

Before the Arbiter for Financial Services

Case ASF 086/2021

MA

(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,¹

Where, in summary, the Complainant claimed to have been a victim of a huge scam by *Infinitrade*, the company that requested her to make various payments to Phoenix on the promise that she would make more money.

She claimed to have lost a total of EUR38,231.

The Complainant stated that by the end of June 2020, she tried to get the 'invested' money back, even conceding that she would not insist on the gains promised by *Infinitrade*. Despite being promised to receive the amount in question, and they would then 'work' with the additional amount she had gained, she then realised that it '*was a lie of course.*'²

¹ Page (P.) 3 - 68

² P. 3

The Complainant was an independent travel agent and due to the negative effects of the pandemic, she considered the investments offered to her as '*... a way to survive during the very hard times for us without any income of my work in tourism.*'³

The Complainant declared that she attempted several times to communicate with the Service Provider seeking assistance, but '*... were very rude on the phone and by mail, there was no single cooperation from their side. I presume they are a bank used by scammers ...*'.⁴

Together with the complaint form, the Complainant referred to further details of the case as evidenced in the documentation enclosed with the same complaint form, one of which is a letter of complaint⁵, addressed to Phoenix, whereby, *inter alia*, the Complainant accused the Service Provider of failing to perform adequate anti-money laundering and *know your client* procedures, whilst also failing to '*... adequately investigate the fraudster's accounts and wilfully blinded itself to obvious red flags.*'⁶

Whilst in the letter of complaint addressed to Phoenix, the Complainant is requesting⁷ a full refund, in the complaint form, she requests '*... what is possible from your side to be compensated in a way for what happened to me.*'⁸

Having considered Phoenix's reply⁹ whereby the Service Provider dismisses the allegations raised by the Complainant.

Primarily, Phoenix submitted that the Complainant '*... has never engaged the Company to provide any sort of service to her*', and thus, declared that it has no contractual arrangement or any obligations towards her. Considering this, and despite having no obligation to do so, Phoenix replied to her complaint when contacted.

Phoenix submitted further that it has no relationship with *Infinitrade*, the company referred to by the Complainant as the one she has engaged with, and

³ *Ibid.*

⁴ *Ibid.*

⁵ P. 8

⁶ P. 13

⁷ P. 18

⁸ P. 4

⁹ P. 72

submits that ‘... the Company holds no records of the said entity and was never a client of the Company.’¹⁰

The Service Provider emphasised that it has no obligations to reimburse the Complainant for acts or omissions carried out by third parties and hence denies all the allegations submitted by the Complainant.

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

Considers:

The Arbiter notes that the complaint mainly relates as to whether Phoenix had carried out a proper due diligence process of its client, that is, of *Finligue Group OU* or *Infinitrade*, and whether it has taken the relevant measures to preclude the same company from defrauding the Complainant.

The Arbiter further notes that in its reply to the complaint, the Service Provider declared, *inter alia*, that it has no contractual arrangement or obligations towards the Complainant as the latter has never engaged it to provide her with any sort of service.

The Arbiter’s Competence

In view of the declaration made by the Service Provider,¹¹ that it never offered any service to the Complainant, the Arbiter has to decide on his 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, Article 19(1) of the Act provides that 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.’*

¹⁰ P. 72

¹¹ *Ibid.*

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**.*¹²

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.'

The complainant submitted that the investments were made by *Infinitrade* –

*'... the investments made by Infinitrade at that time.'*¹³

She has also clearly declared that she fell victim of an alleged scam orchestrated by *Infinitrade*.

The Complainant admitted that, when transferring payments, she acted on the instructions given to her by the same company.

She stated that:

*'... Infinitrade let me make different payments to the bank Phoenix Payments Ltd, situated in Malta in order to generate more money.'*¹⁴

It is evident that at the time the payments were made, her contact was only with *Infinitrade*.

She further stated that:

*'I have been a victim of a major fraud last year in June 2020, orchestrated by Infinitrade, better known as Finlingue Grupp OU, a client of the financial service provider, Phoenix Payments Limited Paytah.'*¹⁵

¹² Article 11(1)(a) of Chapter 555 of the Laws of Malta

¹³ P. 3

¹⁴ *Ibid.*

¹⁵ P. 78

Alexandros Giannakellis stated that with regard to *Finlingue Group OU*, they did all the due diligence according to law.

The Complainant was not a customer of Phoenix but her only relationship was with *Infinitrade/Finlingue Grupp OU*.

Determination of eligibility

Considering the above, and having reviewed the circumstances of the case, it is evident that there was no relationship between Phoenix and the Complainant.

Phoenix's representative declared that,

*'Since there is no business relationship between Phoenix and the complainant, Phoenix had no obligation under the applicable AML laws in Malta, to carry out any due diligence on the complainant, nor did it, at any point, have any form of relationship or contact therewith within the context of a service provider/customer relationship.'*¹⁶

No evidence to the contrary was submitted in this regard.

A complaint with the Arbiter can only be filed against the Service Provider in line with the Act.

Considering 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.

Without entering into the merits of the case, since this case has had an extensive negative psychological impact on the Complainant, and the Complainant declared that even a small compensation would help her recover her mental health, the Arbiter recommends the Service Provider that, purely on an *ex gratia*

¹⁶ P. 88

basis, and without admitting any liability, pays the Complainant a small amount of money to help her bring to a closure this unfortunate episode in her life. This recommendation is non-binding on the Service Provider.

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