

## Before the Arbiter for Financial Services

Case ASF 043/2021

UH

(the 'complainant')

vs

Phoenix Payments Limited (C 77764)

('Phoenix' or the 'service provider')

Sitting of 24 May 2022

The Arbiter,

Having considered in its entirety, the Complaint including the attachments filed by the complainant,<sup>1</sup>

Where, in summary, the complainant claimed to have been a victim of a sophisticated investment scam by a company called Trader UR, which company instructed her to transfer money to Phoenix

She explained that on 8 August 2019, she opened an account for online trading with *TraderUR.com* and deposited the sum of £250 from her Nationwide account. She admitted having never traded before but, at that time, she needed extra income to save for a property she was buying. Her intention was just to learn how to trade.

On the same day, she was contacted by a *TraderUR's* representative introducing himself as her account manager who would be helping her to '*make the best out of my trading*'.<sup>2</sup>

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<sup>1</sup> Page (P.) 2-55

<sup>2</sup> P. 2

The complainant further stated that following an assurance that he would assist her with anything that is required, he advised that:

*'... it would be better to make a deposit a minimum of £1000 and he will put it on a 'term trade' (which is risk free and whatever happens I don't lose the deposit).'*<sup>3</sup>

On that advice, the following week she would make some profit; the complainant deposited EUR1,000 from her *Barclays* account, which deposit the representative helped her in doing by remotely connecting to her computer.

The following week, *'... he said I have accumulated £241 and he will get the withdrawal done for me so I received £241 in my Nationwide account. I believe that this was done to gain my trust.'*<sup>4</sup>

The complainant was then advised to deposit a further £15,000 and the following week she would get £25,000 - £45,000 profits. The representative assured her yet again that whatever happens, she would not lose the amounts deposited and resultantly,

*'I believed him, so I deposited £5000 and told him I can't do £15000. He advised me I can deposit in Dollar instead, so I deposited additional £6404.86 to my account; by this time, I had £12,281.53 in my TraderUR account.'*<sup>5</sup>

Around the end of August, she was informed of a bonus amounting to £5,196.00 which she was about to receive and, on depositing the same amount to the account, she had a balance £17,477.53.

The complainant explained how the representative requested to remotely connect with her to be able to trade on currencies and commodities and, despite not wanting to do anything, she trusted him, considering that he was the account manager.

She then briefly<sup>6</sup> explained some trades that were made both by the representative and others by herself, the respective profits made, and the communications exchanged between them in relation to the same profits.

However, she claimed that:

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> P. 2-3

<sup>6</sup> P. 3

*'The next thing all the profits was going red and I was getting "Margin call" alerts. I didn't know what to do or don't even know what it was. I emailed him, no response. When I call, the helpdesk kept telling me that they will let him know and he'll call me soon (the response time is 48 hours).'*<sup>7</sup>

By that time, the *'money in my account was all gone only about £500 left.'*<sup>8</sup>

The complainant stated that when she managed to communicate with the representative, he explained that, following discussions with his manager, he could get her money back from their *'Emergency funding'*, but, a letter from her explaining the occurrence was required. Upon doing what was required, she was then contacted by the representative's manager, whereby she was informed that;

*'... the committee needs to see activity in my account for them to see the account as active and refund the money. He said they have requested the account should have 18.5% of what was lost (£8535.00). Once I have done that, Troy [the account manager] will send them the activity on my account and it shouldn't take more than 10 days to get my money back. I made a deposit of £8535.00.'*<sup>9</sup>

Following various attempts to communicate with the representative, she was advised that

*'... to complete the application for the refund he needs to connect to my machine again just to do a very small order to show the committee the activity on my account. He placed about 3 orders. And almost straight away (about 30 minutes to 1 hour they were all on red).'*<sup>10</sup>

Further attempts to contact the representative remained futile.

The complainant stated that *TraderUR* does not exist anymore, and considering that all the transfers, apart from the initial £250, were done to Phoenix, they tried contacting them by virtue of a letter<sup>11</sup> (which was also filed with this complaint), but Phoenix remained silent on the issues raised.

She admitted that:

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> p. 7

*'What I did not know is that TraderUR was a scam and completely unregulated. Therefore, I did not actually receive any investment services whatsoever as they never put my funds in a brokerage account for me as I was expecting. All that I received was an online simulation.'*<sup>12</sup>

In addition to the above, the complainant insisted that she was instructed to transfer money to the service provider, and

*'... if they had done due diligence with their client, obtained KYC documents and followed anti-money laundering laws, they would have realized Polotis OU was a scam.'*<sup>13</sup>

In view of the above, the complainant is requesting Phoenix to

*'... either retrieve my monies from their client Polotis OU or in the alternative, to reimburse me for my painful loss of 19941 GBP.'*<sup>14</sup>

**Having considered Phoenix's reply**<sup>15</sup> whereby the service provider dismissed all the allegations raised by the complainant.

Primarily, Phoenix submitted that TraderUR, the company mentioned in the complainant's declarations, is *'unbeknownst to the Company and the Company confirms that it has no connection to TraderUR and has never corresponded with any of the individuals mentioned within the Complaint.'*<sup>16</sup>

The service provider further submitted that considering this, despite its obligation to carry out due diligence on its customers in terms of Chapter 373 of the Laws of Malta, the Prevention of Money Laundering Act and Subsidiary Legislation 373.01, it is not obliged to carry out any due diligence on the said company.

Phoenix, however, declared that its customer is Polotis OU, and confirmed that, in fact, all the relevant due diligence on Polotis OU and its Ultimate Beneficial Owners was carried out and thus has satisfied its obligations at law.

The service provider emphasised that it has no obligations to reimburse the complainant for acts or omissions carried out by third parties with whom it has

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<sup>12</sup> P. 4

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> P. 60

<sup>16</sup> *Ibid.*

no connection whatsoever, and denies all allegations presented by the complainant. This, particularly, in view of the latter's negligence in trusting her funds to third parties without making the relevant checks and depositing funds with such parties at the request of an individual who she was never acquainted with. Phoenix insisted that the complainant was grossly negligent when considering that she gave access to her hardware to a third party whom she barely knew.

In this respect, the service provider submitted that it accepts no responsibility of the Complainant's negligence and/or acts or omissions carried out by third parties.

**Having heard the parties and seen all the documents and submissions made,  
Considers:**

The Arbiter notes that the complaint mainly refers to the lack of due diligence which the service provider should have carried out. If such due diligence had been carried out, it would have resulted in understanding that Polotis OU was a scam.

From the facts of the case, and especially from the explanation given by the complainant in its complaint form, the Arbiter notes that the complainant has continuously communicated with TraderUR and has accordingly acted on its representative's instructions.

In fact, she clearly declared that:

*'I was the victim of a sophisticated scam by a "company" calling themselves TraderUR.'*<sup>17</sup>

In its reply to the complaint, the service provider then declared that

*'... reference is being made to TradeUR which is an entity unbeknownst to the Company and the Company confirms that it has no connection to TradeUR and has never corresponded with any of the individuals mentioned within the Complaint.'*<sup>18</sup>

It was further declared that Phoenix

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<sup>17</sup> P. 4

<sup>18</sup> P. 60

*'... has no obligations to reimburse the Complainant for acts or omissions carried out by third parties which have no connection whatsoever with the Company [Phoenix] ...'*<sup>19</sup>

Therefore, in view of such declarations, the Arbiter has to examine his competence.

### *Competence of the Arbiter*

The question of whether the Arbiter enjoys jurisdiction in a particular case is dictated by the provisions of Chapter 555 of the Laws of Malta ('the Act') whereby the Arbiter is obliged to investigate his jurisdiction.

Article 22(2) of the same Act stipulates that:

*'Upon receipt of a complaint, the Arbiter shall determine whether the complaint falls within his competence'.*

Moreover, Article 19(1) of the Act stipulates that the Arbiter can only deal with complaints if filed by *eligible customers*:

*'It shall be the primary function of the Arbiter to deal with complaints filed by **eligible customers** through the means of mediation in accordance with Article 24, and where necessary, by investigation and adjudication.'*

The Act stipulates further that:

*'Without prejudice to the functions of the Arbiter under this Act, it shall be the function of the Office:*

*(a) To deal with complaints filed by **eligible customers**.'*<sup>20</sup>

### **Eligible customer**

Article 2 of the Act defines an '*eligible customer*' as follows:

*'a customer who is a consumer of a financial services provider, or to whom the financial services provider has offered to provide a financial service, or who has sought the provision of a financial service from a financial services provider.'*

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<sup>19</sup> *Ibid.*

<sup>20</sup> Article 11(1)(a)

The service provider insists that their customer is Polotis OU and not TraderUR, with whom the complainant has communicated on a continuous basis.

The complainant stated that:

*'It is being said that TraderUR.com told me that they could invest on my behalf and give me a high return, I say, yes. They told me I could invest on their platform and that it would be a great opportunity because I could make a lot of money by doing that.'*<sup>21</sup>

From the facts as emerged during this case, it is amply clear that the investment/deposit advice and the eventual promises made, were given by TraderUR.

The service provider emphasised that its customer is Polotis OU and not TraderUR. The only relationship the complainant had was with TraderUR and not with Phoenix.

### **Determination of eligibility**

Considering the above, and having reviewed the circumstances of the case, it results that it was not the service provider that offered her the service as she interacted only with TraderUR. Although Phoenix processed the relevant transactions, it was not the company of which the complainant *'... was a victim of a sophisticated investment scam ...'*<sup>22</sup>

The service provider's declarations in relation to its services offered in this case were clear; were not contested by the complainant, and no evidence to the contrary was submitted.

The service provider had no contractual relationship with the complainant and did not provide her or offered her a service.

A complaint with the Arbiter can only be filed against the service provider if the complainant is an **eligible client** according to law.

Having considered all the facts, it results that the complainant was not *'a customer who is a consumer'* of Phoenix, neither that Phoenix *'has offered to provide a financial service'* to the complainant, nor that the complainant *'has*

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<sup>21</sup> p. 299

<sup>22</sup> p. 4

*sought the provision of a financial service from Phoenix for the purposes of the Act'.*

Accordingly, the complainant cannot be deemed an '*eligible customer*' in terms of Article 2 of the Act.

Therefore, the Arbiter does not have the competence to deal with this complaint.

Considering that the case was decided on a procedural issue, each party is to bear its own costs of these proceedings.

**Dr Reno Borg**  
**Arbiter for Financial Services**