

Before the Arbiter for Financial Services

Case No. 143/2020

AO ('the Complainant')

vs

Em@ney p.l.c.

(Company Reg. No. C 55558)

('the Service Provider' or 'Em@ney')

Sitting of the 14 June 2022

The Arbiter,

Having seen **the Complaint** relating to the late execution by Em@ney p.l.c. ('the Service Provider' or 'Em@ney') of a payment transaction requested by the Complainant.

The Complaint, in essence, revolves around the claim that Em@ney p.l.c. failed to execute promptly and within the time limits prescribed by the applicable legislation,¹ the Complainant's instructions for the transfer of EUR50,000 from the Complainant's account held with Em@ney, to an indicated third party.

The Complaint

The Complainant explained that it holds an account with the Service Provider that it uses for its normal activity.

It submitted that on various occasions, following its orders for SEPA transfers from its account, the Service Provider requested documents without a real legal

¹ Namely, the Payment Services Directive, Directive No. 1 issued by the Central Bank of Malta on The Provision and Use of Payment Services, as well as the Prevention of Money Laundering Act as indicated in the Complaint.

basis or that do not make legal logical sense, with the pretext of anti-money laundering legislation, before being able to process the orders for SEPA transfers.

The Complainant explained that it always complied with each single request of documentation made in order to have the transfers expeditiously processed. It submitted that despite such documents have always been provided, Em@ney however failed to process a number of transfers within the legal periods established by law.

The Complainant claimed that although this has happened for a number of times, it decided to submit a formal complaint in relation to the last order for a SEPA transfer of EUR50,000 made on 30.09.2020.

The Complainant explained that the SEPA transfer of EUR50,000 was initially ordered on 30.09.2020 and supportive documentation on the rationale of the transaction was provided to the Service Provider.

It submitted that Em@ney did not process the transaction within the time limits introduced by Article 83.1 of the consolidated version of Directive (EU) 2015/2366, of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, the Payments Services Directive ('PSD') and the transposed domestic legislation, Directive 1 of the Central Bank of Malta on the Provision and Use of Payment Services, CBM 01/2018, version of 24 August 2020 ('Directive 1').

It noted that Article 83 of the PSD and Para. 59(1) of Directive 1 stated that:²

*Art. 83 PSD - 'Member States shall require the payer's payment service provider to ensure that after the time of receipt as referred to in Article 78, the amount of the payment transaction will be credited to the payee's payment service provider's account by the end of **the following business day.**'*

*Para. 59(1) - 'The payer's payment service provider shall ensure that after the time of receipt (...), the amount of the payment transaction will be credited to the payee's payment service provider's account **by the end of the following business day.**'*

² P. 7

The Complainant submitted that, instead, and only five days later, in 05.10.2020, the Service Provider requested further documentation before acceding to process such transfer order.

It noted that in line with the Service Provider's practice and like in other instances, Em@ney requested a '*Board Resolution of the company's shareholders*'.³ It further noted that such document did not make legal sense for a company to agree or approve the transactions as the only person/s entitled to approve such transactions were the legal representatives, hence, the Directors of the Complainant and not the shareholders, in terms of the Companies Act or in terms of the Company's Memorandum of Association.

The Complainant stated that despite that this was explained to Em@ney previously, the Service Provider simply refused to carry out the SEPA transfers when Shareholders Resolution are not produced.

It noted that the Complainant complied with the Service Provider's request for further documentation on the very same day it was requested, that is, on 05.10.2020, and it also urged Em@ney to process the SEPA transfer with '*utmost urgency*'.⁴

The following day, on 06.10.2020, the Complainant sent a reminder to the Service Provider and contacted them by phone. The only response received from Em@ney was that '*The documents are still being evaluate (sic) from our compliance Dept.*'⁵

On the subsequent day, 07.10.2020, the Complainant contacted Em@ney and similar messages were received that the request had been received but was '*under scrutiny*' or '*assigned to the appropriate Department*'.⁶

On the next day, 08.10.2020, the Complainant insisted and Em@ney replied that the documents '*are still being evaluated*'.⁷

³ P. 7

⁴ P. 8

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

The Complainant submitted that similar messages were sent to the Service Provider during the subsequent days, but Em@ney only replied on the 12.10.2020 that *'the Compliance dept. is still evaluating the transaction'*.⁸

It was further noted that on the 13.10.2020, the Complainant sent a legal letter and formal complaint to Em@ney claiming the following:

- a) That it was unreasonable for Em@ney to spend over two weeks evaluating less than 5 documents to support a transaction;
- b) A reminder for Em@ney to comply with their legal obligations under Maltese legislation transposing the Payment Services Directive and its own Terms and Conditions as per the Service Agreement;
- c) That there were no reasons based on law to block the transfer;
- d) That in case where Em@ney was treating the transaction as a suspicious one in terms of the Anti-Money Laundering legislation, Em@ney was obliged to inform the FIAU accordingly within 1 working day, following which the Service Provider was obliged to process the transaction within the following working day if the FIAU does not notify of any suspension on the transaction, or within the following day after 3 working days if the FIAU notified of any suspension on the transaction;
- e) That, in terms of Article 28 of the Prevention of Money Laundering Act ('PMLA'), a transaction may be delayed by a maximum of three (3) working days, following the day the FIAU is notified (as per Section 5.8 of the FIAU's Implementing Procedures);
- f) That the Complainant directed Em@ney to process the transaction within the day or to state the legal reasons for not doing so and that failing to comply with such direction would confirm the unlawful standing in this matter, and that the Complainant would take the due action to defend its rights for breach of agreement, for breach of EU law and for breach of AML legislation, as well as for the damages that such situation was causing to the Complainant.

⁸ *Ibid.*

The Complainant submitted that Em@ney still failed to process the transaction on 13.10.2020, although on 14.10.2020, it then informed the Complainant that the transaction had '*been authorised*'.⁹

This notwithstanding, the transaction was not processed on 14.10.20 and the Service Provider informed the Complainant that it would be shown as 'done' before 10 a.m. of the following day, 15.10.2020.

The Complainant stated that the transaction was finally cleared in the afternoon of 15.10.2020, and was received by the payee on the 16.10.2020, sixteen days after it had been ordered.

The Complainant further stated that on 20.20.2020 it submitted a reasoned complaint and a request for compensation based on articles 89, 90 and 91 of the PSD, the PSD-transposing Maltese legislation and other national legislation following the Service Provider's unlawful conduct.

It stated that the request for compensation claimed the following items:

- Interest from withholding the amount of EUR50,000 in the form of interests as per the definition of '*legal interest for late payment*' and as per art. 26 of the Commercial Code (Chapter 13 of the Laws of Malta): Eur165;
- Damage deriving from depriving a person (in this case a legal person) of the use of its own money, as per art. 1047 of the Civil Code: Eur165;
- Costs deriving from the legal expenses and legal consultation for the issuing of legal letters, in terms of art. 1031 of the Civil Code: Eur540;
- Costs deriving from recovery costs in the form of time spent by the Complainant's accountant for two weeks requesting information on the status of the transaction, in terms of art. 1031 of the Civil Code: EUR380;
- Non-pecuniary costs in relation with the reputational damage caused to the Complainant towards the payee and third parties and for culpable negligence in terms of art. 1031 of the Civil Code: EUR125.

⁹ *Ibid.*

The Complainant submitted that Em@ney was therefore directed to compensate the Complainant with the total amount of EUR1,375 plus recovering costs, further statutory legal interest of 8%, further recovery costs and full legal and court costs.

It further stated that the Service Provider's lawyer replied on 28.10.2020 without addressing the issues raised in the complaint claiming that the Service Provider *'has rules and regulations (sic) that the Institution is obliged to adhere with prior to affecting (sic) any transactions of any kind'*, without substantiating any legal basis for such affirmation and because the *'Institution (...) shall take all the time necessary to ensure with all national, and EU regulations (sic)'*, which again would contradict art. 83 PSD and art. 28 PMLA.¹⁰

The Service Provider's representative concluded that *'your frivolous and vexatious request (sic) of damages is of course being negated (sic) in its totality'*.¹¹

Other explanations

The Complainant further explained that the reasons of this complaint relate to infringement of the PSD and transposed domestic legislation, prejudicing the Complainant's standing, in the following counts:

a) *Liability for the delayed execution of the transaction ordered on 30.09.2020*

The Complainant underlined that the PSD (art. 89, 90 and 91) and Directive 1 (para.'s 64, 65 and 66) clearly state, *inter alia*, that

*'where a payment order is initiated directly by the payer, **the payer's payment service provider shall be liable to the payer for correct execution of the payment transaction**, unless it can prove to the payer (...) that the payee's payment service provider received the amount of the payment transaction'*.¹²

The Complainant submitted that hence, it must be concluded that the Service Provider is liable to the Complainant for the correct execution of the transactions ordered by the Complainant.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

The PSD (art. 78) and Directive 1 (para. 54), define the time of receipt of a payment order as **'when the payment order is received by the payer's payment service provider'**, hence on 30.09.2020 (14:01:18 hours) for the transaction order of EUR50,000.

The Complainant further submitted that such transaction was only processed sixteen days later, as described and demonstrated by way of documentation attached to its Complaint, exceeding the time limits of the PSD (art. 83.1) and Directive 1 (para. 59.1): **'the amount of the payment transaction will be credited to the payee's payment service provider's account by the end of the following business day'**.

b) *Liability for not addressing the points raised in the Company's complaint*

The Complainant claimed that the Service Provider not only (did not) address nor evaluate any of the points raised in its complaint, but it used a strongly worded response to dismiss it, limiting itself to define the complaint as *'vexatious and frivolous'* whilst insisting that there are *'rules and regulations'* that allow the Service Provider to freeze the Complainant's monies as long as the Service Provider deems necessary, without substantiating those *'rules and regulations'*.¹³

The Complainant submitted that the PSD (art. 101.2) and Directive 1 (para. 73.1) oblige the Service Provider to **'address all points raised'** within the Complainant's complaint, *albeit*, as a matter of fact, it did not address any point.

The Complainant further noted that, in this sense, it must be underlined that there is no agreement between the Complainant and the Service Provider that allows the latter to block or delay a transaction and that the Prevention of Money Laundering Act (Art. 28) as developed by the FIAU's Implementing Guidelines (section 5.8) do not allow service providers to delay AML suspicious transactions for more than three days which, in any case, is possible under extraordinary circumstances where the FIAU has ordered such suspension.

¹³ P. 10

c) *Liability for not having informed the Complainant on its rights*

The Complainant claimed that it should have been informed of its rights by the Service Provider as stated in the PSD (art. 101.3 and 101.4) and Directive 1 (para. 77). It alleged that the Service Provider did not do so at any time whatsoever. It further claimed that the obligation to inform consumers of their rights is not being complied with at any level.

Remedy requested by the Complainant

The Complainant requested compensation in terms of the PSD and Maltese law as follows:

- a) Refund of the **charges** relating to the Transfer Order for such charges in terms of art. 89.3 PSD and para. 64.12 Directive 1, *'payment service providers shall be liable to their respective payment service users for any charges for which they are responsible, and for any interest to which the payment service user is subject as a consequence of non-execution or defective, including late, execution of the payment transaction'*.
- b) Payment of legal interests on the amount of the transfer order as a consequence of **late execution** in terms of art. 89.3 PSD and para. 64.12 Directive 1, *'payment service providers shall be liable to their respective payment service users for any charges for which they are responsible, and for any interest to which the payment service user is subject as a consequence of non-execution or defective, including, late, execution of the payment transaction'*.¹⁴
- c) Payment of legal interest for **withholding the amount** of EUR50,000 from the Complainant as a creditor in the form of interests as per the definition of *'legal interest for late payment'* and as per art. 26D of the Commercial Code (Chapter 13 of the Laws of Malta).¹⁵
- d) **Damage deriving from depriving a person** (in this case a legal person) **of the use of his own money**, as per art. 1047 of the Civil Code.

¹⁴ *Ibid.*

¹⁵ P. 11

- e) Costs deriving from the **legal expenses and legal consultation** for the issuing of legal letters to Em@ney, in terms of art. 1031 of the Civil Code, and preparing the Complaint and representation of the Complainant before the Office of the Financial Arbiter, as partially caused by the Service Provider's failure from informing the Complainant about its rights or addressing the Complainant's complaints in time or as required by law.
- f) **Fees payable to the Office of the Financial Arbiter** for the submission of this complaint, in terms of art. 1031 of the Civil Code.
- g) **Costs** deriving from the charges by the Complainant's **accountant** for the time spent during two weeks requesting information and liaising on the status of the transaction, in terms of art. 1031 of the Civil Code.
- h) Non-pecuniary costs in relation with the **reputational damage** caused to the Complainant because it was not able to deliver as promised towards the payee within the agreed time and thus for culpable negligence by the Service Provider in terms of art. 1033 of the Civil Code.
- i) **Interests on late payment** of the total due.

The Complainant accordingly indicated the total of EUR1,915 – made up of EUR40 in charges; EUR165 in late execution interests; EUR165 in late payment interests; EUR165 as per Art. 1047 CC; EUR850 in legal expenses; EUR25 in Fees OFA; EUR380 as accountant expenses; and EUR125 in reputational damage. Interests over the total for late payment (up to 15.12.20) was also calculated for EUR25.18.

The Complainant thus claimed a grand total of EUR1,940.18 (up to 15.12.2020) plus interests.

In its reply, the Service Provider essentially submitted the following:¹⁶

That, in the first instance, the correspondence sent by both the Complainant and the Service Provider were both explicitly sent on a without prejudice basis. In the Service Provider's view, this automatically rendered the said correspondence inadmissible in any Court or Tribunal. The Service Provider further submitted that,

¹⁶ P.181-185

to this effect, such correspondence should be removed from the file and should not hold any value in relation to the hearing of the case.

With reference to the facts of the case, Em@ney submitted that the claim should be considered by the Arbiter as frivolous and vexatious as provided by article 21(2)(c) of Chapter 555, Arbiter for Financial Services Act.

This is in view of the following:

1. *Em@ney clearly notified the Complainant of the non-execution of the transaction*

The Service Provider noted that, contrary to that stated by the Complainant, it notified the Complainant through a colour-coded procedure, which informs the client in real time as to whether a transaction has been approved or whether it is still pending.

It stated that when a client requests an order for payment, the transaction enters in the system and an orange colour code is displayed which clearly indicates to the client that the order has been received, however, it is being evaluated and has not yet been executed by Em@ney.

The system automatically moves the amount of the requested transfer into a suspense account for the time required by the Service Provider to evaluate and authorise such a transaction.

If the transaction is refused, the amount is reversed to the client's account. Only upon the verification and authorisation of the transaction is this colour changed from orange to black.

All this may be easily seen and verified by the client in his back office. The orange colour automatically notifies the client that the transaction has not been authorised and has not been verified, and this may be due to various reasons as is stated in the different regulations regulating Em@ney.

The Service Provider submitted that, in addition, the Complainant was notified by means of electronic messages in his back office (including via the Help Desk) that the documents provided to justify the transactions were insufficient and that the Service Provider required additional justification for the transaction.

2. *The timeframes indicated by the Complainant are incorrect*

Although the order may have been requested on the 30 September 2020, this was however requested after the counter open hours set by Em@ney, and therefore, all requests for payment orders are automatically transferred to the next business day.

It submitted that the actual date of receipt is therefore to be considered as being the 1st October 2020. Moreover, on the 1st October 2020, the Help Desk informed the client that his ticket was sent to the respective department and that his request was being evaluated.

Apart from the evident information on the Complainant's area in the Service Provider's back office, showing and informing the client that the request has not been processed, the Help Desk also informed the Complainant that his request was sent to the department of competence and therefore informed the Complainant that it was still being evaluated.

3. *In any event and without prejudice to the matters already indicated, the Service Provider was not only entitled, but more so duty bound at law, to postpone the execution of a transaction where additional information is required for Anti-Money Laundering ('AML') purposes or where there is a suspicion of money laundering or terrorist financing.*

The Service Provider submitted that it is essential to note that article 93 of the EU Directive 2015/236 specifically states that:

'No liability shall arise under Chapter 2 or 3 in cases of abnormal and unforeseeable circumstances beyond the control of the party pleading for the application of those circumstances, the consequences of which would have been unavoidable despite all efforts to the contrary, or where a payment service provider is bound by other legal obligations covered by Union or national law'.

This clause is reflected verbatim in paragraph 68 of Directive No 1 of the Central Bank of Malta in relation to The Provision and Use of Payment Services.

It further submitted that it is evident from the wording of these provisions in conjunction with similar wording in the said Directive (paragraphs 44(3), 44(5), 55(1) and 55(2)) that the phrase '*other legal obligations*' is intended primarily to cover AML obligations.

The Service Provider pointed out that the UK regulator has also specified and removed any doubt in the interpretation of what the legal obligations covered by the Union or National Law shall consist of:

'Liability under the conduct of business requirements in Part 7 of the PSRs 2017 relating to rights and obligations (but not to the information requirements in Part 6 of the PSRs 2017) will not apply where the liability is due to:

- *abnormal and unforeseen circumstances beyond the person's control, where the consequences would have been unavoidable despite all efforts to the contrary*
- *obligations under other provisions of EU or national law (e.g. anti-money laundering legislation)'*.

It submitted that Em@ney is therefore justified at law in delaying, including non-executing, a payment transaction in the event that additional information is required in terms of the AML regulations or otherwise if there is any suspicion of money laundering or terrorist financing.

In this respect, the Service Provider is obliged to avail itself of the right provided by regulation 16(2)(e) of the Prevention of Money Laundering and Funding of Terrorism Regulations. In particular, it reserved the right, in response to the allegations of the Complainant, to disclose to the Arbiter during the course of the proceedings, relating to the failure or delay in carrying out a transaction, the reasons why the Service Provider refrained from executing the transaction requested by the Complainant.

The Service Provider suggested that this disclosure be made *in camera* solely to the Arbiter, unless otherwise directed by the Arbiter.

The Service Provider submitted that, as a result of such disclosures, it will be apparent to the Arbiter that Em@ney has complied in all respect with the

relevant legislation and that all time frames which are required to be respected at law have been respected in their totality by Em@ney.

The Service Provider stated that it may confirm, and may even prove (shall this be the case as stated above), that all time frames were respected to the fullest extent provided at law, and that all allegations brought forward by the Complainant are incorrect and do not do any justice to Em@ney's hard work to ensure that all transactions are in line with all the AML regulations which are in force and are of the highest importance to the Service Provider.

Em@ney takes pride in all its daily operations to ensure the highest best international practice, to ensure that it is in line with all the AML rules in place, and keep on giving satisfactory service to each and every client.

The Service Provider further submitted that since Maltese law goes beyond the requirements of the AML rules imposed by the EU law, since it states that the mere suspicion of criminal activity is sufficient (being, as it is termed, a so-called 'suspicion-based regime'), and there is no need to have knowledge of the criminal activity, it is the duty of the subject person to verify and confirm all details and justifications sent by the client.

It further submitted that after analysing the initial justifications sent by the client, Em@ney requested further documentation.

Therefore, it argued that it was clear that the Complainant's claim of being aggrieved is on the basis of the Service Provider requiring further documentation and analysis of such transaction, as is obliged by obligations at law.

4. *Without prejudice to the matters already raised, the delay in the execution of the transaction by a couple of days, solely and exclusively to abide by all rules and regulations which are binding on the Service Provider did not result in any financial liability suffered by the Complainant.*

The Service Provider submitted that Article 26(3)(c)(iv) of Chapter 555, (the Arbitrator for Financial Services Act), specifically states that there must be actual damages 'suffered', which by the claim of damages provided by the Complainant, the damages are neither real nor actual.

It submitted that the Complainant has not proved that he has suffered any real or actual damages; he did not provide any receipts or justification for the damages he claimed.

In addition, and without prejudice, it further submitted that the right to claim damages for late execution is regulated by paragraph 64 of Directive No 1 of the Central Bank of Malta in relation to The Provision and Use of Payment Services which in turn implements the provisions of Directive 2015/236. Paragraph 64(1) provides:

'(4) Where a payment transaction is executed late, the payee's payment service provider shall ensure, upon the request of the payer's payment service provider acting on behalf of the payer, that the credit value date for the payee's payment account is no later than the date the amount would have been value dated had the transaction been correctly executed.'

It is argued in this respect that in terms of this Directive No 1 and in terms of the EU Directive, liability is limited to ensuring that the credit value date for the payee's payment account is no later than the date the amount would have been value dated had the transaction been correctly executed.

In conclusion, it reiterated that Em@ney was not only entitled to but was obliged at law to delay the transaction in terms of relevant legislation.

In addition, the Service Provider kept the client informed to the extent allowable at law at all times during the processing of its order, whilst in the meantime remaining vigilant and compliant with all its AML rules.

The Service Provider submitted that, therefore, it is of the humble opinion that:

1. The Complainant's request should be considered by the Arbiter as frivolous and vexatious, and that the Arbiter should apply article 21(2)(c) of Chapter 555 Arbiter for Financial Services Act;
2. Em@ney has done its duty under all laws and regulations regulating its activity, and therefore humbly submitted that the Arbiter should refute all claims done by the Complainant and pronounce that the Service Provider

(should it be required) has abided with all its obligations according to the law and find no liability whatsoever;

3. Without prejudice, even if the Arbiter had to determine that damages are payable, damages should in any event be limited to actual direct damages actually suffered and in terms of the Directive 1 to ensuring that the credit value date for the payee's payment account is no later than the date the amount would have been value dated had the transaction been correctly executed.

The Service Provider further requested that expenses, including legal expenses, should be against the Complainant.

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

Further Considers:

Preliminary Pleas

Complaint being frivolous and vexatious

The Service Provider submitted that the Complaint is frivolous and vexatious in accordance with Article 21(2)(c) of Chapter 555 of the Laws of Malta.

However, the Service Provider did not submit any evidence, nor did it motivate this plea. The Arbiter does not agree with the Service Provider that this Complaint is frivolous and vexatious because the Complainant has a legitimate right to ask the Arbiter to examine the conduct of the Service Provider in connection with the execution of the transaction being the subject of this case.

The lawmaker established the Office of the Arbiter for Financial Services just for this purpose – it wanted to create an informal forum where consumers of financial services (including micro-enterprises) could seek redress against any injustice or unfair practice by financial services providers authorised or licensed by the MFSA.

The Arbiter will therefore examine this complaint.

Request for certain documents to be expunged

In its reply, the Service Provider submitted that correspondence sent by both parties were explicitly sent on a 'without prejudice' basis and, accordingly, such correspondence should be inadmissible before the Court or Tribunal.

The Service Provider therefore requested the Office of the Arbiter for Financial Services ('OAFS') to remove such correspondence from the file and for such correspondence not to hold any value in relation to the hearing of this Complaint.

The question of 'Without Prejudice' correspondence has intrigued not only the Maltese Courts but also Courts in other jurisdictions.

In the case ***Aspider Solutions Malta Limited Vs Redtouch Fone Limited***¹⁷ the First Hall Civil Court reiterated the established general rule that correspondence containing information about negotiations between the parties are privileged and should not find their place in a judicial process. The scope behind the rule is that Courts and other Tribunals should encourage the amicable settlement of disputes without the intervention of the Court or any other Tribunal. The exhibition of 'without prejudice' correspondence in judicial and quasi-judicial proceedings discourages the culture of negotiation because the parties would be afraid to negotiate freely because what they say during negotiations might be used in Court or in a Tribunal against them.

The reasons behind the refusal of 'without prejudice' letters are twofold. Firstly, because public order encourages the amicable settlement of disputes and, secondly, because what is agreed between the parties is law between them. The State gives a lot of importance to compromise, so much so, that a compromise¹⁸ between the parties not only has a contractual dimension but also serves to bring the dispute to a finality (*res judicata*).¹⁹

However, in the decision of the Civil Court above quoted, the Court held that the rule of not allowing 'without prejudice' documents can also have its limitations. For instance, while documents relating to negotiations are privileged, other documents which do not impinge on the negotiation between the parties may be

¹⁷ Decided by the First Hall Civil Court, 02/03/2020

¹⁸ Defined in Art 1718 of the Civil Code

¹⁹ Art. 1729, Civil Code

allowed and considered by the Court. It is the Court in the particular circumstances of each case which decides which documents marked 'without prejudice' are admissible as evidence. The Court expunged documents which related to negotiation but allowed others which were not.

The Arbiter is following this practice adopted by the Court. After examining the correspondence exchanged between the parties and marked 'without prejudice',²⁰ he notes that this correspondence did not form part of any attempt to negotiate or compromise the issue between them. In reality, the Complainant sent intimation letters arguing its case that the Service Provider was not justified in delaying the payment to a third party, while the Service Provider responded that the payment execution had to be delayed because they had to make their checks to follow rules and regulatory obligations by which they were bound. This correspondence is just a repetition of what the parties have basically submitted in this case and does not add anything to the arguments which the Arbiter is being asked to consider.

Therefore, the Arbiter will not expunge these documents.

The Merits of the Case

Facts of the Case

The pertinent facts are summarised below:

(a) *The Complainant*

The Complainant is a company registered in Malta with Company Registration Number C 88152.

The Complainant falls within the definition of a micro-enterprise in terms of Article 2 of Chapter 555, Arbiter for Financial Services Act ('the Act') as per declaration submitted by the corporate director of the Complainant.²¹

²⁰ P. 18-25

²¹ P. 192

It is noted that in its Complaint, the Complainant explained that it had an account with Em@ney which it *'used for its normal activity'*.^{22, 23}

However, the nature of the Company's business was not truly explained during the proceedings of the case.

- (b) *Chronology of the disputed transaction*: It is noted that the Complainant first had to increase its daily limit to be able to initiate the intended transfer.²⁴

Following the said increase in the daily limit, the Complainant made an order for the payment of EUR50,000, from its account held with Em@ney, on the 30 September 2020 (after 14:00 hrs) as confirmed by both parties.²⁵

It is also noted that on the 30 September 2020, at 14:07 the Complainant sent a message to Em@ney stating that:

'We processed a Loan of 50K as per Promissory Note and Donation Agreement. Attached relevant documents. Would appreciate if you can validate ... asap so as the client receives the monies'.²⁶

A request for assistance by the Complainant was made the day after, on 1 October 2020. The Complainant was informed by the Service Provider, on the same day, that his *'request for assistance was forwarded to the department of competence'* and that they will keep the Complainant *'informed on the processing status'* of his request.²⁷

On the 5 October 2020 (09:58), Em@ney sent a message to the Complainant notifying that its Compliance Department required the following documents:

'Board Resolution of AO shareholders

Purpose of the Loan

Colour copy of valid identity card or passport of [...name of individual...]'

²² P. 7

²³ Emphasis added by the Arbitrator

²⁴ P. 12

²⁵ P. 7, 182, 196 & 204

²⁶ P. 12

²⁷ *Ibid.*

The Complainant subsequently sent a message to the Service Provider on 5 October 2020 (16:38) which read as follows:

'Please find attached the required supporting documents. Would be appreciated if you treat this with utmost urgency'.²⁸

This was followed by an *'urgent reminder'* message by the Complainant, the day after, on the 6 October 2020 (8:10).²⁹

The Service Provider replied on 6 October 2020 (15:37) notifying the Complainant that

'The documents are still being evaluate from our compliance Dept.'³⁰

The Complainant sent further enquiries on the 7 October 2020 where he was informed by the Service Provider on the same day that

'The transaction is still under scrutiny of compliance department'.³¹

On the 8 October 2020, the Complainant sent another message to Em@ney requesting an update whilst highlighting that

'The situation is extremely urgent now'.³²

The Service Provider replied on the same day, 8 October 2020, informing the Complainant that:

'Documents supporting the transaction are still being evaluated'.³³

A further message was sent by the Complainant to Em@ney on the 9 October 2020. This message asked for any news on the transaction, with the Complainant noting that:

²⁸ P. 13

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² P. 14

³³ *Ibid.*

'Whilst we understand that you would need to take your time to evaluate documents etc. we fail to understand why the matter is taking so much time'.³⁴

The Complainant also asked if they could have a definitive answer by the day.

The Complainant was informed by Em@ney, through a message dated 12 October 2020, that the compliance department was *'still evaluating the transaction'*.

On the 13 October 2020, the Complainant sent a formal legal letter and complaint to Em@ney relating to the delay in the execution of its payment order.³⁵

The Service Provider subsequently sent a message to the Complainant on 14 October 2020 (15:35) where it notified the Complainant that *'the transaction has been authorised'*.³⁶

Further exchanges between the Complainant and the Service Provider were made on the 14 and 15 October 2002, given that the transaction was still *'showing as pending for validation'* on the Complainant's screen.³⁷

As confirmed by the Complainant,

'The transaction was cleared by [Em@ney], using a SEPA system, only in date 16.10.2020', with the colour code of the transaction 'changed from Orange to Black (meaning that it had been approved) only after 14:35:44 hours of 15th October, 2020'.³⁸

It is further noted that as explained by the CEO of the Service Provider during the hearing of 23 March 2021, Em@ney's *'counter opens only in the morning (from last year because of the Covid problem) from 9.00 to 12.00*

³⁴ *Ibid.*

³⁵ P. 14; 18-20

³⁶ P. 14

³⁷ P. 15

³⁸ P. 205

noon...'³⁹ and that when someone proposes a transaction to Em@ney, the 'system first blocks and reserves the amount of the transaction'.⁴⁰

As also described by the Service Provider in its reply,

'the system automatically moves the amount of the requested transfer into a suspense account, for the time required by [Em@ney] to evaluate, and authorise such a transaction'.⁴¹

Whether the time taken by the Service Provider to process the transaction was justified:

In order to assess whether the time taken by the Service Provider was justified or not, the Arbiter will first examine the nature of the transaction. Since the Complainant is asking the Arbiter to order the payment of damages, the Arbiter has to establish whether the Service Provider's conduct did in fact lead to any damages sustained by the Complainant.

The disputed transaction – nature

The transaction, registered on 30 September 2020 at 14:01:18, for the amount of Eur50,040 was described (on the system) as *'Debit for Bank Wire in favour of [...name of individual...] Reason-Loan to Promissory Note of 18th September 2020'.⁴²*

As indicated above in the chronology of events, the Complainant's order was for the payment of Eur50,000 to an individual. The transaction involved *'a Loan of 50K as per Promissory Note and Donation Agreement'*, as explained by the Complainant in its communications with the Service Provider.⁴³

It is further noted that during the hearing of 23 March 2021, an AML analyst of the Service Provider testified *inter alia* that:⁴⁴

'The transaction in this case was a transfer of €50,000 from the Maltese company, AO, to a natural person in a third country. And it was allegedly a loan. There was

³⁹ P. 194

⁴⁰ P. 195

⁴¹ P. 131

⁴² P. 21

⁴³ P. 12

⁴⁴ P. 198

a promissory note, a donation, and it was very complicated and it was a bit inconsistent. The pattern was strange and there were some red flags for us like the jurisdiction. During the analysis of the transaction, it transpired that before this transaction, AO received a loan of 100k that was coming from a company based in Panama ...'.

As also explained in its final submissions, the Service Provider stated that,

'... this client had an incoming loan of 100k and then half of this loan was transferred to a physical person'.⁴⁵

The PSD, corresponding provisions and the remedy requested –

As to the applicable legal framework and claim for damages, it is noted that in its Complaint, the Complainant referred to various provisions of the *EU Directive 2015/2366 on payment services in the internal market* ('the Payment Services Directive').

Reference was namely made to Article 68 on '*Limits of the use of the payment instrument and of the access to payment accounts by payment service provider*'; Article 78 on the '*Receipt of payment orders*'; Article 83 on '*Payment transactions to a payment account*'; Article 89 on '*Payment service providers' liability for non-execution, defective or late execution of payment transactions*'; Article 90 on '*Liability in the case of payment initiation services for non-execution, defective or late execution of payment transactions*'; Article 91 on '*Additional financial compensation*'; and Article 101 on '*Dispute resolution*', of the said Directive. Reference to corresponding provisions under the Central Bank of Malta, Directive No. 1 on '*The Provision and Use of Payment Services*' ('the CBM's Directive 1) was also made by the Complainant.⁴⁶

After the Arbiter considered the Articles of the PSD quoted by the Complainant and read through the whole Directive, the Arbiter notes that although the Payment Services Directive does indeed include various provisions relating to the liability of the payer's payment services provider in certain specified scenarios, including in the case of late execution of payment transactions, the same Directive has a waiver in Article 93 which, among other things, absolves

⁴⁵ P. 212

⁴⁶ Such as paragraphs 54, 59, 64, 65, 66, 73 and 77 of the CBM's Directive 1.

the payment service provider from 'late payment' due to its observance of its other obligations under Union or National law:

*'No liability shall arise under Chapter 2 or 3 in cases of abnormal and unforeseeable circumstances beyond the control of the party pleading for the application of those circumstances, the consequences of which would have been unavoidable despite all efforts to the contrary, **or where a payment service provider is bound by other legal obligations covered by Union or national law** ...'*⁴⁷

(This is also reflected in Paragraph 68 of Directive 1 issued by the Central Bank which gave effect to PSD 2.)

Anti-money laundering legislation features both in Union Law and also in Maltese law. Therefore, the Service Provider's plea that due to the particular nature of the transaction they had to carry a proper due diligence and examine carefully the documents supplied by the Complainant surely fits within the scope of Article 93 of the PSD2.

Moreover, **Preamble 62 of the Payment Services Directive indeed clearly refers to such law.**

The said preamble stipulates *inter alia* that,

*'This Directive should be without prejudice to the payment service provider's obligation to terminate the payment service contract in exceptional circumstances **under other relevant Union or national law, such as that on money laundering or terrorist financing**, any action targeting the freezing of funds, or any specific measure linked to the prevention and investigation of crimes'*.⁴⁸

The Arbiter observes that during the proceedings of the case, the Complainant did not elaborate on the nature of the disputed transaction, did not produce a copy of the documents (such as the Promissory Note and Donation Agreement sent to the Service Provider), nor did it explain if and how the transaction fitted with or reflected its 'normal activity' and, thus, whether the disputed

⁴⁷ Emphasis made by the Arbiter

⁴⁸ Emphasis added by the Arbiter

transaction was typical of the purpose for which the account with Em@ney was used.

The Arbiter considers that no sufficient evidence has emerged that the disputed transaction was an ordinary one, reflective of the Company's '*normal activity*'.

In the circumstances, the Arbiter considers it reasonable for one to expect a higher level of probing by the payment provider of such a transaction due to its size of Eur50,000 (which also necessitated an increase in the daily limit of the Complainant's account) and in view of the particular nature of the transaction as outlined above.

The Service Provider had every right to consider its legal obligations to examine further any unusual transaction and take the necessary time to make sure that the transaction was a *bona fide* transaction according to law.

PMLA⁴⁹ Considerations

In its Complaint, the Complainant particularly emphasised that even in terms of the PMLA and related framework, the Service Provider could not have taken so long to process the transaction.

The Arbiter would like to point out, in the first instance, that this issue basically falls squarely within the ambit of the FIAU. However, the Arbiter examined these provisions carefully in order to establish whether the allegations made by the Complainant, namely, that by not adhering strictly to the time frames established in PMLA regulations, the Service Provider caused the Complainant the alleged damages.

After carefully examining the proofs brought before him by the parties, the Arbiter has come to the conclusion that the Complainant did not prove that the time taken by the Service Provider - even when considering PMLA laws and regulations - caused any *real damage* to the Complainant.

⁴⁹ Prevention of the Money Laundering Act, the Prevention of Money Laundering and Funding of Terrorism Regulations, and also the FIAU's Implementing Procedures.

Claimed damages

As explained above in this decision, the Complainant is basically alleging that the conduct of the Service Provider caused it financial damage.

However, the Arbiter has already concluded that since the transaction was not an ordinary transaction, the Service Provider had every right and obligation to examine it before ordering its execution. Therefore, no damages are due as a consequence of the Service Provider's conduct.

Moreover, since the Complainant alleges that it had suffered damages, it should have provided enough evidence to convince the Arbiter that, in fact, it suffered the alleged damages.

The Arbiter does not consider that adequate and sufficient evidence has been presented or emerged, in the particular circumstances of the case, which substantiate the damages claimed from the alleged deprivation on the use of the Complainant's own money during the period when the payment order was under consideration by the Service Provider until executed.⁵⁰

Nor has adequate and sufficient evidence been presented to substantiate the damages claimed by the Complainant from the reputational damage it claimed it resulted from the matters complained of.

Moreover, no evidence of any foregone interest payments on the amount of the transaction and/or of any interest that the Complainant was subject to as a consequence of the time taken until execution of the transaction were either presented or emerged during the case.

Finally, the quantum of damages as declared by the Complainant in its Complaint is not supported by any receipts or any other evidence to sustain them.

⁵⁰ That is, over the eleven working day period of 1 October 2020 to 16 October 2020.

Decision

For the above-stated reasons, the Arbiter is rejecting the complaint.

Given that the Arbiter has refused the preliminary pleas raised by the Service Provider, each party is to bear its own legal costs of these proceedings.

Dr Reno Borg

Arbiter for Financial Services