

## **Before the Arbiter for Financial Services**

**Case ASF 143/2022**

**RW (the 'Complainant')**

**vs**

**EM@NEY PLC Reg. No. C 55558**

**('EM' or 'Service Provider')**

**Sitting of 7 September 2023**

**The Arbiter,**

**Having considered in its entirety, the Complaint filed on 28 November 2022, including the attachments filed by the complainant,<sup>1</sup>**

### **The Complaint**

Where, in summary, the Complainant claimed to have been a victim of a scam orchestrated by a fictitious online trading platform <https://platinex.co> which the Complainant claims is owned and operated by Lithe Group Ltd. The Complainant was instructed by the alleged fraudsters to deposit money into an account in the name of Securo OU held with the Service Provider and states that such payments immediately showed as a deposit in his name on the fictitious online platform thus establishing an evident link between Securo OU and Platinex/Lithe Group.

The Complainant transferred on 02 August 2021, through Migros Bank of Switzerland, CHF 5457.50 (then equivalent to €5,000) to the account held by Securo OU with EM.<sup>2</sup>

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<sup>1</sup> Page (P.) 1 - 57

<sup>2</sup> P. 36; 54

The Complainant is holding the Service Provider responsible for his loss claiming that if EM had conducted its operations properly by:

- meeting the requirement of EU director for Payments Services (PSD 2 EU – 2015/2366)
- fulfilling its obligations under the Anti Money Laundering (AML) regulations for proper due diligence on its clients Securo OU
- acting in accordance with FATF recommendations on a risk-based approach as part of effective implementation of FATF International Standards on Combatting Money Laundering,

then the Service Provider ***‘should not have processed*** (the payment ordered by the Complainant) ***and in any case not credited the Beneficiary’s*** (Securo OU) ***account at the PSP*** (EM).’

Accordingly, EM ***‘has caused damage to the Client amounting to the aggregate sum of all payments processed in favour of the non-licensed and fraudulent persons/entities’***.<sup>3</sup>

By way of remedy, the Complainant claimed full refund of CHF 5457.50.

### **The reply of the Service Provider**

**Having considered EM’s reply<sup>4</sup> dated 12 December 2022**, whereby it categorically denied all allegations made by the Complainant and raised a preliminary plea on the Arbitrator’s competence to hear this Complaint on the basis of Article 22(2) and Article 19(1) of Chapter 555 of the Laws of Malta (the Act), declared that it has no relationship with the Complainant, whether contractual or otherwise and, accordingly, the Complainant was not an *‘eligible customer’* in terms of Article 2 of the Act.

The Service Provider also maintained that the Complaint was frivolous and vexatious in terms of Article 21(2)(c) of the Act in that Complainant admitted that he was in contact with *platinex.co* and he made payments in the name of

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<sup>3</sup> P. 29

<sup>4</sup> P. 63 - 65

Securo OU; so, EM cannot be held liable for the acts or omissions of third parties and denies any responsibility.<sup>5</sup>

Service Provider further stated:

***'That Em@ney Plc is bound by a code of secrecy and is not permitted to disclose any information about its current or former customers to third parties; to do so would be to violate its legal obligations. Therefore, the request made by the complainant to the respondent is a request which is forbidden by law.***

***The complainant confirms in his complaint to this Honorable Tribunal that he is not a customer of Em@ney Plc and that he authorised and confirmed the transaction on behalf of the beneficiary, Securo OU. In several points, the complainant also confirmed this in his application, stating that this is the "amount representing the sum of all payments made to said Merchant/web platform," referring to [platinex.co/Securo](http://platinex.co/Securo) and not Em@ney plc.***

***As confirmed by the Claimant, the alleged dispute and claim are against Securo OU/[platinex.co](http://platinex.co), a third party incorporated in a separate jurisdiction. This claim should have been instituted against third-party companies and directors as applicable and not against Em@ney plc.***

***Em@ney Plc has undergone all its Due Diligence obligations following Chapter 373 of the Laws of Malta and its subsidiary legislation. According to the same law, it is obliged to carry out due diligence on its customers. All the relevant due diligence on Securo OU and its Ultimate Beneficial Owners was carried out, and the Company has satisfied all its obligations at law. For all intents and purposes, and without prejudice, [platinex.co](http://platinex.co) was never a customer of the respondent, and Securo OU is no longer a customer of the respondent.***

***Em@ney Plc is an MFSA-licensed financial institution that always acts within the parameters of its license, acts diligently and is in line with all its legal obligations.***

***Em@ney plc has no obligations to reimburse the Complainant for acts or omissions carried out by himself and/or third parties. All allegations put***

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<sup>5</sup> P. 64

***forward by the Complainant are denied herewith, and Em@ney Plc accepts no responsibility for the negligence and/or acts or omissions by third parties.***<sup>6</sup>

### **Preliminary Pleas**

The Arbiter is hereby refusing the preliminary plea related to Article 21(2)(c) of the Act as the Arbiter does not find anything vexatious or frivolous in the Complaint. Client has incurred a loss through fraud and is entitled to pursue all reasonable avenues to try to recover his loss.

As to the preliminary plea related to whether Complainant is an ‘eligible customer’ as defined in the Act, the Arbiter issued a decree on 04 July 2023 requesting submissions in writing from the Complainant submitting proofs about his being an eligible customer of the Service Provider.

The Act, Chapter 555 provides in Article 11(1)(a) and again in Article 19(1) that the primary function of the Arbiter is to deal with complaints filed by eligible customers.

The Arbiter therefore feels it is obligatory to decide the preliminary plea raised by the Service Provider that the Complainant is not their eligible customer before deciding on the merits of the case. If it results that the Complainant does not qualify as an eligible customer of the Service Provider, then the Arbiter would have no competence to adjudge this Complaint.

The preliminary plea has to be decided upon before entering into the merits of the case for two particular reasons:

1. If the Arbiter has no competence to adjudge this case, then the Complainant should know it in order to consider taking his case before a competent court or tribunal.
2. If the Arbiter has no competence to adjudge this case, it is prudent not to express an opinion on the merits of the case so as not to prejudice the opinion of another competent court or tribunal.

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<sup>6</sup> P. 64 - 65

The Complainant replied stating that he has ***'already provided all the arguments and evidence when submitting the complaint and throughout the meetings'***.<sup>7</sup>

The Service Provider then replied that:

***'In accordance with the submissions made by Em@oney Plc, it has been clearly established – and not contested by the complainant - that the complainant is not a customer of Em@oney Plc. Consequently, it is re-submitted that the arbiter lacks the competence to adjudicate this matter. This point has been previously articulated in our submissions, prepared in response to the complaint received from RW'***.<sup>8</sup>

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

**Considers:**

The Complainant has failed to provide any evidence to challenge the plea raised by the Service Provider that he is not an *'eligible customer'*.

The Arbiter notes that the Complaint mainly revolves around the allegation made by the Complainant that the Service Provider did not observe its legal obligations relating to KYC and AML procedures and failed to investigate its client's accounts which were related to fraud and financial crime.

Considering that the Complaint mainly revolves around money-laundering and financing of terrorism issues, the Arbiter would like to draw the attention of the Complainant that questions and issues in this regard should be addressed to the Competent Authorities in Malta that specifically deal with such issues.

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

The Service Provider declared that it is not the legitimate respondent in this case, as it had no contractual obligations towards the Complainant, and he has never been their client.

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<sup>7</sup> P. 69

<sup>8</sup> P. 70

## 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**.'<sup>9</sup>*

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.'*

The Complainant makes it clear in his Complaint that he was a victim of *fraudsters*, and no evidence was provided that EM were in some way directly involved in the scam. The fact that EM had an account relationship with the beneficiary of the funds transferred does not constitute sufficient evidence that EM had failed their KYC obligation or was aiding and abetting the fraudsters in their devious schemes. A single one-off payment of a transfer of €5,000 should not be expected to give rise to concerns leading to non-execution of

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<sup>9</sup> Article 11(1)(a)

Complainant's own instruction to credit such fund to the indicated client account.

The Arbiter takes note of the assurance given by the Service Provider in their reply that ***'platinex.co was never a customer of the respondent, and Securo OU is no longer a customer of the respondent.'***<sup>10</sup>

### **Decision on 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 the Service Provider and the Complainant.

In view of the above, it results that the Complainant was not *'a customer who is a consumer'* of EM@ney, neither that EM@ney *'has offered to provide a financial service'* to the Complainant, nor that the Complainant *'has sought the provision of a financial service from EM@ney 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 the merits of this Complaint.

This without prejudice to the right of the Complainant to take his case to a competent court or tribunal.

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

**Alfred Mifsud**  
**Arbiter for Financial Services**

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<sup>10</sup> P. 64