

Before the Arbiter for Financial Services

Case No. 037/2020

SV

(‘the Complainant’)

vs

FXDD Malta Limited as substituted by

Triton Capital Markets Limited

(C48817)

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

Sitting of 16 November 2021

The Arbiter,

PRELIMINARY

Change in name

The Office of the Arbiter for Financial Services (‘OAFS’) has discovered, through its own research, that in the year 2020, FXDD Malta Limited changed its name to Triton Capital Markets Limited (‘the Service Provider’). This results from the records filed in 2020 with the Malta Business Registry relating to the change in name.¹

¹https://registry.mbr.mt/ROC/index.jsp#/ROC/downloadDocument.do?companyId=C+48817&filename=C+48817%2FC_48817_D62_0.pdf&archiveid=3829778&anonEmailAddress=&anonConfirmEmailAddress=

No notification was made by the Service Provider to the OAFS regarding such material development, but after a communication from the OAFS of the 1 November 2021, the Service Provider confirmed the change in name and also that the Malta Business Registry issued the change in name certificate on 30 November 2020. For all intents and purposes, the records of this case have accordingly been updated to reflect the change in name of the Service Provider.

The Complaint

Having seen **the Complaint** which relates to the dividend charges made by the Service Provider with respect to trades undertaken by the Complainant in Contracts for Differences (CFDs)² on stock indices. The deductions involve a retroactive dividend adjustment made in respect of short positions³ taken by the Complainant in the said financial products.

Background and Submissions made by the Complainant

The Complainant explained that he started trading with the Company on 28 November 2017, (first using account number 1124011 and later account number 745165). After trading for 5 months, he saw a single debit charge of USD206,556 in his statement dated 9 April 2018 (for his account number 745165).

The Complainant submitted that the Service Provider made a retroactive adjustment to his account which was not stated in the client agreement. He noted that the Company claimed that the charge was:

‘dividend adjustment you are obligated to pay as an individual or legal entity that is short instruments either in CFD’s, Indexes, or Single Stocks to the owners of the equities or equity index. This is not a retroactive charge but a current adjustment made to your account based on the short positions you held on these instruments within the 1st Qtr. 2018’.

²A 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 derivatives ... 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. ... CFD traders may bet on the price moving up or downward. 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>

³ A sell position.

The Complainant submitted that these charges were, however, not mentioned in the client agreement provided. He further submitted that the debit item was made in a single entry without him being provided with any explanations as to which trades it related to.

The Complainant remarked that the trades that the Company referred to in its response had occurred as early as 29 November 2017, five months before the charge.

The Complainant submitted that all of the Company's daily statements state that the statements will be considered confirmed by him if not objected to in 24 hours, but the Company, however, made the debit adjustments months after all the trades were closed. It was submitted that this was a great disparity which was unjust and unfair.

The Complainant further submitted that had he known that the Service Provider would charge the said amounts, he would probably have placed different trades or not traded at all.

It was further submitted that had the charges applied quarterly, the Company should have also charged them for similar trades made in Q4 of 2017, which they did not.

In his attachment to the Complaint Form, the Complainant further noted that after his bad experience, he has worked with other brokers and done extensive research on the matter. He claimed the following:

- That in finance it is well established that the owner of stocks or stock indexes receives dividends and that when sold short the same dividend is due from the short seller. The Complainant submitted that, however, when traded as derivatives, they are not to be assumed if not specifically agreed upon as some brokers charge them whilst some do not.
- That most brokers that are charging them will show the charges in the swap field of the *mt4* trading platform daily where clients can look them up before trading. It was further noted that brokers will apply them nightly without any delay.

- That in general, be it equities or equity indexes, the dividend amounts are known even in advance of the dividend pay-out date. The Complainant submitted that it was absurd that FXDD waited 3 months to undertake the charges which were clearly retroactive.

The Complainant submitted that the charges were not an innocent correction or due adjustment. He pointed out that he was almost sure that if one had to explore in respect of which customers the Company has made these adjustments, he claimed that one would certainly find that the Company did not do these adjustments for customers who had long positions on these assets. It was noted that, in such cases, the Company would have had to credit the customers' accounts with dividends.

Complainant's request

The Complainant requested the disputed charge of USD206,556 to be credited back into his account. Given that he was not using the Company's trading account anymore he requested the funds to be wired to his bank.

In its reply, the Service Provider, in essence, submitted the following:⁴

That the Company operates under a Category 3 investment services licence issued by the Malta Financial Services Authority and it has been operating since 2010. It stated that in accordance with the terms of its licence the Company does not, and cannot, provide any advisory services to its customers. The Company further stated that it is authorised to provide execution only services to its customers on a variety of products, including, but not limited to, CFDs on single stocks and stock indices.

The Service Provider added that the product that is the subject matter of the Complaint is CFDs on stock indices (Index of shares) which basically consists in trading on the value of an underlying index of shares.

It further explained that by the very nature of this product, a short position on CFDs on stock indices would have the dividend debited, whilst a long position on such CFDs would have the dividend credited.

⁴ A fol. 105-106

It submitted that this is intrinsic to the nature of CFDs on stock indices, and is a standard practice applied throughout the financial industry and, as such, cannot simply be refused or ignored by investors in such products. It further submitted that this dividend charge is fixed by the company which issued the shares/stock and not by the Service Provider. Therefore, when the Company's customers trade CFDs on stock indices, they are trading the total value of the underlying stock plus the cash settlement of the dividend once it is paid.

The Service Provider further noted that this will eventually result in a debit or credit on the customer's account based on the customer's short or long position which by its very nature can only be applied retroactively.

The Company explained that this dividend charge is debited or credited by the issuer of the stock to the Service Provider and the Service Provider then debits the account of its clients having short positions, and credits the accounts of its clients having long positions on such CFDs on the Company's platform. It submitted that the payment date of the dividends is pre-defined in the description of the underlying stock and is public information available to all investors that trade such products.

The Service Provider submitted that the Complainant is an experienced trader who has been its customer since November 2017. It noted that, as required by the applicable MFSA Investment Services Rules, the Company conducts an appropriateness test on all its customers at on-boarding stage.

It further stated that in his application form, the Complainant confirmed to the Company that he carried out transactions in financial instruments in significant size at an average frequency of 10 transactions per quarter in the previous 4 quarters, before becoming a customer of the Company.

These transactions included stocks, commodities, futures and futures options, foreign exchange and bonds, with some of these being complex instruments.

The Service Provider also noted that the volume of past trades in these financial instruments, according to the Complainant's declaration in his application form, varied up to a maximum of USD100,000 for foreign exchange and up to USD50,000 for each of the rest of the mentioned financial instruments.

The Company submitted that, furthermore, the Complainant's account activity with the Company confirms that he is a frequent, knowledgeable, and experienced trader having carried out numerous weekly and at times daily transactions in CFDs on stock indices on the Company's platform. It submitted that the Complainant should have therefore certainly been aware of the intrinsic properties, risk and benefits of trading CFDs on stock indices, including the dividend charge.

The Service Provider noted that in his complaint, the Complainant stated that the Company debited his account retroactively. The Company confirms that, in accordance with its internal operating procedures, it debited and credited the accounts of all its customers after the dividend attached to the stocks became due and was debited or credited to the Company by the issuer of the stock.

It noted that, as it stated previously, the issuer of the stock debits or credits the dividend adjustments to the Service Provider and the Service Provider then debits or credits its customers' accounts depending on whether they hold a short or long position. The Company submitted that this is not a service fee charged by it.

The Service Provider further submitted that the Complainant's relationship with the Company is exclusively governed by the Customer Agreement which was approved by the MFSA. It stated that the Customer's Agreement gives the Company the right to make dividend adjustments to its customers' accounts.

The Service Provider strongly rejected any allegations made by the Complainant in his complaint. It submitted that the Company distinguishes itself by its excellent customer service throughout its many years of operation and is disappointed that one of its customers was not happy, particularly due to the fact that this customer had experience and knowledge of the sector in which they both operated.

Having heard the parties and seen all the documents and submissions,

Considers:

The Merits of the Case

The Arbiter 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.⁵

Profile of the Complainant

According to the Account Information section of the Customer's Application Form dated 11/16/2017 presented by the Service Provider, the Complainant, a Turkish citizen born in 1971, has a post tertiary level of education with his employment indicated as a Manager in the engineering/architecture business.⁶

According to the same form, the account with the Service Provider was expected to have a deposit amount of USD49,000-USD99,000 and was opened for '*Proprietary Trading*'.⁷

Trading Accounts held

The Complainant opened two accounts with the Service Provider, both denominated in USD. One account (with number 1124011) was opened in November 2017, with this account being '*traded for a month*' by the Complainant.⁸

As stated during the hearing of 6 October 2020, after the Complainant asked for better spreads, he then '*opened another account and the funds were transferred from one account to the other*'.⁹

The Complainant explained, during the same hearing, that he '*traded for another four months on the new account*' (bearing number 745165).

Transactions undertaken by the Complainant

The Complainant provided a list of the transactions undertaken on both accounts.

⁵ Cap. 555, Art. 19(3)(b)

⁶ A fol. 109 & 111

⁷ A fol. 111

⁸ A fol. 4 & 152

⁹ *Ibid.*

The transactions on account 1124011 were undertaken between 28 November 2017 to 26 December 2017.¹⁰ The '*Total Trades*' made on this account amounted to 79 as indicated in the statement provided by the Complainant with all the trades being '*sell*' (short) positions.¹¹ The said statement for account 1124011 indicated '*Gross Profit*' of '464.07', '*Gross Loss*' of '17 185.85' and **a total net (loss) of '-16 721.78'**. It also indicated a '*consecutive profit (count): 464.07(10)*' and a '*consecutive loss (count): -15 020.85 (63)*'.¹²

The transactions on account 745165 were undertaken between 27 December 2017 to 5 April 2018.¹³ The '*Total Trades*' made on this account amounted to 496 as indicated in the statement provided by the Complainant with all of the trades, with the exception of two,¹⁴ being '*sell*' (short) positions.¹⁵

The statement for account 745165 further indicated '*Gross Profit*' of '409 707.25', '*Gross Loss*' of '86 697.81' and **a total net profit of '323 009.44'**. It also indicated a '*consecutive profit (count): 171 222.79 (42)*' and a '*consecutive loss (count): -52 348.43 (17)*'.¹⁶

Dividend Adjustment

No dividend adjustments were reflected in the statement for account 1124011 which, as indicated above, involved trades undertaken in 2017.

A dividend adjustment of (USD206,556) marked as '*MISC Adjustment 1st Qtr index C*' was reflected in the statement for account 745165 on 09 April 2018, after the trades of the first quarter of 2018.¹⁷

General overview of Position on Dividend Adjustments

A general search regarding dividend adjustments as disclosed by other regulated brokerage companies indicates that various other brokers do adjustments with respect to CFDs on stocks/stock indices where, in the case of dividend payments

¹⁰ A fol. 10-11

¹¹ *Ibid.*

¹² A fol. 11-12

¹³ A fol. 14-28

¹⁴ Two trades constituted '*buy*' (long) positions.

¹⁵ A fol. 14-27 (A fol.27 - '*Buy*' positions)

¹⁶ A fol. 28

¹⁷ A fol. 27

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, indicates on its website that if you hold a 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',*¹⁸ further 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 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 ...'*¹⁹

The following example was provided:

'CFD dividend adjustment:

Let's say you hold a long position of 3,000 Vodafone share CFDs and Vodafone announces a 15p dividend. In this case, £450 would be credited to your CFD account.

$$15p \times 3,000 = £450$$

*Note: If you held a short position going into the ex-dividend date then your spread betting or CFD account would be debited £450. The dividend will appear as a 'Price Adjustment' in your account history within the platform.'*²⁰

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

¹⁸ <https://www.cmcmarkets.com/en-gb/learn-cfd-trading/corporate-actions>

¹⁹ *Ibid.*

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

²⁰ *Ibid.*

with the exact amount you have incurred as additional running loss/profit due to the dividend adjustment'.²¹

The website of another brokerage company also provided an explanation of the impact of dividends on the CFD trades describing *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'.²²

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

'We'll either credit or debit your Account with a dividend adjustment if the Underlying Asset for your Contract is a stock, share or index which pays a dividend, and your Contract is open on the ex-dividend day for that Underlying Asset'.²³

The website of another regulated broker explains *inter alia* the following on dividends for CFDs:

'When an underlying stock that is part of an Index goes ex-dividend, entitlements will be allocated on the ex-date but the actual value of the payment will be

²¹ <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>

²² <https://help.fxcm.com/uk/Product-Guide/Overview/CFD-Trading/955240643/What-are-Index-CFD-Dividends.htm>

²³ https://files.pepperstone.com/legal/UK_EU/UK_Ts_and-Cs.pdf

*settled on Pay Date. The Index CFD will be price adjusted to reflect this dividend. The weighted proportion of the applicable dividend within the Index, will be credited to the client's account for long positions and debited for short positions.*²⁴

Various articles can also be found over the internet on the application of dividend adjustments in relation to CFDs.²⁵

Hence, dividend adjustment on CFD trading is clearly an area which is commonly catered for by several brokerage companies involved in the execution of such type of trading.

Final Observations and Conclusions

The following key considerations are pertinent to the case in question:

- a) *Experience/Awareness* - The Application Form for the opening of an account with the Company completed by the Complainant indicates *inter alia* that the frequency of transactions previously carried out by the Complainant in forex, stocks, commodities/futures and futures options was '*10 and more*', with the size of his investment portfolio, managed on '*own account*', being '*50,000-99999k*'.²⁶

The section titled '*Financial and Trading History Information*' of the same form indicates that the previous trading and investing experience was of 6-24 months in '*commodities and futures and futures options*' and in '*foreign exchange*' respectively with such trading being in the range of '*\$50,000-\$100,000*' in foreign exchange and '*\$0-\$50,000*' in '*commodities and futures and futures options*'.²⁷ The frequency of trading was indicated as weekly for forex and monthly for commodities/ futures and futures options.

During the hearing of 6 October 2020, the Complainant stated *inter alia* that '*... I am asked to give a brief description of my trading history before*

²⁴ <https://www.home.saxo/rates-and-conditions/cfds/trading-conditions>

²⁵ <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/>

²⁶ A fol. 110

²⁷ A fol. 111 & 112

*becoming a customer of FXDD. I say I traded with other brokers and usually I traded in CERS, bears and indexes. Asked about the amount of transactions I made, I would say the amounts were about \$300,000/\$400,000. The sum of my account was at \$300,000 / \$400,000.*²⁸

During the same sitting, the Complainant further noted that *'Being asked if I had traded CFDs with stock indices before becoming a client of FXDD, I say, yes. I confirm that I am familiar with CFDs.'*²⁹

It has thus clearly emerged that the Complainant, who was taking the investment decisions on the trading accounts himself, was an experienced trader who had been trading in investment instruments including CFDs prior to commencing trading with the Service Provider.

It is further noted that during the hearing of 6 October 2020, the Complainant stated that *'... being asked how come I never brought up the matter that dividend charges were not being charged, I say **actually before 2018, I called FXDD and asked them about the dividends and the person I talked to told me that I was not involved with the dividends.**'*³⁰

Hence, in the circumstances, it is considered that in light of the previous experience in the trading of CFDs, and even the Complainant's testimony, suggest that the Complainant must have had a certain level of awareness on the general application of dividend adjustments on CFD trading at the time when he was undertaking trades in CFDs with the Service Provider.

- b) *Nature of trades* - The transaction history for the two trading accounts opened in November and December 2017 respectively, indicate numerous transactions (over 500 transactions in less than 5 months on the said accounts combined) with the majority of the trades being 'short' positions as indicated in the section titled *'Transactions undertaken by the Complainant'* above.

²⁸ A fol. 153

²⁹ *Ibid.*

³⁰ A fol. 155 - Emphasis added by the Arbiter

The transaction account history in respect of both accounts indeed only indicates just two long positions made by the Complainant out of the over 500 transactions.³¹

The possibility that the trading strategy adopted by the Complainant was one to take advantage of the lack of dividend adjustments experienced in the previous months of 2017 (November to December 2017) cannot thus be excluded either.

The Complainant has stated in his complaint that had he *'known that FXDD would charge these amounts, I would probably place different trades or would not do any trades at all'*.³² He has, however, not explained or demonstrated the basis for such assertions, nor has he indicated what he would have done differently.

Taking also into consideration the overall positive performance of the trading accounts over the short trading period of less than five months, and the material net realised profit still resulting to the Complainant after the dividend adjustments (as considered in further detail below), the assertions made by the Complainant are not convincing in the circumstances.

- c) *Extent of loss/profit* - As indicated under the section titled *'Transactions undertaken by the Complainant'* above, the Complainant made a net loss (close to USD15,000) on his account 1124011 and a substantial profit (of over USD300,000 prior to the dividend adjustment of USD206,556) on his account 745165.

The Complainant himself confirmed, during the hearing of 6 October 2020, that *'Although I lost about \$14,000 on my first account, I made a big profit on my second account.'*³³

As summarised in the final submissions of the Service Provider:

³¹ A fol. 27

³² A fol. 4

³³ A fol. 152

*'The dividend adjustment in the amount of USD 206,556 covered short positions on CFDs on stock indices during the 1st Quarter of 2018 and was made on the 9th April, 2018. The amount of the dividend adjustment should have been higher in the amount of USD 261,930.30 but FXDD did not pursue the full amount. The total profit made by Mr SV on Trading Account 4MT745165 before the dividend adjustment, was USD 327,549. It is worth noting that this situation has in actual fact worked to the benefit of Mr SV as should the dividend charges have been applied earlier, he would not have been in a position to place more trades as he would have been margined called.'*³⁴

It has emerged that the Complainant still made a considerable profit on account 745165 over the period December 2017 to April 2018, even after the deduction of the contested dividend adjustments of USD206,556. Overall, the Complainant still ended with a net realised profit (close to or slightly more than USD100,000) during the five-month trading period since he commenced trading with the Company in end November 2017, after taking into consideration the loss experienced on the first account as well as the dividend adjustment undertaken on his second account.

- d) *Benefits gained by the Complainant* - There were no dividend adjustments made on the short positions undertaken on account 1124011 in 2017. Dividend adjustments were however undertaken on account 745165 shortly after the first quarter of 2018.

As noted by the Service Provider in its final submissions, *'the dividend adjustment for Quarter 1, 2018 was made on the 9 April 2018 which is a reasonable period when bearing in mind that FXDD had a glitch in its I.T. system related to dividend adjustments on CFDs on stock indices. FXDD made its position clear in these proceedings that it had a glitch in its I.T. system whereby dividends on stock indices were not being debited or credited on its system. This can also be seen from Dr Nicola Mallia's testimony'*.³⁵

³⁴ A fol. 245

³⁵ *Ibid.*

It is noted that during the hearing of 2 December 2020, Dr Mallia testified *inter alia* that '*There was a slight delay due to a glitch in the system for the calculations of the adjustments and there was a slight delay when issuing the calculations on all the accounts held at FXDD.*'³⁶

The Complainant stood to benefit on his 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.

It is clear that there was a tangible benefit gained by the Complainant from the lack of prompt dividend adjustments made by the Service Provider in view of the '*glitch in its I.T. system*'.³⁷

- e) ***Market practice*** – **The application of dividend adjustments for positions taken 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 '*General 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 as evidenced in the same section.

- f) ***Contractual provisions*** – **The relationship between the Complainant and the Service Provider was governed by a Customer Agreement signed by the Complainant on 11/16/2017.³⁸**

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

³⁶ A fol. 227

³⁷ A fol. 227 & 245

³⁸ A fol. 114

Clauses 9, 11 and the paragraph before last of page 25 of the agreement were indicated by the Service Provider as the most relevant clauses.³⁹

Whilst the paragraph before last of page 25 of the Customer Agreement⁴⁰ relates to the customers' responsibility for reporting errors, Clause 9 and 11 of the Customer Agreement respectively titled as '*Customers Monies*'⁴¹ and '*Margin Requirements*'⁴² 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',⁴³

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 ...'⁴⁴

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.

³⁹ A fol. 155 & 247

⁴⁰ A fol. 32

⁴¹ A fol. 37

⁴² A fol. 39

⁴³ A fol. 37 - Emphasis added by Arbiter

⁴⁴ A fol. 39 - Emphasis added by Arbiter

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

Decision

For the above-stated reasons, the Arbiter is accordingly rejecting the Complainant's request for compensation.

The costs of these proceedings are to be borne by the Complainant

**Dr Reno Borg
Arbiter for Financial Services**