, as further outlined in its reply below.

2. HCI submitted that by the Complainant's own admission, the Complainant had developed a strong personal bond with Fernando Márquez, who had acted as a referral agent (terminology submitted as being interchangeable with *'introducing broker'*) to HCI.

   It explained that, in accordance with prevailing regulations and HCI's terms of business, HCI's relationship with an introducing broker is limited to said broker introducing a prospective client to apply for an investment account with HCI, which will in turn, undertake to accept the applicant on the

[6] P. 116-121, with attachments from P. 122 - 211

understanding that no other information, including investment advice, has been or will be provided by the introducing broker to his nominee.

HCI submitted that as part of the Complainant's registration process with the Service Provider, the Complainant had formally confirmed his understanding of this in terms of the content of the Customer Agreement, which includes the referral agents' disclaimers (at Clause 15, on page 14 of the document), and specifically its opening statement in bold type.[7] It noted that this is replicated within the separate Appendix VII to the customer registration, entitled *'Referral Agents Disclaimer'* which states that '*Tier1FX does not supervise the activities of referral agents and assumes no liability for any representations made by referral agents*'.[8]

3. HCI submitted that Fernando Márquez was registered as an introducing broker with the Company on 16 September 2022 and added that this relationship has since been terminated as a consequence of the above-referenced infringement. It further added that his nomination was via *Javier Molins Dal Re* with whom HCI had a long-standing professional relationship as a provider of trade signals in financial instruments to HCI's discretionary portfolio management services.

4. It explained that '*Molins Dal Re has provided his activities pursuant to the Company's policies and contract terms implemented and constantly updated in accordance with European copy trading regulations and ESMA guidelines - in particular, with ESMA's Q&A 2012/382, Question 9: Article 4(1)(9) of MiFID – Automatic execution of trade signals, and pursuant to ESMA's Supervisory Briefing on supervisory expectations in relation to firms offering copy trading services of 30 March 2023/35-42-1428*'.[9]

5. The Service Provider submitted that at the time of his registration with HCI, the Complainant had disclosed that he was a sufficiently experienced investor. Reference was made to the copy of the '*Discretionary Portfolio Management Registration and Agreement*', that the Complainant

[7] P. 141
[8] P. 116
[9] P. 116 & 117

produced to the Arbiter, specifically Section 2 of the document, where it submitted that the Complainant:

a. declares to have a good investment knowledge of equities and bonds and understands the terminology;

b. claims to have gained his experience privately;

c. claims to have traded an average of 10-20 contracts (CFDs, options or any other derivative financial instruments) per month over a period of 2 years or less.

6. HCI noted that the Complainant declared to the Arbiter that he was taken advantage of due to his '… *lack of knowledge in the matter to impose unsustainable commission cost*s ...'.[10] It submitted that upon review of HCI's internal documentation, as well as transcripts of communications between the Complainant and Márquez, it is, however, evident that the Complainant is far from the inexperienced investor he has stated as being in his submission to the Arbiter.

HCI submitted that evidence of this includes a communication dated 31 May 2022, wherein the Complainant complains about the charges he had incurred on a prior investment placed during the course of the COVID lockdown with a third-party manager (noted to be external to the Company), thereby indicating his knowledge and hence his experience of how commissions are applied and their net potential effect upon investment performance.

It added that communications relating to the same third-party brokered portfolio details the Complainant's discussions with Márquez, who, it was noted, the Complainant clearly held in very high esteem, regarding the placement of stop-loss positions on various trades he had made or intended to make. HCI observed that the technicalities and related terminology referred to in these communications are not typical of a trader with no experience.

[10] P. 117

7. HCI noted that the Complainant appears to have suggested, in his written communications with Márquez on 26 September 2022 that he thinks that his risk exposure to the trading programme to which he has subscribed is too high. It added that there is also evidence of multiple telephone calls between the two during the course of this relationship but at no stage throughout this entire process did the Complainant consider reaching out to HCI for guidance.

   It further noted that this was despite the Complainant receiving from HCI via email daily trading reports and associated statements from his trading account on the *MetaQuotes MT4* trading platform, which detailed his net trading capital balances (after stated transaction fees).

   HCI emphasised that the only communication it received from the Complainant, following his onboarding as a client of HCI, occurred only more than a year after the conclusion of the events which gave rise to this Complaint. This occurred on 3 January 2024 with the content of the communication being largely replicated in the communication addressed to the Arbiter and to which HCI duly replied on 8 January 2024.

   The Service Provider noted that the Complainant claimed he had additionally communicated with HCI earlier on 11 December 2023. HCI asserts that no such communication had been received from the Complainant (prior to that of 3 January 2024), and no transcript of the claimed message has been provided by the Complainant in the accompanying documentation submitted to the Arbiter which has since been made available to HCI.

8. Furthermore, pertinent to its rebuttal is the communication from the Complainant to Márquez dated 9 January 2023, alleging the latter to be a fraudster and stating (HCI presumed sarcastically): '... *relax and don't think about the money you made me lose*'.[11] HCI further noted that, in January 2024, the Complainant messaged Márquez stating: '*I know exactly what happened ... We will start with Oscar Mazon Martinez and we will continue with Javier Molins*.'[12]

[11] P. 117
[12] P. 118

The Service Provider noted that although it knows Molins (Dal Re), it is unable to establish who Oscar Mazon Martinez is. HCI submitted that it is similarly intrigued by the Complainant's use of the plural of the first person in this communication to Márquez, which it submitted may imply collusive behaviour between the two and the casting opportunistically of a wide net in an attempt to enmesh separately Molins Dal Re, HCI and Mazon Martinez, who HCI suspects may be associated with the Complainant's previous brokerage relationship, which was separately referenced by Márquez in their communication of 26 September 2022 as '*the guy from MAPFRE*'.[13]

9. HCI submitted that it appears odd that despite claiming that '… *Fernando Márquez, who was the only contact I had, stopped answering my calls and Whatsapp messages and disappeared …*', the Complainant continued to message him through to 3 January 2024, as detailed in the WhatsApp logs provided by the Complainant to the Arbiter.[14] It noted that, as stated earlier, he did not consider contacting HCI at any stage during this period despite receiving daily emailed trade and other notifications from HCI.

10. In HCI's opinion, the Complainant is directing the blame for his losses in an opportunistic manner and, as already stated, is submitting false information regarding his investment experience in order to try and elicit a favourable response from the Arbiter against HCI. It added that, it appears from the texts submitted to the Arbiter in support of his claim, that the Complainant has also filed a complaint with the Spanish regulatory authority, CNMV. HCI added that it cannot ascertain, however, whether this represents a complaint lodged against HCI or against one or both of the individuals named in the Complainant's earlier communications with Márquez.

11. By way of summary of this part of its communication, HCI contended that:

[13] *Ibid.*
[14] *Ibid.*

a) The Complainant, possibly in collusion with Márquez, has latterly added HCI to what was initially a specific objective to direct his complaints solely against Molins Dal Re and Mazon Martinez.

b) He had never, on any occasion while his account with HCI was active and his trades were fully disclosed to him daily, made any attempt to contact HCI to voice his concerns and to specifically relay to HCI the same comments he had made to Márquez regarding his risk exposures in September 2022.

c) The Complainant has clearly falsified his statement to the Arbiter regarding his investment experience.

d) HCI is of the opinion that there is sufficient doubt, in terms of the Complainant's allegations and lack of immediate recourse (of circa 15 months) following his trading losses, to warrant any justification to this claim and the time already expended by both the Arbiter and HCI to address these issues.

HCI's reply with respect to the management of the Complainant's portfolio and related fees' structure

12. The Service Provider explained that the Complainant's portfolio was managed by HCI by way of trading signals which were provided by Javier Molins Dal Re. It submitted that this is representative of a *Consultant Services Agreement* for copy trading (signal) services between HCI and Molins Dal Re.

13. It explained that the Copy Trading (discretionary portfolio management) setup provides that HCI, as Portfolio Manager, gets signals from a Signal Account (demo or real) connected to HCI's exclusively managed Master/PAMM account. Clients' trading accounts, which are subscribed to HCI's portfolio management system, are, in turn, linked to HCI's Master/Pamm account. It added that the Signal Account is managed by a strategy provider - in this case by Javier Molins Dal Re.

HCI further explained that the choice of strategy and strategy provider is made by the client subject to the endorsement of HCI, which will ensure that, based upon the client's stated investment/trading experience, the elected strategy passes the mandated suitability assessment which is contained within Section 8 of the '*Discretionary Portfolio Management Registration and Agreement'*.

14. HCI explained that the portfolio managed for the Complainant principally traded CFDs in major markets' indices - (German) Dax, (US) Dow Jones Industrial Average, (Spain) IBEX, EUR/USD currency pair and crude oil.

    It reiterated that Molins Dal Re has a long-standing relationship with HCI's *Tier1fx* brokerage with a generally positive track record devising signals' strategies.

    It further explained that the strategy to which the Complainant subscribed was introduced by Molins Dal Re in quarter two of 2022. This was deemed as a low-leverage strategy comprising up to 15 daily trades with an average risk per trade of 5% and a maximum portfolio risk (hard stop loss) of 50%. It added that the strategy was back-tested to reveal a maximum (notional) historical drawdown of 10% and a hypothetical worst-case drawdown also of 10%.

15. HCI noted that the major market indices mentioned represent an important distinction as the portfolio strategy principally comprised equity-based indices which the Complainant had previously disclosed upon registration to '... *have a good investment knowledge of* …'.[15]

16. It was explained that the portfolio managed for the Complainant, unfortunately, suffered the damaging impact of a markets' *'bear squeeze'* consequent to, as well as contributing to, a rapid reversal from previously falling main market indices as stop-losses from large open sale positions were triggered and which fuelled a substantially stronger, albeit technical rally.

[15] P. 119

HCI added that the rapidity of the rebound moreover resulted in inevitable price slippage as bear positions were closed at levels higher than those originally set thereby aggravating the portfolio losses. The strategy agreed to by the Complainant did not contain any stop-loss hedges, beyond the 50% hard stop loss, which meant that the portfolio could not adequately unlock its bear positions in order to go long of the markets and participate in the rebound. The strategy was moreover compounded by the largely technical, as opposed to fundamental, nature of the market reversal and hence consideration of its sustainability to the upside.

17. Market dynamics including price reversals are not uncommon, but the severity of price actions can prove to be extremely damaging and impossible to predict or to adequately model within a back-dated stress-test scenario. HCI further submitted that according to data sourced, the period between August 2022 (which coincided with the Complainant's entry) and September 2022, the primary VIX volatility index measured a difference equivalent to 80% in increased volatility from its low point of 19.12 in August through to 34.53% by end-September, which, it was submitted, coincided with the sharp equity markets' reversal.

18. The Service Provider submitted that the Complainant's statement that *'... they* (presumed by HCI to refer to Márquez and HCI) *also pressured me to sign the change in risk strategy ...*', is a damaging allegation.[16] It claimed that the Complainant accepted a higher-risk option put to him by Márquez to try to recover his losses, which he could have nevertheless refused, either on the basis of his own trading experience or by having sought separate counsel from HCI at that time.

19. HCI deemed it important to add that each portfolio management client is provided with instructions on the utilisation of the *'EPM'* tool which along with the *'Leave Program'* button within his MT4 trading account portal, would have enabled the client to exit the managed portfolio and immediately close out his positions without any intervention on the part of the portfolio manager.

[16] P. 120

It emphasised that the EPM tool is especially relevant since it enables the client to ascertain and, if necessary, to override the strategy provider's capital risk thresholds by applying tighter stop-loss limits with each new transaction. HCI submitted that neither the EPM tool nor the Leave Program button were ever deployed by the Complainant, thereby leaving each open market position exposed to the vagaries of what proved to be highly volatile trading conditions in equities and their related indices.

HCI's reply about the issues surrounding the increased commission charges

20. HCI submitted that although admitting to having agreed to the increased commission charges in August 2022, the context behind these increases were explained to the Complainant in accordance with the justification for the said increases as follows:

- The increased commissions were not applied universally and were limited to transactions within the main market indices. HCI explained that commissions applied to CFDs in commodities and Forex remained unchanged. It noted that the Signal Provider and, in this case, the Introducing Broker (Molins Dal Re and Márquez) initially worked on the assumption that HCI would provide access to, and accordingly price, mini-CFD contracts, with a minimum lot equivalent to one-tenth the nominal value of a typical contract.

- The absence of this offering by HCI, therefore, gave rise to the need to promptly raise, on 19 August 2022, the corresponding commission rates to what are nevertheless lower than previously set on a pro-rata basis. It added that, based upon market comparisons, HCI's commission rates are moreover deemed as competitive relative to the pure brokerage charges (i.e., excluding advisory and/or management fees premia applied here) on similar CFD trades by other Malta licensed online brokerages.

- The above referred to back-testing processes (applied to new management strategies), included the impact that the proposed commissions' charges would have upon the projected/implied portfolio management net returns.

HCI noted that a valid case in point here is that the Complainant's portfolio generated a positive return of circa 3.65%, with a maximum drawdown of just 0.75%, within the first month and a half of trading into early September 2022, net of the increased commissions. It submitted that this is evidenced in the documentation submitted by the Complainant to the OAFS in support of his complaint.

- HCI further submitted that this was communicated to the Complainant and explains why his own risk assessment process did not commence until the end of September, which, it was added, frankly challenges his assertion that the fees' structure was fundamental to what he has alleged was a fraudulent scheme.

21. HCI submitted that it has attempted as best as it can, and in a manner which it hoped the Arbiter would comprehend, to refute the basis of the claims and related allegations made against HCI by the Complainant. It reiterated that this experience was an extremely unfortunate one for the Complainant and that HCI empathises with his obvious frustrations. HCI nevertheless contends that it was in no way at fault for his losses and that he possessed the experience to understand the high-risk nature of the trading medium he had chosen to employ and to contractually accept the risks of losing part or all of his trading capital.

22. The Service Provider further submitted that what the Complainant has sought to do is to mislead the Arbiter and to extract a settlement for which he has no reasonable claim. It submitted that this is a position HCI will unequivocally defend and, if necessary, it will seek legal recourse against the Complainant should he persist to attempt to tarnish HCI's professional reputation.

The Merits of the Case

The main issues involved in this Complaint can be summarised as follows:

Position of Complainant	Position of Service Provider
Lost €50,000 investment in less than 3 months between August and October 2022 and considers himself scammed by Fernando Márquez ('FM') who directed him to make this investment with HCI. FM had trained Complainant to trade Contract for Difference ('CFD') and won over his complete trust presenting himself as a highly experienced broker specialising in CFDs.	HCI is not responsible for the actions of FM. FM was just an introducing broker/referral agent ('IB'/'RA') who was engaged by HCI on 16 September 2022 (which was after the Complainant had been onboarded) and since this complaint has had his engagement terminated. In its Terms of Business, HCI make it clear (in BLOCK CAPITALS) that it does not supervise the activities of IBs/RAs and assumes no liability for any representations they make, and they are fully independent from HCI.[17]
FM never disclosed that he was a commercial agent or introducer for *tier1fx.com*, the brand name of HCI for the service contracted.	IBs/RAs as normal practice receive compensation for introductions and in this case Complainant twice signed acceptance letters which clearly disclose and consented to the fees paid to IB/RA.[18]
Complainant depicts himself as an inexperienced investor who believed FM that the chosen investment strategy, whilst risky, is tried and tested and could produce profits of 3% per month and that charges would only apply on a performance basis. Instead, his capital was mostly lost through application of transaction charges for high frequency trading	At the on-boarding Complainant had defined himself as an experienced investor who had experience in CFD's trading 10-20 trades per month.[20] The charges involved were fully disclosed and explained and the increase in the trading charge for CFD's related to main market indices which was due to the chosen investment strategy investing in ten

[17] P. 123
[18] P. 22; 99
[20] P. 94

Position of Complainant	Position of Service Provider
which on their own amounted to over €36,000[19] explaining why he lost his capital in such a short time. The charges for CFD trading which originally was set at €1 per transaction were raised to €6 and he signed for this whilst travelling on holiday on the assurance by FM that the increased charges will not affect performance.	times higher value trades than originally anticipated (mini-CFD contracts). The charge was still competitive compared to that offered by competitors. For the first 6 weeks of trading until early September 2022 the strategy delivered positive returns of circa 3.65% net of charges. On 19 October 2022, the Complainant raised his risk profile to *'moderate to high'* and declared that *'changes in the portfolio value would not have material impact on my overall standard of living'.* [21]

The Arbiter also takes into consideration the following:

1. Complainant admits that he had full faith in FM and even when things finally went wrong the Complainant kept directing his complaint towards FM right until 3 January 2024.[22] It was only at that stage, on 4 January 2024, that Complainant started to direct his Compliant against HCI.[23] This notwithstanding that the loss had been crystallised more than a year earlier (by October 2022) and in the meantime he was in regular contact with FM regularly blaming him for his loss.

2. Complainant was expecting a return of 3% per month from his investment. Such targeted high reward inevitably also involves high risks.

3. Even as late as 19 October 2022, Complainant changed the parameters of his discretionary management mandate to increase his risk appetite to 100% potential loss.[24]

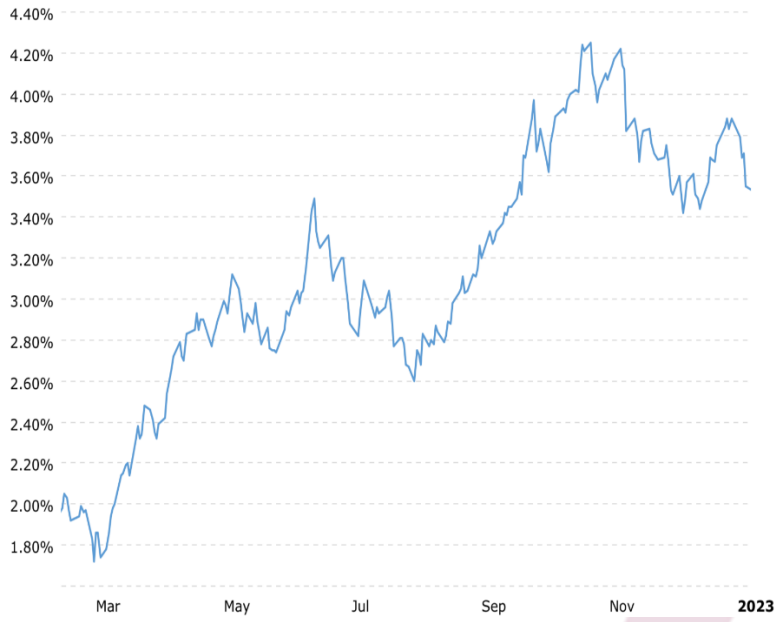
[19] P. 10
[21] P. 58
[22] P. 255 - 257
[23] P. 10
[24] P. 244

4. The Complainant never used the facility to stop-loss when he started feeling uncomfortable with losses as they were accumulating and never contacted HCI during the period to seek any advice or discuss any matter.

Analysis and considerations

Having analysed all the submissions made by both parties, the Arbiter is of the opinion that the Complainant was fully aware of the high risks in CFD trading and once on an informed basis he decided to enter a high-risk investment expecting a return of 3% per month, he must have been aware that there were significant risks of loss of capital.[25] After all, the investment was undertaken in the context of high geo-political uncertainty with the ongoing war in Ukraine which led to sharp impulse in inflation and a sudden reversal in interest rates as shown in the chart below.

US 10-year Treasury Yield March to December 2022 [26]



Interest rate changes, especially if sudden and not well signalled, inevitably impacts the value of all investment asset classes especially in case of financial

[25] P. 61 – In completing the Source of Wealth & Origin of Funds Declaration, the Complainant was clearly warned about the high risks involved in trading derivative financial instruments, that CFDs are complex instruments involving potential high risks of losing the capital and that 79.2% of retail investors trading CFDs had lost money in the last 12 months.

[26] Source: publicly available information on Bloomberg, Marketwatch etc.

derivatives like CFD's which take long/short positions rather than actual buying and selling of the underlying investments.

ESMA (European Securities and Markets Authority), being the EU's financial markets regulator and supervisor, made specific restrictions/measures on the sale of Contracts for Differences.[27]

These measures include margin close-out protection stating that:

> *'If the margin allocated to a CFD trading account (including initial margin and variation margin allocated to the position) by a retail investor falls to less than 50% of the minimum required initial margin of the open CFD positions, the provider must close out the position(s) on the terms most favourable to the client'.* [28]

The said requirements are reflected in the *Conduct of Business Rulebook* ('COB Rulebook') issued by the MFSA at the time and applicable to the Service Provider.[29] The *'Margin Close-out Protection'*, is defined in the said Rulebook as follows:

> *'Means the closure of one or more of a Retail Client's open CFDs on terms most favourable to the Client when the sum of funds in the CFD trading account and the unrealised net profits of all open CFDs connected to that account falls to less than half of the total initial margin protection for all those open CFDs'.*

The following Rule outlined under the section titled *'Restriction on CFDs in respect of Retail Clients'* of *'Section 1: General Principles'*, under *'Chapter 4 Sales Process and Selling Practices'* of the COB Rulebook is particularly relevant:

> *'R.4.1.44 The marketing, distribution or sale of CFDs to Retail Clients is restricted to circumstances where all of the following conditions are met:*

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[27] https://www.esma.europa.eu/press-news/esma-news/esma-adopts-final-product-intervention-measures-cfds-and-binary-options
esma50-162-215_product_intervention_analysis_cfds.pdf (europa.eu)
https://www.esma.europa.eu/sites/default/files/library/esma71-98-125_faq_esmas_product_intervention_measures.pdf

[28] Section 2.3, para. (12)(1) of the ESMA document *titled 'Product Intervention Analysis – Measures on Contracts for Differences'* indicated in the preceding footnote.

[29] E.g., Version 13 issued 20 December 2017 (Last revised 29 July 2022)

(a) The Regulated Person requires the Retail Client to pay the initial margin protection as follows:

…

(b) The Regulated Person provides the Retail Client with the Margin Close Out Protection;

(c) The Regulated Person provides the Retail Client with Negative Balance Protection;

(d) The Regulated Person does not directly or indirectly provide the Retail Client with a payment, monetary or Excluded Non-Monetary Benefit in relation to the marketing, distribution or sale of a CFD, other than the realised profits on any CFD provided; and

(e) The Regulated Person does not send directly or indirectly a communication to publish information accessible by a Retail Client relating to the marketing, distribution or sale of a CFD, unless it complies with the requirements of Part C, Section 2 of Chapter 1.'

The said measures are also reflected in HCI's website at *tier1fx.com*.[30]

There is no doubt that if the Complainant had a portfolio of direct investments in CFDs, the Service Provider would have been unquestionably obliged to close out the positions on reaching the 50% loss protection measure. The Service Provider, however, seems to maintain (a view which is not supported by any specific ESMA provision or MFSA rule) that, in case of a discretionary mandate, this obligation might be more flexible so much so that rather than closing out positions, HCI sought and obtained the Complainant's written agreement[31] to continue the position raising his risk profile to 100% loss of capital. Additionally, HCI still considered that such an investment strategy with full capital loss potential remained suitable for the Complainant's risk profile.

The Complainant did not frame his complaint to include claims that the investments were unsuitable and, consequently, **no award can be made regarding a complaint not included in his submissions**. This notwithstanding, the Arbiter harbours doubts on the suitability of the actions taken for a person

[30] https://www.tier1fx.com/new-esma-measures-retail-clients/
[31] P. 243 - 244

with a restricted asset base and general profile as that of the Complainant,[32] even though this is mitigated by the risk attitude that the Complainant revised and eventually chose for himself during the relationship, including that he can absorb a substantial or total loss of capital without a negative effect to his standard of living. These doubts arise even more so when considering the Complainant's overall profile in further depth as detailed below:

Complainant's Profile

It is noted that in Section 2, titled *'Knowledge of Investments'*, of the *'Discretionary Portfolio Management Registration & Agreement'*, the Complainant explained that his level of education was of a *'secondary'* level.[33] As to his knowledge and experience, he indicated that *'I have a good investment knowledge of equities and bonds and understand the terminology'* and that *'I have invested on the basis of the professional advice I have been given'*.[34] He did not indicate, however, that he was *'an experienced private investor'* nor that he had made investments *'without receiving any advice'* or *'on an execution-only basis'*.[35]

As detailed in the *'Source of Wealth & Origin of Funds Declaration'*, the Complainant outlined that:

> *'My brother and I have a company … and we are dedicated to the production, sale and distribution of wines as well as other beverages'*.[36]

It is further noted that whilst the Service Provider deemed the Complainant as an *'experienced investor and trader'*,[37] nevertheless, there were certain key limitations as to the Complainant's experience and knowledge when taking various factors collectively into consideration. This is particularly so when taking into consideration that:

[32] P. 92 - 98
[33] P. 93
[34] *Ibid.*
[35] *Ibid.*
[36] P. 60 – The English version was derived following a general Google translation of the text in Spanish indicated in the said Declaration Form.
[37] P. 11

- the Complainant's academic background was limited to secondary level, with just some general course in CFDs taken from Orizon School (apparently in 2022); [38, 39]

- he clearly did not indicate himself as being *'an experienced private investor'*;[40]

- his experience in CFDs was clearly limited in that between the options of *'Never invested and/or traded in CFDs, options, or any other derivative financial instruments'* and *'2 years or less'* (which were the options available on the lower end of the scale), the Complainant just selected *'2 years or less'.* The latter, however, is an option one would have opted for even if one had been trading just for one or a few months. Thus, on its own, this did not provide comfort in experience;[41]

- the fact that the Complainant indicated in the Discretionary Portfolio Management Registration & Agreement, that his trades per month were *'10-20'.* On its own, this does not either reasonably justifies him to be treated as an experienced investor and trader. Apart that it is unclear when, with whom[42] and exactly for how long such trades had occurred and been undertaken, such an aspect needs to be seen in the context of the other declarations made and the information/background emerging on the Complainant as outlined in this decision;

- the Complainant had never invested in forex or derivative instruments related to forex as he had declared in his form.[43] Whilst CFDs on forex was seemingly only a limited part of the strategy given that HCI explained that '*the portfolio strategy principally comprised equity-based indices'*,[44] however, this aspect is in itself telling about the limited investment experience of the Complainant;

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[38] P. 29

[39] A general search on the internet on 'Orizon School' yielded no details/background about this school other than it was temporarily closed as at early June 2024 – https://www.google.com/search?q=%22orizon+school%22+madrid&rlz=1C1GCEA_enMT1092MT1092&oq=%22Orizon+school%22+madrid&gs_lcrp=EgZjaHJvbWUqBggAEEUYOzIGCAAQRRg7MgcIARAhGKAB0gEKMTY3MTNqMGoxNagCCbACAQ&sourceid=chrome&ie=UTF-8

[40] P. 93

[41] P. 94

[42] The Complainant referred to in his Complaint that he previously had an account with an unregulated broker, *1market.com*. It is unclear for how long such account was held with this *'unregulated broker'* – P. 10

[43] P. 94

[44] P. 119

- the Complainant's background in selling wines/beverages, which was his source of wealth and funds as detailed above;[45]

- the trading being the subject of the dispute of this Complaint involves CFDs which *'are complex instruments and come with a high risk of losing money rapidly due to leverage'*;

- the Complainant was ultimately a retail investor who was not a professional investor and neither did he elect to be treated so. HCI had indeed classified him as a '*Retail Client*' following consideration and evaluation of his profile.[46]

When one analyses the assets of the Complainant, as disclosed in the said form, one further notes that the total investment portfolio of the Complainant was just limited to the sum of EUR 56,000 out of which the Complainant placed the bulk thereof (that is, EUR 50,000) into the managed investment account with HCI.[47]

Apart from questions on diversification, which arise when the bulk of one's total investments are placed into just one managed account which was pursuing a particular high-risk strategy, it should have been evident that risking the complete loss of the total investment portfolio would have had a tangible bearing to the Complainant, even when considering the value of other assets held by the Complainant which were relatively moderate.

It is further noted that at the time of the discretionary portfolio management registration agreement of August 2022, the Complainant had indicated that his *'preferred general investment risk level'* for his *'individual investments'* (excluding the trading account) was of *'Low to Moderate'*, whilst his *'preferred general investment risk level'* for the managed trading account with HCI was of *'Moderate'* risk. At the time, the Complainant had also declared that a 30% reduction in the total value of his managed trading account would have materially impacted his overall standard of living.[48]

[45] P. 60 & 96
[46] P. 249
[47] P. 95
[48] P. 97 – Emphasis added by the Arbiter

These aspects clearly conflicted with the Complainant's drastic change in approach, where just after two months, in October 2022, he requested to put his investment portfolio at 100% risk and, thus, at the highest risk of losing everything, which is what has actually happened within a very short period of time.

Activities of the Referral Agent

Furthermore, the role played by FM, as introducing broker, in procuring the said choices for the increase in the Complainant's risk profile, also raises doubt whether HCI should have accepted the Complainant's choices without suspecting that FM was operating beyond the rules regulating introducing brokers.

In its reply, HCI stated that Fernando Marques acted as a referral agent (also referred to as introducing broker), and that *'In accordance with prevailing regulations and the Company's terms of business, our relationship with an introducing broker is limited to said broker introducing a prospective client to apply for an investment account with the Company, which will in turn undertake to accept the applicant* ***on the understanding that no other information, including investment advice, has been or will be provided by the introducing broker to his nominee'.***[49] HCI noted that the said relationship had been terminated due to infringement of the said conditions.[50]

It is noted that in its email of 19 October 2022, sent by HCI to the Complainant with respect to the stop loss threshold and the Complainant's increase in risk appetite to a 100% potential loss, HCI *inter alia* stated that:

> *'As discussed with your introducer Fernando Márquez, the strategy employed by Hogg Capital Investments ('HCI') is close to reaching the stop loss threshold calculated on the value of the initial deposit'.*[51]

It is unclear why such discussions were being held with the introducer at the time which relationship goes beyond the limitation of introducing a prospective client as stipulated by HCI in its reply.

[49] P. 116 – Emphasis added by the Arbiter
[50] *Ibid.*
[51] P. 244

Ultimately, as also indicated in the said email, HCI was not bound to follow the requested increase in risk despite the Complainant's request to do so. In the said email of 19 October 2022, it was indeed stated *'… that the final assessment of this amendment as to the continued suitability of the service provided to you will be made by HCI who may still decide to apply the above risk mitigation measure and cease implementation of the strategy on your account'*.[52]

The multiple aspects raised above should have clearly raised questions and red flags to the Service Provider who had a very onerous obligation and responsibility with a discretionary portfolio management mandate and had to exercise due care and attention and act in the Complainant's best interest as required in terms of the applicable MFSA rules.

Conflict of interest

The Arbiter also feels it necessary to make a deeper assessment on the claims made by the Complainant that the losses (and consequent erosion of capital) was mostly the result of trading commissions made on trades rather than from market movements. He argued that the high level of commissions was the result of an inherent conflict of interest on the side of the Service Provider, FM, and Javier Molins Del Re (JMDR) who apart from being a Consultant to HCI generating the trading signals for the management of the Discretionary Portfolio, was also a collaborator of FM.[53]

The Complainant argued that he was assured that charges would only apply if he made profits on his portfolio. It is evident that what the Complainant claims relate only to Performance and Management fees and not to brokerage charges.[54] These are clearly explained in Acknowledgements signed (twice) by the Complainant which clearly indicate that brokerage fees are applicable per trade irrespectively, whilst Performance Fees would only apply on a performance basis.[55]

However, it is true that the high-frequency trading which started in September 2022 and continued aggressively in October 2022 and beyond, absorbed over

[52] *Ibid.*
[53] P. 116 HCI confirm that FM was introduced to them by JMDR
[54] P. 22 – Management Fee was 0% whilst a 25% Performance Fee applied on a High-Water Mark basis.
[55] P. 22; 99

€30,000[56] in charges which, together with market movement losses, resulted in a practical wipe-out of portfolio balance by November 2022.

The Arbiter wanted straight answers whether HCI had strong enough conflict-of-interest policy to ensure that it always acted in the best interest of the client and to ensure that even their consultants and contractors abide by such high governance conflict-of-interest policy.

HCI Conflict-of-Interest policy is disclosed in Annex IV to the Customer Agreement.[57] Apart from making general commitment to prevent conflict of interest and to take all steps to identify conflicts of interest within the firm and any person directly and indirectly linked by control or between one client and another that arise in the course of business, it makes reference to the conflict of interest policy itself giving its website address. A person linked by control would in the Arbiter's opinion extend to JMDR through the consultancy agreement.[58]

The fees payable to the Consultant are defined in the consultancy agreement as 15% of total gross revenues *'emanating from [HCI's] (i) performance fee, (ii) management fee and (iii) trading mark-up (or commission) fee per trade'*.[59] This automatically presents an inherent conflict-of-interest where the Consultant gains from high-frequency trading even if this is not in the interest of the customer. However, the Consultancy Agreement has a commitment by the Consultant to read and consider all policies of HCI including the Conflict-of-Interest Policy. It also has the Consultant's acceptance to abide by the conditions of such policy.[60]

A copy of HCI's Conflict of Interest policy was downloaded from their website.[61] Whilst it refers to fees charged by Asset Manager/Referral Agents it has no specific provision for services/fees covered by the Consultancy Agreement with JMDR who is neither a referral agent nor a direct asset manager. However, in the circumstances, the Arbiter accepts that JMDR may be considered as an Asset

[56] p.215
[57] P. 158
[58] P. 160 - 171
[59] P. 172
[60] P. 171
[61] https://www.tier1fx.com/wp-content/uploads/2019/11/Conflictofinterest_Policy_TIER1FX_Malta_2019V01.pdf

Manager for the purpose of the Conflict-of-Interest policy as his signals are automatically transmitted to the discretionary mandate.

At the hearing of 22 April 2024, Mark Hogg on behalf of HCI revealed as follows:

Of the total commissions earned from trading fees amounting to €31,072.13, 50% was earned by HCI, 21.25% was earned by JMDR and 21.25% was earned by FM. The remaining 7.5% covered umbrella and related technical/trade platform fees. [62]

The fees were disclosed to the Complainant who signed twice acknowledging that 50% of the brokerage fees were being allocated to the Referral Agent.[63] However, one can argue that the Consultant is not a Referral Agent. So, whilst the quantum of the commission paid to third parties was properly disclosed by HCI, the recipients of such commissions were not properly disclosed.

The Arbiter during the hearing of April 2024, also directed HCI to make final submissions explaining what precautions were taken in this particular case to guard against the possibility of these trades being motivated by conflicted interest and to explain whether the Complainant's experience was similar to other clients with similar investment strategies.

In their final submission, HCI tackled the Conflict-of-Interest issues in paragraphs 12 – 18 of its submissions.[64] The Arbiter considers, however, that the inherent Conflict-of-Interest of JMDR is not properly addressed by the mere fact of proper disclosures, especially as the Complainant was not informed about this Conflict-of-Interest but was only informed that the 50% of the brokerage fee was allocated to a referral agent **who was not the person with ongoing inherent conflict-of-interest through the signals for high frequency trading.**

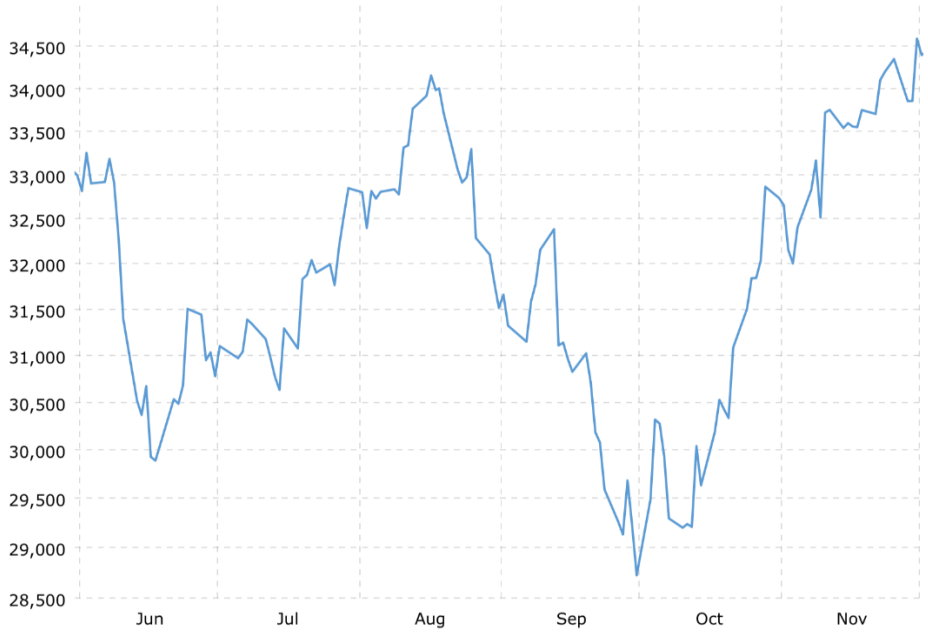
A somewhat better justification is given in paragraphs 30 – 39 of the said submissions[65] which confirms that the Complainant's experience was not unique but was experienced also by clients that adopted the same strategy. It is particularly well summarised in para. 39 of the said submissions explaining the short squeeze where short sellers were caught out with sudden upward reversal

[62] P. 215
[63] P. 22
[64] P. 230 - 232
[65] P. 235 – 238

of the markets leading to substantial losses to whoever had expected the market to continue its downward trend.

Hereunder is a chart showing the performance of the Dow Jones Industrial Average Index (US) in the second half of 2022 showing that following a consistent drop in September, there was a sudden reversal in October in spite of interest rates continuing to climb as shown in a previous chart.

Dow Jones Industrial Average Index (US) June – November 2022 [66]



Decision

The Arbiter is obliged by Article 19(3)(b) of Chapter 555 of the Laws of Malta to determine and adjudge a complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.

Having considered all matters as above explained, the Arbiter decides that there is no proof that the losses suffered by the Complainant were anything other than market losses which were inherent in the aggressive investment strategy that

[66] Source: publicly available information like Bloomberg, Marketwatch, etc.

he chose, and of which risks and potential reward he was fully informed and signed for. The Complainant's claim that his loss was the result of some scam organised by HCI with the co-operation of its collaborators has not been proven.

However, the Arbiter is concerned about two issues of this case:

1. Whether HCI was correct to suggest to client to raise his risk profile from 50% loss to 100% on 19 October 2022 (rather than close out position at the 50% cap) and to accept that discretionary portfolio of CFD's with 100% risk loss was suitable for their customer's risk profile. Enforcement of the 50% cap would have saved Complainant 50% of the capital loss, i.e., €25,000;

2. The inherent conflict-of-interest resulting from the remuneration terms for JMDR as contained in the Consultancy Agreement. Whilst no evidence emerged that the high-frequency trading that was undertaken in October 2022 was motivated by any conflict of interest issues that were detrimental to the client, but was merely execution of an experienced opinion which in this case backfired, it is still evident that the client was not sufficiently well informed about the inherent conflict-of-interest and the risks of high-frequency trading in this context. **The remuneration terms contained in the Consultancy Agreement between HCI and JMDR were never disclosed to the Complainant.** The Arbiter is therefore inclined to consider the transaction fees incurred in the month of October 2022 (for the amount of € 21,255.21), [67] resulted from certain undisclosed risks involved in high-frequency trading for which the client was not sufficiently advised.

For reasons above explained the Arbiter hereby dismisses the request for full compensation made to re-instate the Complainant in his pre-investment position. However, the Arbiter is ordering a compensation payment of €23,000 (Twenty-three thousand euro)[68] to be paid by the Service Provider to the Complainant for the evident failure of the Service Provider:

1. **to inform client about the risks of high-frequency trading and to disclose the inherent risks of conflict-of-interest resulting from such high-**

[67] P. 52
[68] The Arbiter takes a rounded average for the loss attributable to two sources of failure.

frequency trading through the remuneration terms of the Consultancy Agreement with JMDR.

2. **to fail to close out the positions on reaching the 50% cap, seemingly in conflict with the product intervention measures imposed by ESMA and applicable in the MFSA's COB Rulebook as outlined above, whilst relying on a questionable practice of raising the risk profile from 50% to 100% loss with very superficial assessment of the suitability of the increased risk for the client and also in the process allowing the introducing broker to influence customer's acceptance beyond the terms of the role reserved to introducing brokers.**

With interest at the rate of 4.25% p.a.[69] from the date of this decision till the date of payment. [70]

By virtue of the powers given by Article 26(3)(c), the Arbiter is hereby requesting HCI to make a strong attempt to renegotiate the Consultancy Agreement to eliminate the inherent conflict-of-interest of JMDR by excluding brokerage fees from the definition of gross revenues, a percentage of which is paid by HCI to the Consultant. In case renegotiation of the remuneration terms of the Consultancy Agreement proves not possible, affected clients are to be formally and specifically informed about the existence of such conflict of interest.

Each party is to carry its own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

[69] Equivalent to the current Main Refinancing Operations (MRO) interest rate set by the European Central Bank.
[70] It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision.

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.