

Before the Arbiter for Financial Services

Case ASF 089/2022

GZ

(Complainant)

vs

XNT Limited (C 52182)

(Service Provider or XNT)

Sitting of 22 June 2023

The Arbiter,

Considered the complaint filed by the Complainant on 13 July 2022¹ wherein he stated that:

1. The Service Provider had confirmed to him that his account was fully opened, and all the sources of funds, information and documents were approved and, further, XNT confirmed that the Complainant can transfer and withdraw funds and assets at any time without any restriction.
2. When the funds and assets were transferred to XNT, he was told that he must invest such funds and assets into their own bond; something the Complainant refused to do as it was not what was agreed.

¹ P. 1 -25

3. XNT subsequently blocked his account and the funds and did not allow the Complainant to invest and trade and consequently he lost income and funds.
4. XNT also blocked the Complainant's access to statements and information on-line.
5. XNT have been refusing to transfer the funds and assets to return them to the Complainant. XNT have been giving the Complainant vague information and covering up and manipulating and, in the meantime, they were charging ***"wrong fees and charges to me"***²
6. That before the funds and assets were transferred to XNT, the Complainant was assured that all information and records were provided and that in reply to the Complainant's request ***"to confirm that whenever at any time I ever need any funds, cash, securities etc. from my account with you there will be no issues, conditions or restrictions of any kind to get them back to me ... please confirm this"***,

the Compliance Officer of XNT had replied,

"I can confirm that all funds reaching the company during this period of time will be available for withdrawals with no restrictions. The withdrawal requests are to be submitted as per relevant Treasury procedures and by completing and executing the Withdrawal request Form which is available from your private web Client cabinet or may be provided by your Account Manager."³

7. Once XNT received the funds and assets from Complainant, ***"they completely changed their tactics and started to manipulate not to return the funds and assets to me."***⁴

By way of remedy, the Complainant expected release and return to him of all funds and assets transferred to XNT, reversal of all kinds of ***"fabricated fees and charges"*** and compensation of a minimum about \$750,000 (not indicated if US or Canadian dollars) by way of lost income and growth due to

² P. 3

³ P. 6 -7

⁴ P. 3

inability to trade the blocked funds/assets. The blocked funds/assets were indicated as:

CAN\$ 2,968,626

US\$ 205,959

US\$ 264,048 by way of IEF shares.

Considered the reply of the Service provider of 27 July 2022⁵ wherein they state:

1. Their business relationship with the Complainant was established on 10 February 2015.
2. The Complainant's account was funded during the period October 2015 and January 2016 from his bank account with a Canada based financial institution.⁶
3. The Complainant then submitted a withdrawal request to transfer the funds to a bank account in his name in a third country outside the EU.
4. As per Bank's compliance policy, this request was refused as funds could only be transferred back to source or to a bank account within a reputable jurisdiction like EU, US or Canada.
5. The Complainant refused and kept insisting that the funds be transferred to his account in countries like Georgia or Hong Kong and never gave a proper reason why the funds could not be transferred to an account in his name in a reputable jurisdiction.
6. The Complainant's unusual behaviour gave rise to suspicions which were reported to FIAU who insisted on being informed before any transfers were carried out essentially leading to a freeze of the account.

⁵ P. 31 - 35

⁶ Eventually it was established that funds were transferred from Keytrade Bank Luxembourg which in 2022 was acquired and absorbed into Swissquote Bank Europe also based in Luxembourg.

7. XNT confirmation about ability to transfer funds out of his account were always subject to compliance with Anti-Money Laundering regulations which require documentation to justify source of funds and the transfer of funds back to origin or to an account in Complainant's name in an equivalent jurisdiction.
8. Complainant failed to provide evidence about sources of his funds, and his request to transfer funds to an account which is not his personal account in a respectable jurisdiction could not therefore be executed.
9. Funds were transferred back to source, but these funds bounced back as it resulted that such source account had been closed.

Considered the hearings which were held on 25 October 2022 and 28 November 2022 from which hearings the following additional information emerged:

1. XNT maintained that fees were being applied in accordance with the Terms of Business accepted by the client and these included non-compliance fees imposed due to failure to co-operate with XNT's due diligence requests for further information and documents requested since November 2015. The Complainant claimed that such fees were ***"like € 300 per day or something like that"***.⁷

Fees were also charged for additional services requested relating to communications with FIAU, regulators and board members; extensive communications with Keytrade to trace funds after they were returned and bounced back;⁸

2. XNT had provided a link where Complainant could access his statement of account and that portfolio statements were sent monthly and on demand. Also, that since 11 June 2021 access to Complainant's trading account was fully restored.

⁷ P. 37

⁸ P. 43

3. Complainant implied that his account was blocked after he refused to invest his funds in a bond proposed by XNT.⁹
4. Complainant suggested to send funds to Saxo Bank (an EU bank) and to a UK Financial Institution but XNT refused.¹⁰
5. XNT claim they can only unblock and release funds/assets if Complainant complies with their demands for Source of Funds evidence and details of an account in Complainant's name with a Financial Institution and/or investment firm with the EU, US or Canada.
6. That Complainant has submitted documentation regarding source of wealth but never submitted evidence requested on the source of funds;

“as long as there is no source of funds in the account, financial institutions around the world will probably not process such transfer; we are talking about €2,000,000 equivalent transfer. Any financial institution we're dealing with or might be dealing with would request such information before actually processing such transfer”.¹¹
7. That when Service Provider had confirmed to Complainant that he can withdraw funds without any problems, it was nonetheless clear that this was subject to the regulatory framework regarding such fund transfers, namely, that transfers had to be in client's name in a properly regulated institution and ***“we never expected Mr GZ to request the withdrawal of funds either to Singapore or Georgia or to any other not so regulated jurisdiction. 99% of the cases any withdrawals that we have are usually in an EU or EA¹² institution. We are a regulated institution. We never thought that a client would request from us to transfer the money to a Singapore bank or a Georgia bank or to Hong Kong. So, we need to treat each case on a case-by-case basis.”***¹³

⁹ P. 36

¹⁰ In page 42, XNT explained that in the absence of Source of Funds documentation, reputable institutions will refuse to accept any transfers.

¹¹ P. 46

¹² Probably meaning EEA – meaning Iceland, Lichtenstein, and Norway.

¹³ P. 47

8. Complainant maintained that XNT took too long to transfer the funds back to origin at Keytrade Luxembourg and, by the time they did, the account had been closed. Service Provider argued that they held the funds for 2 months prior to returning them (unsuccessfully) to origin, as they were trying to understand and get evidence on the source of funds. By the time funds were returned to origin, ***“Keytrade was not willing to have Mr GZ as a client anymore so there was no chance for us to send the funds back”***.¹⁴

Further considerations and analysis

The main basis of this Complaint is that at the on-boarding stage the Complainant was given certain assurances about the free transferability of the funds and assets transferred, which were then not kept up by the Service Provider once the funds/assets were actually transferred.

The Complainant maintains that this caused him loss of revenues quantified at not less than \$750,000 and has caused his funds/assets to be blocked for reasons not clear to him. The Complainant also makes allegations that the Service Provider changed their position after he refused to invest funds in a bond they suggested and that in the meantime they were charging him exorbitant fees in spite of dishonouring their original commitment to the funds being available for withdrawal without restrictions.

The Service Provider maintains that as they are a regulated institution and must follow Anti-Money Laundering (AML) regulations, any commitment they gave about free transferability of the funds was always conditioned by strict adherence to compliance rules in line with the AML obligations. Consequently, when client transferred about EUR 2 million worth of funds and assets, they had an obligation to get evidence on the source of such funds. When Complainant failed to provide such evidence, they tried to return the funds and assets to origin. However, this was refused by the originating bank, Keytrade Bank Luxembourg, on the basis that the Complainant’s account had been closed and that they were not prepared to reopen such account.

¹⁴ P. 46

This matter raised suspicions to the Service Provider which together with Complainant's non-provision of source of funds evidence, forced them to report such suspicions to the Authorities in April 2016 and, from there onwards, basically, the account has been frozen through regulatory orders.¹⁵ It is quite conceivable that further directions from regulatory authorities could not be divulged during the hearing proceedings but it is evident that the Service Provider would need solid evidence of proof of funds in order to process any request for transfer of funds.

Complainant's inability or unwillingness to provide such evidence and insistence to transfer funds to non-(EU or EEA or US/Canada) respectable institutions further complicates the problem for quick release of the funds/assets.

The Arbiter cannot be expected to issue any decision which would put any licensed institution having to choose between breaking any AML regulations and guidance or order received from regulators and the decision of the Arbiter. On the contrary, the Arbiter, through his decision, has the obligation to uphold the high regulatory standards of our jurisdiction to ensure that our country does not become a soft target for money laundering and financing of terrorism.

Consequently, in this case, the Arbiter feels that the Complainant's failure to provide evidence about the source of funds fully justified the Service Provider to override any misguided assurances about free transferability of the funds given at the onboarding stage. After all, no evidence was provided at the onboarding stage about the rather high value of the funds/assets that were eventually transferred, and no disclosure was made that the source bank, Keytrade Luxembourg, was unhappy with the relationship with the Complainant to the extent that they would refuse to accept a return to origin order.

Furthermore, the fact that there were enough indications that the Malta jurisdiction was being used as a quick pass through of funds from Luxembourg to other non-reputable jurisdiction,¹⁶ further justifies the cautious approach adopted by the Service Provider after receipt of the funds. The argument that

¹⁵ FIAU letter of 21 April 2016 (p. 35) stipulates two months' monitoring but also requested Exante Limited to immediately "*inform the FIAU of any transactions and banking operations **prior** to these being carried out through the account*" (Arbiter's emphasis)

¹⁶ Keytrade agreed to transfer funds assets to Malta, an EU member country, but would probably have refused to transfer such assets to a bank outside the EU, EEA, US or Canada.

the Service Provider has manipulated events so that they can benefit from the charges being made to the Complainant's account is belied by the (unsuccessful) attempt of the Service Provider to return funds to origin.

The Complainant could have avoided all claimed losses and saved all charges if he provided documentary evidence of the source of funds/assets he transferred as he was obliged to do under EU regulations which he was fully aware of, having had a relationship with a Luxembourg-based bank.

Furthermore, in his evidence at the hearing of 25 October 2022, the Complainant admitted that ***“in the EU it is very difficult to open an account if you are not physically living in the EU. I lived there and I am aware of the situation. Right now, I am living in Canada. There is no problem in having money transferred to Canada, but I was doing some things in the EU”***.¹⁷

There is no evidence that Complainant ever provided evidence about a Canada bank account to where the funds could be transferred in his name.

Furthermore, with the passage of time, as suspicions grew by his refusal to give evidence about the source of the funds, it was no longer a question of just transferring the funds to a reputable jurisdiction but also an obligation to get documentary evidence about a clean source of the funds. Without such evidence, the regulators would not have lifted their objections to release the funds and no reputable bank would probably have accepted the transfer. Hence why probably the Complainant kept insisting about transfers to less reputable jurisdiction.

Decision

The Arbiter is obliged to decide by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.¹⁸

The Arbiter is further obliged to consider and have due regard, in such manner and to such extent as he deems appropriate, to applicable and relevant laws, rules and regulations, in particular, those governing the conduct of a service provider, including guidelines issued by national and European Union

¹⁷ P. 37

¹⁸ Chapter 555. Art. 19(3)(b)

supervisory authorities, good industry practice and reasonable and legitimate expectations of consumers, and this with reference to the time when it is alleged that the facts giving rise to the complaint occurred.¹⁹

The Arbiter therefore has to decide whether the assurance given to the Complainant about free transferability of the funds transferred to his account with the Service Provider built legitimate expectations that this would be done irrespective of the provisions of the local and EU AML regulations of which the Complainant must have been well aware.

The Arbiter has no doubt that no such legitimate expectations existed. If Complainant had any such expectations, they certainly were not legitimate as one cannot expect regulated institutions to go against regulations.

In the circumstances, the Arbiter is hereby deciding against the Complainant and declining to offer any of the remedies sought. The Complainant has, in any case, provided no evidence of actual losses incurred due to any action of the Service Provider.

Due to the particular circumstances of this case, and as the Service Provider has been charging fees to the Complainant's account, the Arbiter is ordering for each party to bear its own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

¹⁹ Chapter 555, Art. 19(3)(c)