

Before the Arbiter for Financial Services

Case ASF 064/2021

NK

(the 'Complainant')

vs

Phoenix Payments Limited (C 77764)

('Phoenix' or the 'Service Provider')

Sitting of 24 May 2022

The Arbiter,

Having considered the Complaint in its entirety, including the attachments filed by the Complainant,¹

where, in summary, the Complainant claimed to have been a victim of an alleged fraud committed by a person behind the web portal www.xytronfx.com, a platform portrayed as a '*trading financial regulated tool*'.

The Complainant submitted that he was misled by the merchant because they gave him the impression that (1) they were entitled to trade in '*regulated financial tools*'; (2) they kept his money in segregated financial accounts; (3) that he was participating in real time trading; (4) and that the address being given was purported to be that of a *bona fide* broker.

He also stated that the circumstances of his case fall within the remit of a regular KYC/AML check that '*diligent banks*' should do according to applicable law.

¹ Page (P.) 3 - 20

He further stated that he was instructed to transfer funds to AM Estonia Services, a company holding an account with Phoenix. The sum of EUR 1,750 was transferred on 29 November 2019. The complainant insisted that in such cases, *'... the beneficiary bank should not have allowed the transaction to happen, if it is possibly related to fraud and/or money laundering. All banks are in a position to check merchants and beneficiaries claiming to provide financial regulated tools for a valid license and to refuse transactions by lack thereof.'*²

He argued that before processing payments related to internet-provided services, beneficiary banks should properly identify the merchants in line with any anti-money laundering legislation in the relevant jurisdiction.

The Complainant submitted that AM Estonia Services accepted his payment for supposedly investing it for his own benefit. However, AM Estonia Services does not have a financial broker licence. In this respect, Phoenix should have closed its account, which however, did not. He stated that:

*'I believe that the beneficiary bank Phoenix Payments Ltd is associated with this fraud and money laundering.'*³

The Complainant claimed that, despite trying to resolve the issue with the Service Provider directly by requesting a reversal of the transaction, the Service Provider did not oblige.

The Complainant further stated that the Service Provider should not accept money from unregulated entities, must do a proper KYC/AML exercise and report the entity in case of irregularities to the appropriate authorities. Failing to do this exercise would render the Service Provider responsible for non-observance of anti-money laundering rules and regulations and could possibly become an accomplice to *'these unlawful acts'*

In view of the above, the Complainant requested that the Arbiter should:

'(1) Check the observance of the KYC and AML obligations of Phoenix Payments Ltd in the case of the disputed transaction "in light of the restriction to process payments possibly related to fraud"; and (2) "To instruct Phoenix Payments Ltd to reverse the disputed transaction with regard to the payment specified in the letter provided to the bank on my behalf."

² P. 3

³ P. 4

Having considered Phoenix's reply⁴ whereby the Service Provider dismisses the allegations raised by the Complainant.

Phoenix explained how, in terms of Chapter 373 of the Laws of Malta, the Prevention of Money Laundering Act and Subsidiary Legislation 373.01 entitled Prevention of Money Laundering and Funding of Terrorism Regulations, it is obliged to carry out due diligence on its customers. It stated that, in fact, it has carried out a full customer due diligence on AM Estonia Services OU, this being their customer, and confirm that all the relevant due diligence on the same company and the Ultimate Beneficial Owners was carried out and, thus, has satisfied its obligations at law.

The Service Provider also notes that all accounts pertaining to AM Estonia Services OU have been closed and it has no relationship whatsoever with such customer anymore.

Phoenix emphasised that it has no obligations to reimburse the Complainant for acts or omissions carried out by third parties. It denies all allegations put forward by the Complainant, whilst insisting that it accepts no responsibility of the Complainant's negligence and/or acts or omissions carried out by third parties.

The Service Provider declared that the Complainant '*... is solicited to seek redress against AM Estonia Services OU accordingly.*'⁵

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

Considers:

The Arbiter notes that the Complaint mainly revolves around the checks and verifications related to the KYC and AML procedures that the service provider failed to carry out when dealing with the transaction being disputed, which failure led to the possible fraud and money laundering.

The Arbiter would like to draw the attention of the Complainant that questions relating to money-laundering and the financing of terrorism should be addressed to the competent authorities in Malta that specifically deal with

⁴ P. 25

⁵ *Ibid.*

these matters. The Arbiter does not have the competence or expertise to deal with these issues.

On its part, the Service Provider states in its reply that it had carried out all the due diligence necessary on their customer *AM Estonia Services OU*.⁶ During the proceedings the Service Provider also stated that *XytronFX* which carried out the scam, was not known to it, and it was not its client. Moreover, Phoenix had no contractual obligations towards the Complainant because he has never been their client.

The Arbiter's Competence

Article 22(2) of Chapter 555 of the Laws of Malta (the Act) stipulates that:

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

Moreover, in virtue of Article 19(1) of the Act, the Arbiter can only deal with complaints 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 customer**.'*⁷

Thus, the Arbiter has to primarily decide whether the Complainant is in fact an **eligible customer** in terms of the Act.

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.'

⁶ *Ibid.*

⁷ Article 11(1)(a)

In the complaint form, the Complainant declared that:

*'I was apparently a victim of an Internet-fraud committed by a person hidden behind the website www.xytronfx.com a web-platform for trading financial regulated tools or similar.'*⁸

In his solemn declaration, he stated that:

*'I was contacted to make financial investments; these financial investments could be on stocks, commodities, on bitcoins, by XytronFX. They have showed me an investment plan with a good reward. They gave me a platform on the internet – very similar to a bank account – where you have your login, your password. You could see what they were doing with your money.'*⁹

The Complainant admits that the product/service was offered to him by XytronFX, including the instructions to transfer the money – *'I just made payments to Phoenix Payments because she [Sofia, XytronFX's representative] told me to ...'*¹⁰ It was at that time that he became aware of AM Estonia Services OU and Phoenix.

The Complainant's relationship was with XytronFX, and at no time did the Complainant prove that he was instructed by Phoenix to transfer any money. His only legal relationship was with XytronFX. He was neither advised by Phoenix to make any money transfer nor to make any investment.

The Complainant clearly affirmed that *'I do not have any contractual relationships apart from XytronFX platform in relation to the payments that I have made.'*¹¹

Moreover, the Service Provider stated that *'they do not know who XytronFX are but admitted receiving payments from the Complainant.'*¹²

The Complainant was aware that Phoenix were only the receiving entity to which XytronFX were transferring the money.¹³

The Complainant did not interact in any way with Phoenix but with XytronFX, with whom he had continuously communicated.

⁸ P. 3

⁹ P. 29

¹⁰ P. 33

¹¹ P. 32

¹² P. 33

¹³ P. 44

Determination of eligibility

Considering the above and having reviewed the circumstances of the case in question, it is evident that there was no contractual relationship between Phoenix and the Complainant. Despite being aware of the Service Provider's existence, the Complainant did not produce any evidence to prove that Phoenix was in any way involved in this scam. Above all, he clearly admitted that the only relationship he had was with *XytronFX*. Phoenix's customer was not even *XytronFX* but *AM Estonia*.

In his testimony, and on cross examination, the Complainant admitted that he signed the agreement and accepted the Terms and Conditions of *XytronFX*. The platform he used was of *XytronFX* and had seen its logos. He also confirmed that the person who talked to him was Sophia, representing *XytronFX*. It was she who told him to make payments via Phoenix.

The Complainant categorically stated that:

I do not have any contractual relationships apart from XytronFX platform in relation to the payments that I have made.

I do not have any contractual relationships with the beneficiary, AM Estonia Services OU.¹⁴

Later on, during his examination, the Complainant further stated that:

*I confirm that Sofia was representing XytronFX with a signature of XytronFX and I believed that she was working for XytronFX. **I have no idea who AM Estonia are.**¹⁵*

However, afterwards, during the same cross-examination, the Complainant contradicts this statement by saying that he knew that *XytronFX* 'is a broker for *AM Estonia*'.

Asked if he signed an agreement with Phoenix Payments Ltd, he said that he did not know because he signed a lot of documents. However, the Complainant's representative, later on during the proceedings, declared that the Complainant did not have any specific agreement with Phoenix.¹⁶

¹⁴ P. 32

¹⁵ P. 33 Emphasis made by the Arbiter

¹⁶ P. 75

From the facts that emerged during the case, the Arbiter can clearly decide that the Complainant's only relationship was with XytronFX, and the instructions it gave to the Complainant proved to be a scam.

In view of the above, 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 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