

## Before the Arbiter for Financial Services

Case No. 027/2018

ZF (“the Complainant”)

vs

Binary Investments (Europe) Limited  
(C70156) (“the Company” or “the  
Service Provider”)

### Sitting of the 9 September 2019

#### The Arbiter,

Having seen **the Complaint** relating to the trading account in binary options held by the Complainant with Binary Investments (Europe) Limited, an investment services company licensed by the Malta Financial Services Authority.

The Complainant submitted that she has suffered losses on her trades with the Company in relation to binary options due to the Company having cheated on her.<sup>1</sup> The Complainant claimed wrongdoings by the Company in relation to her account and claimed evidence of fraudulent activity.<sup>2</sup>

During the hearing of 19 June 2018, the Complainant however stated *inter alia* that “*I am not accusing the company of fraud. I am definitely not*”,<sup>3</sup> and that:

*“because the answers that I received were not satisfactory, it appeared as fraudulent options, but I did not say that it was fraud”*.<sup>4</sup>

The Complainant submitted that:

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<sup>1</sup> A fol. 6

<sup>2</sup> A fol. 6 and 10

<sup>3</sup> A fol. 149

<sup>4</sup> A fol. 150

- 1) under the pretext of trading binary options, the Company was undertaking an activity similar to a game of chance where the binary options trades offered by the Company were being reduced to “*a controlled, manipulated game*”<sup>5</sup> through the application of several parameters by the Company;
- 2) the Company has deliberately misled the investor given that the information provided to the investor, including the contents of the Company’s internet trading platform, “*do not point to a ‘game character’*”;<sup>6</sup>
- 3) the Company has cheated her for 3 ½ years without the Complainant being made aware of “*the risk of the impossibility to achieve a profit*”.<sup>7</sup>

The Complainant claimed that despite the information that she had “*borrowed money from various banks for trading has not stopped the greed of the trading platform operator*”.<sup>8</sup>

The Complainant further explained that most of the money deposited in her trading account amounting to a total of EUR180,822.00 came from loans she took from banks which she still has to pay back for years, whilst other money came from her savings.

It was submitted that following the regular loss of money on her trading account, the Complainant analysed the data related to her transactions where this indicated “*a strong suspicion that it was a scam*”.<sup>9</sup>

The Complainant claimed that she has hinted to the Company “*at the illegal trading process*”.<sup>10</sup>

The Complainant submitted that despite the Company stating that her winning rate on her binary options trades amounted to 49%, and that this was within the expected statistical bounds for the trades performed, a high hit rate did not,

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<sup>5</sup> A fol. 6

<sup>6</sup> A fol. 7

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> A fol. 8

<sup>10</sup> Ibid.

however, guarantee success for an investor. The Complainant stated that “*Given the fact that I lost EUR143,396.32, I found the sequence a mockery*”.<sup>11</sup>

The Complainant claimed that the error messages that she had encountered were rejected by the Company and claimed that the Company twisted the factual arguments she presented regarding her trading account with the Company, also not completely explaining or considering all matters raised by her.<sup>12</sup>

The Complainant highlighted the following aspects as proof of the claimed wrongdoings of the Company:

- 1) Having a constant hit (winning) rate on the trading account for weeks, months and years
- 2) Discrepancies in price information
- 3) Wrong price trends
- 4) Inaccurate and erroneous price information
- 5) Wrong information about possible pay-out
- 6) Wrong price information
- 7) Deceptive price information at the starting point time
- 8) Time and price deviations
- 9) Manipulation with Time and Time Display – Example I
- 10) Manipulation with Time and Time Display – Example II
- 11) Incorrect information on the price axis
  - 1) With respect to the constant hit (winning) rate, the Complainant argued that it was not possible for a human to achieve a consistent winning rate over the period 2014 to 2017 and argued that this was

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<sup>11</sup> A fol. 9

<sup>12</sup> Ibid.

only possible if a trader's decisions were being corrected or adjusted by an algorithm.

The Complainant presented graphs showing a constant hit rate and also charted the weekly winnings and losses over the indicated period claiming that *"after every laboriously achieved profit day by day, the losses followed uninterruptedly"* like an *"avalanche"*.<sup>13</sup> The Complainant claimed that the Company's online trading platform was applying software running *"'top-class' algorithms that filter, sort and calculate many parameters, obtain the prices from different sources and select the most favourable ones for broker, not for user"*.<sup>14</sup>

The Complainant submitted that the broker's obligation for best execution of trades in the customer's interest was being ignored.

- 2) On discrepancies in price information, the Complainant pointed out that the price of a currency pair at a specific point in time on the tick chart shown by the trading system was different from that applicable on the same time reflected in the minute chart available on the same system. It was claimed that this led to wrong decisions especially in relation to trades of a short-duration.<sup>15</sup>

The Complainant disputed the explanations provided by the Company for the differences where the Company had explained that the minute chart showed the closing/last price at the minute. The Complainant claimed that the tick price and the minute price should have had the same values also referring to the systems of another broker offering binary option trading.<sup>16</sup>

- 3) With respect to wrong price trends, the Complainant submitted that according to the data on the Company's website *binary.com*, the price of EUR/USD dropped between 17:42 and 17:46 on 23 June 2017, but the price of EUR/USD had actually gone up during this timeframe as

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<sup>13</sup> A fol. 11

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> A fol. 12

indicated on the website of a price/chart provider *godmode-trader.de*.

The Complainant claimed that the explanations provided by the Company, which had quoted the price source from Bloomberg, was not adequate as “*Bloomberg is not a source of real prices. Bloomberg is a news agency*”,<sup>17</sup> and the Complainant also referred to the disclaimer on price details on Bloomberg’s website. The Complainant argued that this was against what had been indicated on *binary.com* which “*promises the ‘real-time-prices’ based on the Interbank price data*”.<sup>18</sup>

- 4) With regards to the claim of inaccurate and erroneous price information, the Complainant stated that the system provided two different price values for the same currency pair. The Complainant referred to the price of the AUD/JPY currency pair which she claimed was reflected differently on the Company’s trading platform with the value at the top of the screen being different than that on the chart section in the same screen where the latter showed a lower value.

The Complainant explained that the reason provided by the Company for the difference in the indicated prices, being due to the movement of the time bar, was untrue.<sup>19</sup>

- 5) The Complainant also claimed that the trading platform provided wrong and false information about possible pay-out. The Complainant explained that the system for example indicated a possible pay-out of EUR19,246.00 on a contract of EUR100.<sup>20</sup>

The Complainant however pointed that this was “*one of the many magic*”.<sup>21</sup>

- 6) With regards to wrong price information, the Complainant explained that different prices were shown for the same currency pair at the

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<sup>17</sup> A fol. 13

<sup>18</sup> *Ibid.*

<sup>19</sup> A fol. 13/14

<sup>20</sup> In case where the EUR/CAD is clearly below the start price after the start time of the contract until 20 minutes as per Attachment 34CD.

<sup>21</sup> A fol. 15

same date and time. The Complainant indicated that on one chart displayed on the Company's system the price of AUD/JPY is shown at 87.007 as at 19:10:00 on 10 November 2017, whilst on another chart on the Company's system the level of the price of 87 is not touched at this specific time but only at 19:10:45.

The Complainant further claimed that not even an average for the value of AUD/JPY on the same date and as at 19.10 would lead to a price of 87.000 or higher.<sup>22</sup>

- 7) The Complainant also claimed that the Company's trading system provided deceptive price information at the starting point time. The Complainant remarked that the starting price should always be the price from the first tick after the start of the contract.

The Complainant explained that a diagram shown on the Company's platform relating to a position in AUD/JPY on 9 November 2015, which had a starting price of 87.069, had a threshold/green line which showed the limit in the value of the price before the start of the contract, where the threshold/green light was at a slightly higher price of over 87.07 than the starting price of the contract.

The Complainant claimed that she took the screenshot of the said diagram in 2015 and that following her enquiries with the Company, who stated that they could not verify the veracity of the image in question, the threshold/green line did not feature anymore on the system.<sup>23</sup>

The Complainant further claimed that despite her representations on the matter, "*the company's interpretations to the trade actions, disagreements and mistakes are not plausible and twisted*"<sup>24</sup> and that the Company made reference to the word "*manipulations*" despite the fact that she did not use first such term herself.

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<sup>22</sup> *Ibid.*

<sup>23</sup> *A fol. 15*

<sup>24</sup> *A fol. 16*

- 8) With respect to time and price deviations, the Complainant referred to an example which she claimed showed “*a significant manipulation of time and price information by an algorithm*”.<sup>25</sup>

It was claimed that both time and prices are systematically adjusted. The Complainant compared two parallel transactions for the same currency pair and explained that the video of these two transactions at times showed different values in prices, information on cash-time and current time.

The Complainant claimed that the only plausible reason for such differences are that the prices and data are being extracted from different sources, with algorithms adjusting the said information.<sup>26</sup>

- 9) The Complainant claimed that there was also manipulation with time and time display. The Complainant explained that there were time gaps and leaps in time with the values on the timeline in the graphs shown on the Company’s systems being out of sync.

It was further claimed that the algorithms used by the Company always adjusted the time as it deemed fit.<sup>27</sup> The Complainant argued that the size of the timeline on the graph was not proportional to the size of the time (x-axis) of the chart and that the scale of the graphs were thus not adequate.

- 10) With respect to manipulation of time and time display it was also claimed that there were instances of time gaps in the mapping/charting of a transaction where the system would jump one or more seconds in the display. It was claimed that this led to a deceptive presentation of information.<sup>28</sup>

- 11) The Complainant submitted that the system also displayed incorrect information on the price axis. An example was provided of a trading

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *A fol. 22*

<sup>28</sup> *A fol. 23*

chart showing the price of a currency pair (on the y-axis) as it changed over time (reflected on the x-axis).

The Complainant claimed that the said example showed that there were various instances where a given price value remained the same for a number of consecutive seconds, but this notwithstanding, the graph line moved instead of remaining constant as would be expected when there is no change in value.

The Complainant ultimately noted that her complaint does not relate to one or few transactions but to the whole trading offer made by the Company, where she compared the Company's activities to the thimblrig shell game where she claimed that the Company was using algorithms not to allow a profit.<sup>29</sup>

It was submitted that there were various errors of different kinds in the Company's trading system with mistakes being repeated permanently, it seemed intentionally, with the constant hit (winning) rate indicating an automated manipulated process.<sup>30</sup>

The Complainant requested the Company to return her lost capital amounting to EUR143,396.00.<sup>31</sup>

**In its reply, the Service Provider, in essence, submitted:<sup>32</sup>**

### ***Preliminary Pleas***

That all correspondence and submissions by the Complainant other than her formal complaint be disregarded and be expunged from the proceedings of this complaint in order to ensure a fair hearing and equality of arms between the parties.

That all proceedings ought to be conducted in the English language, particularly since the Complainant's complaint was submitted in English.

That the Complaint is vexatious and frivolous and should be rejected in its entirety. It was submitted that the Complainant has resorted to intimidation

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<sup>29</sup> A fol. 26

<sup>30</sup> *Ibid.*

<sup>31</sup> A fol. 4

<sup>32</sup> A fol. 116 - 130

tactics even before the commencement of proceedings before the Arbiter for Financial Services.

Reference was made to the Complainant's email of 6 March 2018, where the Complainant boldly insisted that "*if the mediation does not end according to my expectation and the reasons for the fact become weak and not plausible, I will file a criminal complaint against the company*".<sup>33</sup>

### ***Reason for Complaint***

The Service Provider submitted that the Complainant's claim that she was not aware of the "*game character*" of binary options trading is manifestly disproved by the fact that when she first opened her account in June 2014, the account was held with Binary (Europe) Ltd, regulated by the Malta Gaming Authority, with all the required gambling disclaimers and notifications to which the Complainant declared to have read, understood and accepted the terms in order to proceed with the account opening.

Moreover, throughout the various trades, amounting to 27,621 in total, it was reasonable to assume that the Complainant familiarised herself with the "*game character*".

Reference was made to the case *Interfoto Library Ltd vs Stiletto Ltd* where the Court in the United Kingdom provided that a party to an agreement may not be relieved of any consequences because they did not take cognizance of the conditions or terms in an agreement.

Reference was also made to the case *Navarro Godwin vs Baldacchino Saviour* where the Court concluded that the party that signs a contract without knowing its content assumes the responsibility of their own carelessness. It was argued that it was not fair, equitable or just for the Complainant to later declare that she was not made aware of the "*game character*" or nature of the investment when in fact she acknowledged the terms of such financial product.

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<sup>33</sup> A fol. 116

The allegations of fraud were rebutted in its entirety and it was *inter alia* highlighted that the Complainant failed to substantiate any allegation of fraud or deceit of any sort.

The Service Provider vehemently denied that there was any manipulation within its trading platform highlighting that it was subject to MFSA regulation and that it has always been in full compliance with all regulatory requirements with the company being regularly audited both internally and externally. The Service Provider also explained that the front-end interface of the binary.com platform is open-source code and the charting library used (HighCharts) is also open-source, thereby assuring the user that the code may be audited by any third party that wishes to examine it.

With reference to the Complainant's claim that she borrowed money from various banks to fund her trading activities, the Service Provider submitted that at no time did it or Binary (Europe) Ltd have any information to that effect. It was noted that the very fact that the Complainant borrowed money in order to invest such borrowed sums is testimony to the fact that the Complainant is no ordinary retail investor.

The Service Provider submitted that over the years the Complainant familiarised herself with the nature of such financial products and was well aware that in the event that the strike prices of her trades were not reached, there would be no pay-out on such trades, rendering her unable to meet her outstanding loans. This was a decision the Complainant unilaterally took for which the Service Provider was unaware of and, in all instances, remains the responsibility of the Complainant.

For the Complainant to attempt to find liability or shift any of the responsibility onto the Service Provider is vexatious rendering the complaint frivolous and should be rejected by the Arbiter in terms of Article 21(2)(c) of Chapter 555 of the Laws of Malta.

### ***Disclosures***

The Service Provider submitted that it had provided all the required disclosures in a comprehensible and accessible form on its *Binary.com* website which is the online platform the Complainant traded on.

The Service Provider referred to various messages and warnings displayed on the footer of every page on its website, which warnings also remind one that gambling can be addictive, to play responsibly and to read about '*Responsible Trading*'.<sup>34</sup> The Service Provider displayed the warnings on '*Responsible Trading*' which *inter alia* warn on the addiction of options trading and not to trade with borrowed money.<sup>35</sup>

The Service Provider also displayed the text relating to '*Written limits and self-exclusion*' which deals with limits and self-exclusion parameters that traders could impose on their accounts.<sup>36</sup>

Reference was also made to the warnings provided to traders on '*Contract Risks*' in the Terms and Conditions page on the Company's website.<sup>37</sup>

The '*Contract Risks*' included *inter alia* warnings that:

*"Trading in Binary Options is speculative and involves a high degree of risk that can result in the loss of your entire investment",*<sup>38</sup> and that

*"If you are in any doubt as to whether Binary Option trading is appropriate and suitable for you, please seek independent advice from an investment consulting professional. Binary.com does not provide such advice. It is your responsibility, taking into account your personal circumstances ...",*<sup>39</sup> amongst various other additional risks.

The Service Provider submitted that the disclosures were in line with the applicable standard licence conditions in terms of its investment services licence and highlighted that the Company's website also provided a '*Reality Check*' to traders in accordance with MFSA's requirements.

The '*Reality Check*' which had a chosen 10-minute interval by the Complainant, provided a warning that:

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<sup>34</sup> A fol. 119

<sup>35</sup> A fol. 120

<sup>36</sup> *Ibid.*

<sup>37</sup> A fol. 121 - 122

<sup>38</sup> A fol. 121

<sup>39</sup> *Ibid.*

*“Options trading can become a real addiction, as can any other activity pushed to its limits. To avoid the danger of such an addiction, we provide a reality-check that gives you a summary of your trades and accounts on a regular basis”,<sup>40</sup> with the option to “continue trading”, “view statement” or “log out”.*

### ***Appropriateness Testing***

It was submitted that the Complainant was required to reply to a Financial Assessment Questionnaire provided by the Company in respect of the appropriateness testing required in terms of the Standard Licence Conditions of the MFSA’s Rules. The said questionnaire was used to determine *“whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product ... being demanded”*.<sup>41</sup>

The Service Provider explained that the Complainant indicated in the reply to this questionnaire that she had over 3 years trading experience in binary options or other financial derivatives; indices trading; stocks trading experience; forex trading experience; commodities trading experience and other financial instruments with such experience involving 40 or more transactions in the preceding 12 months.

The Service Provider submitted that the information provided by the Complainant clearly indicates that she had extensive previous investment experience with binary options and other financial instruments, at a high trading frequency rendering her an experienced investor.

It was also submitted that the semantics and lexicon used by the Complainant in her own complaint is testimony to the fact that she is well aware of the methodology and risks behind such investment products. It was pointed out that

it is therefore clear that the Complainant was an experienced trader and was given ample warning about the risks of trading on the instruments available on the Company’s website.

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<sup>40</sup> A fol. 122

<sup>41</sup> Ibid.

With respect to the other aspects raised by the Complainant, the Service Provider submitted the following:

### **1. *Constant hit rate***

That the constant hit rate essentially shows that the way the Complainant analysed the expectancy of market directions was generally wrong and, therefore, her trading strategy was unable to beat the market resulting in no or unfavourable pay-outs.

That by her own admission, the Complainant put significant time and effort into her trading strategy and she *“used many sources of information”, “learnt and applied different tactics”*, used her intuition (*“I felt different”*), traded a variety of underlying markets and different contract durations (*“I traded different forex pairs and I chose transactions of different duration”*) and also used a variety of money-management strategies (*“I executed trades with differentiated starting capital”*) and also traded at different times of the day, thus, increasing her knowledge as she traded.

That by her own admission, the Complainant was not influenced in any way by *Binary.com* as the Company bars any influence of its clients in their choice of trades or strategy.

The Service Provider further submitted that the Complainant erroneously concludes that given that she did not generate profits on the executed trades, then this amounted to wrongful practices by the Company.

The Company strongly rebutted the allegations made by the Complainant and highlighted that it was the unsuccessful trading strategy chosen by the Complainant that was to be blamed for not generating profits.

### **2. *Discrepancies in the price information***

The Service Provider submitted that there were no discrepancies in prices. The Company noted that the Complainant appears to be alleging that the real-time minute chart is showing live prices for the last minute of the chart despite the fact that the minute is not yet over. It was submitted

that this was standard practice for financial charting as it provides users with real-time information. It was also noted that this was automatically generated using standard market conventions and cannot be manipulated.

The Service Provider submitted that the chart behaviour on *binary.com* was compared with the behaviour of a forex chart on a Bloomberg terminal and similar behaviour was found. The Company was, therefore, confident that its charts are accurate, and use established standard market conventions.

### **3. *Wrong price trend***

It was submitted that the forex market has no central price fee as it is not a centralised market and accordingly prices will differ albeit slightly between feed providers. It was submitted that the Complainant was provided with a screenshot from a Bloomberg terminal which showed that the prices from Bloomberg were substantially similar to the Company's prices at the relevant time thereby signifying that the methodology used to generate the financial charting and the Company's data feed was not tampered with.

The Company submitted that the Complainant was wrong in stating that "*But Bloomberg is not a source of real prices. Bloomberg is a news agency*", as Bloomberg is at the fore for market data analysis and information networking and the Bloomberg FX prices are considered a trustworthy source in the financial community. The Company further submitted that any other number of reputable financial data feeds would have shown similar price action at the relevant time.

The Company also referred to the disclaimer in its Terms & Conditions document relating to '*Differences with other data feeds*' which *inter alia* highlighted that data feed may at times differ slightly from other data feeds over the internet and indicated the reasons for such differences.<sup>42</sup>

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<sup>42</sup> A fol. 125

#### **4. *Inaccurate and erroneous price information***

The Service Provider rejected such allegation on all counts explaining that the video provided by the Complainant in attachment 33/CD did not substantiate her complaint as there was nothing wrong in the way the program worked. The Company submitted that the Complainant had dragged the bar at the bottom of the chart in order to zoom in on a past historical area of the chart.

The Company further submitted that when a user does that, the spot indicator (being the dotted red line on the chart) will no longer update automatically as the user is viewing a historical area of the chart which may be an area of prices that are completely different in value to the latest spot. It was submitted that if the spot indicator were to update in real time, it would require having the y-axis of the chart wide enough to contain the latest spot with this making the viewing of the historical price data unfeasible as it would reduce it to a tiny space.

The Service Provider submitted that the Complainant was, therefore, complaining about a chart feature that was actually implemented correctly and that this can be clearly demonstrated by utilizing the online charting system.

#### **5. *Wrong information about possible pay-out***

It was submitted that when the Company logged onto the Complainant's account, the contract in question actually indicates a pay-out of Eur192.46. Whilst the screenshot provided by the Complainant shows a pay-out Eur19,246 it may be possible that the Complainant's browser is ignoring the decimal point treating the 192.146 amount as 19246.

#### **6. *Wrong price information***

The Service Provider claimed that following examination of the attachments provided by the Complainant, the Company found no error into the system.

The Company explained that the minute that the Complainant had highlighted with her mouse was 19:10 with this being the last tick at 87.007 given that by convention, the tick showed at any given minute is the last tick of that minute.

The Company further explained that the reason the last tick is shown for a given minute (rather than the first tick, or the average tick) is for the chart to be able to show the last-minute updating in real time.

It was noted that the price of 87.007 can be seen at the end of the 19:10 minute in the video provided by the Complainant in attachment 36.

#### **7. *Deceptive price information at the starting point time***

The Service Provider submitted that the particular trade in AUD/JPY of the 9 November 2015 highlighted by the Complainant was actually a winning trade for the Complainant on which she received a successful pay-out. It was also submitted that the Complainant's allegation of manipulation was thus puzzling.

The Company further explained that there were no errors as the price of 87.069 reflected the entry tick which was different to the latest spot price at the time the Complainant took the screenshot.

The Company submitted that the complaint by the Complainant is simply a failed attempt to find unfounded and unproven fault in the platform to make good for the losses, which are an inherent risk in these kinds of trades, and which are due to market fluctuations and wrong market predictions.

#### **8. *Time and price deviations***

The Service Provider submitted that the chart at the bottom of the video taken by the Complainant appears to have stopped updating with the Complainant having possibly clicked "*Stop*" in her browser or her internet connection dropped for any other reason.

It was highlighted that the front-end code of the *Binary.com* website is entirely open-source and depends on an open API (application programming interface).

#### **9. *Manipulation with Time and Time Display***

The Service Provider noted that the Complainant appears to be complaining that the x-axis of the tick-by-tick chart is scaled in such a way that ticks are displayed equidistantly. It was further noted that this is a convention chosen for these charts so that each tick becomes clearly viewable allowing clients to clearly see each individual tick of the market.

The Service Provider strongly rejected the Complainant's statement that this chart convention is "*misunderstandable, misleading, simply fraudulent*" and submitted that if the Complainant wants to see charts that are scaled in equidistant time, then she can choose the 1, 2, 3 or 5-minute charts. It was noted that for tick-by-tick charts it is, however, important for various investors to see each individual tick clearly.

The Company submitted that if tick charts were charted on an equidistant time axis rather than individual tick basis, as the Complainant appears to allege, then ticks would end up 'clumped' together which would make examining the tick-by-tick feed harder for clients.

The Company also noted that the Complainant appears to have presented her voluminous claim simply because she disagrees with the interface of the displayed chart and submitted that this is not a legitimate ground to present a complaint and, either way, there is no wrong conduct on the part of the Company.

With respect to the claimed time-gaps, the Company submitted that the *Binary.com* website is synchronised with an atomic clock using the NTP time protocol and, therefore, there was no doubt that server time was accurate. It was noted that the website's open-source code obtains its time from the *Binary.com* API and that any allegation on the time and time display was unfounded.

The Company further submitted that the *Binary.com* website uses the *HighCharts* charting library which is open-source with all codes visible to the public. It was submitted that *HighCharts* is a widely used charting library in the financial industry and it was, therefore, preposterous to claim that its charts are in any way manipulated or misleading to investors.

**10. *Miscellaneous about the company***

The Service Provider submitted that its establishment and application for an MFSA licence was a result of the change in regulation in the EU where binary options on financial indices were reclassified from gambling to investment services.

It was further submitted that *Binary.com* has a long history of 18 years and its website, originally *Betonmarkets.com*, was rebranded to *Binary.com* once it became clear that EU regulators were going to reclassify binary options from gambling to investment services.

**11. *Incorrect information on the price axis (y-axis)***

The Company submitted that the Complainant had apparently zoomed in on the chart in such a way that, due to price granularities, some values on the y-axis are repeated. It was argued that this is a result of the way that the *HighCharts* library handles this display and will be the case on the many hundreds of other financial websites that use the *HighCharts* library.

The Company further noted that there was nothing intentionally misleading about the chart and, if users move their mouse cursors over specific ticks, they would see the precise point values on the chart.

In conclusion, it was submitted that the complaint was unfounded both in law and in fact. It was remarked that the Complainant clearly misunderstands the user interface or complains about specific conventions in the charts both of which are, in fact, standard practice and are identical to those of the hundreds of other financial websites that use the *HighCharts* charting library.

It was further submitted that the Complainant is not an ordinary retail investor but a sophisticated investor with a significant amount of experience in these kinds of trades. It was noted that the Complainant's trading strategy, unfortunately, was not able to generate a positive pay-out, but by no means should that be attributable to any wrongdoing on the Company's part.

### **Having heard the parties and seen all the documents and submissions**

#### **Considers:**

#### ***Preliminary Pleas***

The first preliminary plea submitted by the Service Provider is to the effect that all "*submissions by GJ other than her formal complaint be disregarded and be expunged from the proceedings of this complaint in order to ensure a fair hearing and equality of arms between the parties*".

The Arbiter notes that in accordance with Article 19(3)(d) of Chapter 555 of the Laws of Malta, the Arbiter should "*deal with a complaint in a procedurally fair, informal, economical and expeditious manner*".

Moreover, Chapter 555 of the Laws of Malta, does not establish any formalities as to how a complaint and the reply to the complaint should be submitted before the Arbiter because the law wanted to leave absolute liberty to the parties to submit their case as freely as possible and emphasis is laid on the *substantive merits of the case* rather than on formality.<sup>43</sup>

The Arbiter further notes that both parties have filed very extensive and detailed explanations, graphs, etc., and it would be unfair on either party if the Arbiter were to expunge documents that either party considered relevant to its case.

However, the Arbiter will only consider *relevant* documents and submissions of either party. The Arbiter could have asked both parties even to summarise their submissions, but it took the task upon itself to sift what is relevant and what is not. This was done indiscriminately and in a just manner.

Therefore, this plea is being rejected.

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<sup>43</sup> Cap 555, Art. 19(3)(b)

The second plea is no longer relevant as the case was conducted in the English language.

Regarding the third preliminary plea the case is not frivolous and vexatious. The plea refers to the mediation stage or pre-mediation stage over which the Arbiter has no competence.

However, during the proceedings the complainant made it clear that it was not attributing fraud to the service provider and the Arbiter conducted the process in a fair and just manner and could not see any intimidation from either side.

This plea is in itself frivolous and is being rejected by the Arbiter.

### **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.<sup>44</sup>**

#### ***Background regarding the Company***

The Service Provider is a company incorporated in Malta on 22 April 2015, with company registration number C70156, and is a holder of an investment services licence granted by the Malta Financial Services Authority.<sup>45</sup>

The Company has a sister entity called Binary (Europe) Ltd which was incorporated in Malta in September 2000 with company registration number C26911. Binary (Europe) Ltd, previously named Regent Markets (Malta) Limited,<sup>46</sup> is an entity licensed by the Malta Gaming Authority.<sup>47</sup>

Following the classification of certain types of binary option products as financial instruments in terms of the MiFID Directive, and the submission of an application for an investment service licence,<sup>48</sup> the Malta Financial Services

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<sup>44</sup> Cap. 555, Art. 19(3)(b)

<sup>45</sup> <https://www.mfsa.com.mt/financial-services-register/result/?id=10374>

<sup>46</sup> According to the records held with the Registry of Companies Agency, the effective date of the change in name from Regent Markets (Malta) Limited to Binary (Europe) Limited was on 25<sup>th</sup> November 2014.

<sup>47</sup> A fol. 117 / <https://www.mga.org.mt/mgaliceeeregister/>

<sup>48</sup> A fol. 117

Authority granted the Company a Category 3 Investment Services Licence under the Investment Services Act, 1994 on 19 May 2015.<sup>49</sup>

The investment services licence granted under the Investment Services Act authorises the Company to deal on its own account with retail and professional clients in relation to investment instruments involving the type of instruments transacted into by the Complainant, that is, binary options on currency pairs.

The Company's founder explained that the Company is part of an international group of companies "*regulated by a large number of regulators, namely: the Malta Gaming Authority, the Malta Financial Services Authority, the UK Gambling Commission, the Isle of Man Gambling Supervision Commission, the BVI Financial Services Commission, the Vanuatu Financial Services Commission and the Labuan FSA*".<sup>50</sup>

### **Background regarding binary options**

In its Product Disclosure Statement, the Company explains *inter alia* that:

*"Binary options are easy to understand. They are called 'binary' because there can be only two outcomes, depending on whether an event occurs at the time the binary option expires:*

- *If your prediction is correct, you receive a fixed amount of Payout that is determined and disclosed at the start of the contract.*
- *If your prediction is incorrect, you lose the amount you invested to purchase the contract.*"<sup>51</sup>

The MFSA indicated that binary options are:

*"cash settled derivatives in which the payment of a fixed monetary amount depends on whether one or more specified events in relation to the price, level or value of the underlying occurs at, or prior to, the derivative's expiry*

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<sup>49</sup> A fol. 51 & <https://www.mfsa.com.mt/financial-services-register/result/?id=10374>

<sup>50</sup> A fol. 173

<sup>51</sup> A fol. 52

*(for example the underlying has reached a specified price ('the strike price') at expiry) ...".<sup>52</sup>*

Binary options have garnered the attention of financial regulatory authorities during the past years. In 2018, the European Securities and Markets Authority ("ESMA") implemented a product intervention measure in relation to binary options prohibiting *"the marketing, distribution or sale of binary options to retail investors"*.<sup>53</sup>

In a document dated March 2018, ESMA explained that;

*"Binary options give the investor the option to make a bet on the occurrence of a specified event, generally in relation to the price, level or value, of one or more underlying(s) (for example a share, a currency, a commodity or an index). If the event does not occur, the investor loses their money (that is the option finishes 'out-of-the-money'). If the event occurs, the option pays out or the contract remains open with the opportunity to receive a pay-out if a separate event occurs (the option finishes 'in-the-money'). In this sense, binary options can be regarded as 'yes/no propositions'."*<sup>54</sup>

ESMA had also stated that:

*"unlike options which can serve a valuable role in hedging exposure to certain assets, binary options do not meet any genuine investment needs for retail investors. Being inherently like gambling products, binary options can also attract compulsive gambling behaviour"*.<sup>55</sup>

With respect to pricing, ESMA explained that:

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<sup>52</sup> Pg. 3 of MFSA's Consultation Document titled *"Consultation on the Implementation of National Product Intervention Measures in relation to Binary Options"* dated 13 May 2019, Ref: 08-2019 - <https://www.mfsa.com.mt/publication/consultation-on-the-implementation-of-national-product-intervention-measures-in-relation-to-binary-options/>

<sup>53</sup> FAQ – ESMA's product intervention measures in relation to CFDs and binary options offered to retail investors, dated 27 March 2018 ESMA71-98-125 [https://www.esma.europa.eu/sites/default/files/library/esma71-98-125\\_faq\\_esmas\\_product\\_intervention\\_measures.pdf](https://www.esma.europa.eu/sites/default/files/library/esma71-98-125_faq_esmas_product_intervention_measures.pdf)

<sup>54</sup> Pg. 11 of the ESMA document dated 27 March 2018 titled *"Additional information on the agreed product intervention measures relating to contracts for differences and binary options"*.

<sup>55</sup> Pg. 8 of the ESMA document dated 27 March 2018 titled *"Additional information on the agreed product intervention measures relating to contracts for differences and binary options"*.

*“...binary options are priced according to the probability of an event occurring, quoting payoffs in a similar manner as traditional fixed-odds bets (for example bets on sporting events or election outcomes). Trades are mostly very short term and investors stand either to make a substantial return or to lose their entire investment. These fundamental features are also found in gambling products, which are linked with addictive behaviour and poor outcomes for consumers.*

*In addition to being highly risk and speculative investments, binary options structurally have negative expected returns. This feature implies that the more positions an investor takes, the more likely they are to lose money on a cumulative basis”.*<sup>56</sup>

The MFSA regards binary options as complex products. In one of its documents on binary options, the MFSA further explained that:

*“Binary options are considered as complex products, with a price structure that makes it difficult for the retail client to accurately evaluate the value of the option in the light of the probability of the reference event happening. Although retail clients can use research engines, available to the public in general, or tools that can help them to determine the price of a binary option, they face significant asymmetries when compared with the information that the binary option distributor has”;*<sup>57</sup>

*“...binary option providers are typically the counterparty to their retail clients’ trades, with the provider determining the price at execution and the payment at expiry. In this regard, providers often require clients to acknowledge that the prices used to determine the value of the binary option may differ from the price available in the respective underlying market. This means that it may not always be possible for retail clients to check the accuracy of the prices received from the provider. These factors make it extremely complex for retail clients to value binary options objectively. The high level of complexity and poor degree of*

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<sup>56</sup> Pgs. 9-10 of the ESMA document dated 27 March 2018 titled “Additional information on the agreed product intervention measures relating to contracts for differences and binary options”  
[https://www.esma.europa.eu/sites/default/files/library/esma35-43-1000\\_additional\\_information\\_on\\_the\\_agreed\\_product\\_intervention\\_measures\\_relating\\_to\\_contracts\\_for\\_differences\\_and\\_binary\\_options.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-43-1000_additional_information_on_the_agreed_product_intervention_measures_relating_to_contracts_for_differences_and_binary_options.pdf)

<sup>57</sup> Pg. 4 of the MFSA’s Consultation Document titled “Consultation on the Implementation of National Product Intervention Measures in relation to Binary Options” dated 13 May 2019, Ref: 08-2019.

*transparency associated with binary options therefore confirms that a significant investor protection concern exists”.*<sup>58</sup>

Prior to ESMA’s product intervention measure on binary options, the MFSA had already put in July 2015, certain measures into place “*with the aim of ensuring enhanced consumer protection*”,<sup>59</sup> “*due to the particular nature of binary options and particularly the fact that they may be offered to retail investors*”<sup>60</sup> (as was allowed at the time).

The measures taken by MFSA back then included the requirement for companies involved in this line of business to take “*adequate measures to ensure enhanced consumer protection and awareness of the risks involved in cases where binary option trading is offered to retail investors*”.<sup>61</sup>

The MFSA, at the time, also required binary options trading companies to comply with the ESMA guidelines on the sale of complex products; and the adoption of specific measures such as the display of certain warnings during trading sessions; the display of counters showing the balance within the client’s account and automatic reality checks during the client’s trading sessions; and the possibility for clients to apply limits on their account such as limits on the amount that may be invested within a specified time period, limits on losses that may be incurred by the client during a specified time period and limits on the amount of time a client may trade in any session together with possible exclusion of trades in specific types of binary options.<sup>62</sup>

### ***Background regarding the trading accounts held by the Complainant***

The trading activity by the complainant occurred from June 2014 till 16 November 2017. The Complainant had first opened a trading account with Binary (Europe) Ltd. in June 2014.<sup>63</sup> Part of the trading activity up until 20 May

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<sup>58</sup> Pg. 5 of the MFSA’s Consultation Document titled “*Consultation on the Implementation of National Product Intervention Measures in relation to Binary Options*” dated 13 May 2019, Ref: 08-2019.

<sup>59</sup> Pg. 7 of the MFSA’s “*Notice to applicants for a Category 3 Investment Services Licence that would like to carry out binary options trading in terms of the Investment Services Act, Cap. 370*” dated 14 July 2015 - <https://www.mfsa.com.mt/wp-content/uploads/2019/05/14.07.15-Notice-binary-options-policy.pdf>

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Pgs. 7-9 of the MFSA’s “*Notice to applicants for a Category 3 Investment Services Licence that would like to carry out binary options trading in terms of the Investment Services Act, Cap. 370*” dated 14 July 2015.

<sup>63</sup> *A fol. 7 & 117*

2015, occurred with Binary (Europe) Ltd under the remit of the licence granted by the Malta Gaming Authority.<sup>64</sup> The original “*gaming account*” that the Complainant had with Binary (Europe) Ltd was eventually deleted and a new account, the “*Investment Account*” was created in 2015 with the Company.<sup>65</sup>

The majority of the Complainant’s binary options trades, 23,582 out of 27,621<sup>66</sup> were done under the Company’s Investment Services licence over a span of nearly 2 ½ years during June 2015 till November 2017.

The Service Provider indicated that the trades undertaken by the Complainant “*consisted mainly of short-term binary options on Forex pairs such as EUR/GBP, AUD/JPY, USD/CAD and other Forex pairs*”.<sup>67</sup>

The trading was done on the Company’s online trading platform at [www.binary.com](http://www.binary.com).<sup>68</sup>

### ***Profile of the Complainant***

The Complainant explained that she is a 58-year-old resident in Germany who is employed as an engineer.

### ***Analysis of the trades/trading account of the Complainant***

One of the lists of trades attached to the complaint form shows a breakdown of the transactions undertaken by the Complainant with the Company (on account number MF1479), during the period from 8 June 2015 till 29 July 2016.<sup>69</sup>

The list of trades during this one-year period indicates that the Complainant purchased multiple binary options contracts with small amounts, typically, of around Eur10, Eur15, Eur25, Eur50 or Eur100 with the amount occasionally

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<sup>64</sup> “During the period between 11 June 2014 and 20 May 2015, [the Complainant] made a total of 4,039 trades on her account with [the Company] (MLT73239), regulated under MGA supervision. During the period between 8 June 2015 and 16 November 2017, [the Complainant] made a total of 23,582 trades on her account with [the Complainant] (MF1479), regulated under MFSA supervision” - A fol. 117

<sup>65</sup> A fol. 7

<sup>66</sup> The figure of 27,621 includes both buy and sell transactions. The total number of trades taking both the buy and the sell side amount in total to 55,242.

<sup>67</sup> A fol. 118

<sup>68</sup> A fol. 3 & 6

<sup>69</sup> Attachment 02/CD

rising to Eur150, Eur200, Eur300 or more. Certain purchases were made with an amount as small as Eur5 and as high as Eur1,300.

Whenever the Complainant's account reached zero or close to zero, a deposit of typically between Eur50 to Eur100 was made each time. Deposits of a higher amount were at times made with the highest deposit being of Eur2,000 and the lowest of Eur5. On certain few occasions the Complainant withdraw part of the money held in her account, with her lowest withdrawal being of Eur30 and highest withdrawal being of Eur3,500 during the said period.

The Complainant withdrew money from her account on less than 10 occasions whilst she deposited money on more than 300 occasions during the said one-year period. The binary options contracts were made in relation to various currency pairs such as EUR/JPY, USD/JPY, AUD/JPY, AUD/USD, GBP/USD, EUR/CAD, USD/CAD, EUR/GBP, EUR/USD and others, with the nature of such trades being

*“ATM (at the money) binary options, being options where the strike price is equal to the underlying spot price at the time the trade is entered”*.<sup>70</sup>

The positions taken by the Complainant in the binary options contract were typically of short duration. The attachments provided by the Complainant to its Complaint Form indicate that the various positions were typically for a few minutes as low as one minute and less than an hour, with some others being for a few hours, typically, ranging between 1 to 10 hours.<sup>71</sup>

During the hearing of 19 June 2018, reference was made to trades with a two-minute timeframe.<sup>72</sup>

The Complainant in all purchased 23,583 binary options contracts from the Company during a nearly two-and-a-half-year period from 8 June 2015 to 16 November 2017.

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<sup>70</sup> Where it was stated that *“It is being said that I was playing with a time frame of two-minute trades, and I am being asked if I was aware that there was an element of risk in this case, I reply yes.”* - A fol. 85

<sup>71</sup> Attachment 05/CD & Attachment 06/CD

<sup>72</sup> A fol. 149

The trades over such period equate to an average of approximately 813 purchases of binary options contracts every month<sup>73</sup> or approximately 186 purchases of binary options contracts every week<sup>74</sup> or approximately 26 purchases of binary options contract every day.<sup>75</sup>

As indicated by the Complainant, for the year 2016 she has won 3,597 transactions and lost 3,665 transactions during the same year.<sup>76</sup> The number of transactions won in 2017 was 3,771 whilst the number of lost transactions was 3,850 during the same year.<sup>77</sup>

With respect to the pay-out rate, as disclosed in the Company's Product Disclosure Statement,

*"Pay-out Rates for all Binary Products are pre-determined and disclosed upfront to you on the Binary.com Platform. These rates represent the percentage of return that binary option contracts generate for correct predictions of market conditions. In such cases, you will receive your invested amount back, plus the profit determined based on the Pay-out Rate (which is expressed as a percentage over the investment amount)".<sup>78</sup>*

From the list of transactions presented by the Complainant covering the period 8 June 2015 to 29 July 2016,<sup>79</sup> it is observed that the contracts purchased by the Complainant<sup>80</sup> had a pay-out rate, that is, a potential return of typically around 90% of the original value of the contract.<sup>81</sup>

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<sup>73</sup> 23,582 trades in 29 months during the period 8 June 2015 to 16 November 2017

<sup>74</sup> 23,582 trades in 127 weeks during the period 8 June 2015 to 16 November 2017 - [https://www.calendar-12.com/days\\_between\\_dates](https://www.calendar-12.com/days_between_dates)

<sup>75</sup> 23,582 trades in 893 days during the period 8 June 2015 to 16 November 2017 - [https://www.calendar-12.com/days\\_between\\_dates](https://www.calendar-12.com/days_between_dates)

<sup>76</sup> Sheet titled "2016" in Attachment 05/CD

<sup>77</sup> Sheet titled "2017" in Attachment 06/CD

<sup>78</sup> A fol. 53

<sup>79</sup> Attachment 02/CD

<sup>80</sup> Which during the period in question amounted to 12,007 contracts.

<sup>81</sup> Data calculated by the OAFS on the figures provided in Attachment 02/CD

## **Other Aspects**

### ***Trades previously done with gaming company***

As indicated above, prior to the “*investment account*” held with the Company, the Complainant held a “*gaming account*”<sup>82</sup> (account number MLT73239)<sup>83</sup> with a sister company, Binary (Europe) Ltd, during the period 11 June 2014 to 20 May 2015. During the 11-month period that the Complainant held this account, the Complainant made 4,039 purchases of binary options contracts on currency pairs. During such period, the Complainant made over 100 deposits ranging from Eur10 to Eur1,000 each time, with 10 withdrawals ranging from Eur50 to Eur1,000. Certain purchases of binary options in the “*gaming account*” were made with an amount as small as Eur0.50 and as high as Eur900.

### ***Claim of market manipulation***

During the proceedings, the Complainant also indicated *inter alia* that “*I see a violation of EU Regulation 596/2014, explicitly on the subject of market manipulation*”.<sup>84</sup>

In reply, the Service Provider remarked that “*This regulation relates to preventing market abuse in the form of insider dealing and is hence irrelevant to the matters at hand*”.<sup>85</sup>

### ***Proofs presented by the Parties***

The Complainant filed an extensive complaint and gave witness before the Arbitrator,<sup>86</sup> apart from filing numerous documents.

The Service Provider presented affidavits from six of its officials, namely, Tony Cini as a member of the Company’s Quants Team;<sup>87</sup> Thomas Edward Alexander Molesworth as Chief Technology Officer at Binary Group Services Sdn BHD which entity has an outsourcing agreement with the Company;<sup>88</sup> Rakshit Kumar

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<sup>82</sup> A fol. 7

<sup>83</sup> A fol. 117

<sup>84</sup> A fol. 431

<sup>85</sup> A fol. 468

<sup>86</sup> A fol. 148-152

<sup>87</sup> A fol. 155

<sup>88</sup> A fol. 159

Choudhary as Head of Quantitative Analysis & Research at Binary Group Ltd;<sup>89</sup> Jean-Yves Christian Sireau as founder and CEO of Binary Group Ltd and director of the Company;<sup>90</sup> Angelos Armenatzoglou as a member of the Company's Quants Team;<sup>91</sup> and Joanna Frendo as Head of Regulatory Compliance and Director of the Company.<sup>92</sup>

The affidavits were followed by various questions asked by the Complainant to the respective persons<sup>93</sup> and subsequent additional answers provided by the officials involved.<sup>94</sup>

### **Final Observations and Conclusions**

In essence, the complaint revolves around the claim that (i) the Complainant was misled regarding the “*game nature*” of binary options (ii) was not made aware of the unlikelihood of achieving a profit on such trades and (iii) lost money on the trades she undertook in binary options on the Company's online trading platform which she asserted had certain mistakes and issues.

The issues that the Complainant claimed with respect to the Company's trading platform involved claims of manipulation of information, display of wrong and inaccurate information on price, price trends, time displays and pay-out.

The Service Provider refuted the claims of the Complainant that there were any manipulations, mistakes or any issues with its trading platform. The Service Provider submitted that the Complainant misunderstood the information and standard displays in the charts featuring on its platform and also claimed that there could have been issues with the display or internet latency on the Complainant's computer which were unrelated to the Company's systems.

The Service Provider claimed that the Company had provided adequate disclosures and that the losses incurred by the Complainant on her trades in

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<sup>89</sup> A fol. 163

<sup>90</sup> A fol. 170

<sup>91</sup> A fol. 175

<sup>92</sup> A fol. 181

<sup>93</sup> A fol. 423 - 439

<sup>94</sup> A fol. 441 - 483

binary options arose solely due to the unsuccessful trading strategy applied by the Complainant.

The following are the most pertinent factors in relation to the case in question:

- a) The Complainant has herself consciously carried out thousands of trades in binary options over a period of a few years. She has at times experienced wins and withdrawn on her profits but has mostly experienced losses on a frequent and cumulative basis on her account.

Despite the recurrent losses, the Complainant continued to engage in the trading of binary options placing trades which carried considerably high potential returns which were in themselves indicative of the highly speculative nature of the trades and excessive risks being taken. The volume of trades and frequency of deposits made, as indicated in this decision in the section above titled "*Analysis of the trades/trading account of the Complainant*", is also **indicative of the highly addictive nature of binary options trading and the ease with which one can incur losses over a short period of time.**

- b) Prior to the trading account opened with the Company, the Complainant initially had a "*gaming*" account with a group entity where she undertook similar trades in the same type of instrument to that traded with the Company. The Complainant has operated the gaming account for nearly a year having done a total of 4,039 trades on the gaming account, prior to the commencement of the trading with the Company.<sup>95</sup>

**Hence, it is considered that there is no basis on which the Complainant can be deemed as not being aware or having been misled about the "*gaming nature*" of binary options.**

- c) With respect to the alleged mistakes and issues with the Company's trading platform, no sufficient convincing evidence has emerged substantiating that the issues raised by the Complainant with respect to the Company's systems are the actual causes of the losses incurred by the Complainant on her binary options trades undertaken with the Company.

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<sup>95</sup> A fol. 117

It has not been adequately demonstrated how the claimed mistakes and issues with the Company's trading platform have, in practice, affected the Complainant's trading decisions and adversely any one of the 23,583 trades undertaken with the Company.

It is accordingly deemed that there is no sufficient and solid basis on which to arrive to a conclusion that the claimed mistakes and issues have actually led to the lost trades and resulting losses. From the information presented no different elements have emerged on binary options to those warned about by ESMA and MFSA as detailed above in this decision.

- d) The Arbiter is, however, cognisant of the nature of the binary options and the onus lying on the Company, as a provider of binary options trading, with respect to the requirement to ensure enhanced protection to consumers.

As highlighted by the MFSA in its notice to binary options trading companies issued in 2015 which is also applicable to the Company:

*"Due to the particular nature of binary options and particularly the fact that they may be offered to retail investors, the MFSA considers it **crucial** that certain measures are taken with the aim of ensuring enhanced consumer protection. **The Board of Directors of the respective licensed entity would need to ensure that the entity takes adequate measures to ensure enhanced consumer protection and awareness of the risks involved in cases where binary option trading is offered to retail investors.**"*

*Binary options trading companies are required to abide by the ESMA guidelines on the sale of complex products".<sup>96</sup>*

- e) The Complainant, as a retail client of the Company, was eligible and merited due enhanced protection. Whilst from the information provided, there is no reason to believe that the Company has not applied certain specific consumer protection measures indicated in the MFSA's notice relating to, for example, the display of warnings and trading limits, *however such measures were just part of and not the sole or only measures that a*

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<sup>96</sup> Pgs. 7/8 of the MFSA's "Notice to applicants for a Category 3 Investment Services Licence that would like to carry out binary options trading in terms of the Investment Services Act, Cap. 370" dated 14 July 2015 – Emphasis added by the Arbiter

*company involved in binary options had to take for the protection of consumers. As indicated in the same notice the MFSA had placed, as part of its licensing criteria on these types of companies, an overall obligation and responsibility on the Board of such entities to ensure the implementation of necessary measures to ensure enhanced consumer protection with the Authority prescribing itself certain measures.*

The adequacy or not of the various measures adopted in practice by a company in this regard must be considered in the context of the addictive and speculative nature of binary options and also seen in the particular circumstances of the case in question.

- f) Over the period June 2015 to November 2017, the Complainant made thousands of transactions and lost money on a frequent basis.

In her complaint to the Service Provider, the Complainant indeed stated that: *“I am very outraged about the fact that you had watched me lose my capital on a regular basis and you didn’t have done something against it”*.<sup>97</sup>

**It is clear from the case in question that the Complainant needed protection even from her own actions.**

The Service Provider had intervened in the past with the Complainant to enforce a consumer protection measure, when it did not allow her to immediately remove the self-imposed trading limits, this being one of the consumer protection measures requested by the MFSA.

As stated by the Service Provider:

*“We also provide clients with self-exclusion facilities and limits, of which [the Complainant] had also made use on 28 December 2016 as detailed below. [The Complainant] had contacted us in February 2017 to remove such limits; however, we fully complied with the consumer protection measures and notified [the Complainant] that such limits could only be*

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<sup>97</sup> A fol. 83

*altered within 7 days. We also directed [the Complainant] to the Responsible Trading page of our website”.*<sup>98</sup>

Certain weakness or deficiency in the measures taken by the Company as part of its obligations towards ensuring enhanced consumer protection is, however, apparent in the case in question.

It has not been demonstrated, for example, that adequate measures were taken by the Company to ensure that the Complainant was not trading with borrowed money. In reply to the Company’s request for information required to update the client’s details, where the Company requested *inter alia* a recent copy of the Bank Statement or Payslip, the Complainant stated that:

*“On 12.02.17 [the Company] received the requested documents from me. Among them were three pay slips and three account statements from the last months Nov. 2016, Dec.2016 and Jan. 2017 ... It can be seen from the account statement that I took out two loans from the bank within a short period of time”.*<sup>99</sup>

No specific comments were made by the Service Provider on this point or how it reasonably ensured that one does not trade with borrowed funds.

On the basis of fairness, equity and reasonableness it is considered that, as part of the enhanced consumer protection measures, the Company should have not just limited itself to issuing warnings on its website not to trade with borrowed money, but also take concrete action in this regard and adopt reasonable measures also with respect to the source of funds and level of money that one affords to lose.

It is reasonable to expect certain checks in this regard both at the initial stages of the opening of an account and on ongoing basis taking also into consideration one’s trading patterns and extent of activity and losses on one’s account.

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<sup>98</sup> A fol. 480

<sup>99</sup> A fol. 424 -425

This is even more so when considering the nature of such products which, as ESMA stated, are *“inherently like gambling products, binary options can also attract compulsive gambling behaviour”*.<sup>100</sup>

**Given the particularities of such products and the obligation placed on the Company to ensure enhanced consumer protection, it is only reasonable to expect adequate checks on aspects involving also the source of money used for trading such instruments with appropriate interventions being made by the binary options trading company as part of its ongoing role in effectively adopting and maintaining adequate enhanced consumer protection measures.**

Chapter 555 of the Laws of Malta has tasked the Arbiter to consider the complaint by reference to what is **fair, equitable and reasonable**. The tools of fairness, equity and reasonableness were handed to the Arbiter by the legislator in order to give better effect to justice being done.

In this case, the Arbiter is factually, legally and morally convinced that whereas many allegations made by the Complainant do not result, on the other hand, the Service Provider did not satisfy all the measures as expected from it as a binary options trading company for enhanced consumer protection.

Since binary options trading was also regulated by *MiFID and Investment Services Rules Standard Licence Conditions*, the Service Provider had to *“act honestly, fairly and professionally in accordance with the best interests of its clients”*.<sup>101</sup>

Given the nature of binary options trading and the addictive nature of such products, the Service Provider was obliged to give more enhanced customer protection to the complainant, which it did not entirely do, as explained above.

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<sup>100</sup> Pg. 8 of the ESMA document dated 27 March 2018 titled *“Additional information on the agreed product intervention measures relating to contracts for differences and binary options”*

<sup>101</sup> ISR-SLC 2.01

## **Decision**

**For the above-stated reasons, the Arbiter is rejecting the claims of the Complainant for a refund on the losses incurred on her trading account due to her claims of being misled or the claimed mistakes and issues relating to the Company's systems.**

**For the reasons also mentioned above relating to enhanced consumer protection, which indirectly also contributed to the loss suffered by the Complainant, the Arbiter concludes that it would be fair, equitable and reasonable in the particular circumstances and substantive merits of the case to award the Complainant a compensation of Eur9,500.**

**This amount is established by the Arbiter in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta which gives a latitude of discretion to the Arbiter to fix compensation. Such compensation has been established *arbitrio et boni viri*.**

**Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Binary Investments (Europe) Limited to pay the amount of nine thousand, five hundred euros as compensation to the Complainant for the reasons amply stated in this decision.**

**With legal interest to be paid by the Service Provider from the date of this decision until the date of payment.**

**Due to the novelty and particularities of this case, each party is to bear its own costs of the proceedings.**

**Dr Reno Borg  
Arbiter for Financial Services**