

Before the Arbiter for Financial Services

Case No. 171/2017

UC (the complainant)

vs

Bank of Valletta p.l.c. (C 2833)

(the service provider or the 'Bank')

Sitting of 5 November 2018

The Arbiter,

Having seen the complaint of the 18 December 2017, whereby the complainant states that: *'Bank of Valletta p.l.c. refuses to open a basic payment account for me, in person. EU Directive 2014/92/EU clearly states: "access to bank accounts: these provisions provide all EU consumers, even those that are not resident of the country where the bank is located, and irrespective of their financial situation, with a right to open a bank account"'*.

No clear answer was given by Bank of Valletta p.l.c.'

He asks the Arbiter to order Bank of Valletta p.l.c. to provide him with a basic payment account.

Having seen the reply of the service provider which states:

1. That by way of a preliminary plea, the applicant pleads the lack of competence and jurisdiction of His Honour, the Arbitrator of the Financial Services to hear this case, since according to Chapter 555 of the Laws of

Malta, the Arbitrator “*deals exclusively with complaints from eligible customers*”. Article 2 of Chapter 555 of the Laws of Malta states that eligible customer means “*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. It includes the lawful successor in title to the financial product which is the subject of the relevant complaint*”;

It should be respectfully noted that *ictu oculi*, even by the very nature of the same complainant’s request, the complainant is not a customer in term of law since it has never been granted or been offered a service of the bank and even more so, not an “*eligible customer*” since he never was (a) a consumer of the bank’s service, (b) the applicant has never offered any financial service to the complainant and (c) the complainant never requested any financial service from the applicant. With all due respect, the request to open a bank account is not a request for financial services and therefore the applicant respectfully submits that from the very start, the complainant’s request should be rejected without any further debate on the merits of the request of same complainant;

2. That, subordinately and without prejudice, the applicant submits that His Honour the Arbitrator should order the connection of this lawsuit with that of case number 028/2017, in the same names, which is also being heard by His Honour;
3. That, subordinately and without prejudice, but also in a preliminary manner, the complainant in his personal capacity, in the way he filed the complaint, does not have juridical interest in the complaint since, through his own admission when giving evidence before His Honour the Arbitrator in complaint number 028/2017, he maintains that he is only interested in opening a bank account in order to be able to operate the business XXX Trading Company Limited (CXXX) and not for their personal needs. Full reference in this sense is being made here to the evidence already provided by the complainant in the Case number 028/2017;

4. That, subordinately and without prejudice, the applicant submits that it is clear and manifest that this complaint was the result of the fact that the complainant realised on reading the second plea raised by the Bank in complaint number 028/2017, commercial partnership cannot claim a right to a bank account under the European Union 2014/92/EU Directive and therefore now, the pretext of a need of a personal account, the complainant seeks to obtain a basic account, when as shall be better stated later on, no bank in any country to which he personally a connection of nationality and/or residence did in fact provide him with such a basic account;
5. That, subordinately and without prejudice, the applicant was fully correct and followed the applicable laws of the land, in particular those which impose on the duties of due diligence when no personal account was opened on behalf of the complainant who chose to never adequately answer the various questions put to him by the Bank to satisfy its duties of due diligence, as imposed by law. Principally, among others, there remains unanswered the question why the same complainant, nowhere in the world and even in his own country where he is a citizen and/or resides he never requested or if he did so request, no bank accepted to provide complainant with a bank account. It is humbly submitted that the laws of the European Union are not there so that European citizens to be used as the citizen would like to use them. Such laws are there so that European Citizens are given rights according to the whole spectrum of European laws interpreted holistically and not selectively. Any other different use would be irregular, incorrect and illegal;
6. That, subordinately and without prejudice, respondent Bank abided by the banking practices and carried out the procedures of due diligence as stipulated by the law. Respondent is prepared to produce in evidence all correspondence between the complainant and the Bank to show how said complainant was not open and clear in his replies to the Bank upon the questions made by the same Bank in order to assess his request to provide him with a personal account, even at the stage when the proceedings before the Arbiter His Honour the suit 028/2017 were already ongoing. Notably among them, the complainant fails to give any explanation why

neither in the Netherlands, of which country he is a citizen, nor in Italy where he permanently resides, he managed to obtain a bank account, when even these two countries are member states of the European Union to which he is definitely more connected;

7. That in this context, it is humbly submitted, that the Bank itself acted correctly in accordance with the banking and financial laws of the country as a member state of the European Union; the Bank followed the applicable commercial practice. Indeed, the Bank would have erred if it had just frivolously opened an account merely because of the undue pressure being made on it by the same complainant. With all respect, the Bank's reputation is not built with the accession to such pressures but through strict observance of the laws of the Land.

The applicant humbly reserves the right to submit further oral and documentary evidence, as well as oral and written submissions, during the sittings before His Honour the Arbiter, to sustain its position.

For the foregoing reasons, Respondent Bank submits that the complainant's claims should be rejected with costs to be borne by said complainant.

Having seen all the documents filed;

Having heard and read the evidence given by the parties;

Considers:

Preliminary pleas:

The first plea raised by the service provider states that the complainant is not an '*eligible customer*'.

Chapter 555 of the Laws of Malta makes it clear that a customer '*who has sought¹ the provision of a financial service from a financial service provider²*' is considered an "*eligible customer*". The complainant was seeking the provision of a financial service from a financial service provider and is, therefore, an

¹ Bold by the Arbiter

² Art. 2 Definition of an eligible customer.

eligible customer according to law. He has, therefore, the right to lodge a complaint with the Arbiter. For this reason the first plea is being rejected.

The second submission made by the service provider to connect this case with Case Number 028/2017 has been acceded to in terms of the decree given by the Arbiter on the 24 September 2018.³

The third plea is also being rejected because the complaint is being made by UC in his own name and not in the name of his company; and, in his personal capacity, he has the juridical interest to apply for a basic payment account. Whether this is a pretext to use it for his company or not, will be dealt with under the merits of the case.

The facts

UC filed a complaint before the Arbiter on the 25 January 2017, where he stated that he wanted to open a bank account with the service provider for his company XXX Trading Ltd. and invoked the Payment Account Directive as a legal basis for the opening of this account.

The service provider replied *inter alia* on the 3 March 2017, that the Payment Accounts Directive is not intended for legal entities but only for physical persons.

The Arbiter gave a decision on the 6 February 2018, stating that the Payment Accounts Directive provided that basic payment accounts were intended for the benefit of physical persons and not for commercial companies and, therefore, rejected the complaint.

On the 1 July 2017,⁴ the complainant asked the service provider to provide him with a basic payments account in his personal name.

The service provider replied that in order to be able to consider his application the complainant had to provide it with certain basic information.

In its e-mail of the 4 July 2017 (15:16)⁵, the service provider asked the complainant the purpose for the opening of the account so that it could guide the complainant on what documentation would be needed. The complainant

³ A Fol. 75

⁴ A Fol. 78, Document A

⁵ A Fol. 79, Document B

replied that he wanted the account to receive his salaries and make day-to-day payments.

In its e-mail of the 5 July 2017 (07:35),⁶ the service provider asked the complainant to provide it with the following documentation:

- *'Passport;*
- *Proof of permanent residential address abroad (e.g. utility bill);*
- *Proof of Maltese residential address (e.g. lease agreement);*
- *Tax identification number/s;*
- *Contract of employment;*
- *Attached form (Letter of Introduction) re-typed by your employer, printed on a company letterhead and returned back to us signed in original by your employer.'*

On the same day at 18:52, the complainant responded that he is not employed by a Maltese company and his salary will not come from Malta. *'Monies to be entered into the account will derive from salaries, commissions, etc, will come in from outside and from within the EU.'*⁷

Instead of replying to the service provider's email of the same day and providing the documentation required by the same service provider, the complainant once again quoted part of the Payment Accounts Directive stating that he had a right to open a basic payment account and asked: *'How, where and when can such an account be opened with your branch?'*⁸

The Bank responded that, on the basis of this reply, it cannot entertain his request because bank accounts can only be opened by non-Maltese nationals in cases where there is a firm/permanent economic activity in Malta or where there is a business or residency connection with Malta.⁹

⁶ A Fol. 81, Document D

⁷ A Fol. 82, Document E

⁸ Ibid.

⁹ A Fol. 84, Document G

The complainant responded that if the Bank does not open the account, he will proceed before the Arbiter for Financial Services and the EU and courts.¹⁰

On the 17 July 2017,¹¹ the Bank responded that since the complainant had stated that he did not have a personal bank account with any other bank and cannot supply it with a banker's reference, it asked the complainant to provide it with the following information:

- *'Whether you held any bank accounts in the past and if there is any particular reason why the account/s was/were closed;*
- *If you have applied to open a bank account with any other EU Bank. If in the affirmative, please let us have the reason for being unable to open an account;*
- *The name of your current employer; the number of years you have been employed with the current employer and how is your salary being paid (eg. cheque, cash).'*

On the same day, the complainant replied that he had never held a personal bank account in Europe and he used his company accounts for his personal use; and since he was going to open an EU-based company rendering *'services as a consultant,'* he was in need of a personal account. He also stated that he felt it *'awkward that you ask all kinds of questions which are not applicable,'* and again cited the Payment Accounts Directive and threatened once again that unless the Bank granted him the account he will file a complaint with the Arbiter.¹²

The complainant sent a reminder on the 21 July 2017, for which the service provider responded on the 26 July 2017. It stated that the Bank had an internal procedure on due diligence process and regretted that his responses to the Bank's communications were generic and inconclusive and once again urged him to reply to their questions posted to him on the 17 July 2017.¹³ The complainant then answered the questions sent to him by the Bank in their

¹⁰ A Fol. 85, Document H

¹¹ A Fol. 86, Document I

¹² A Fol. 87, Document J

¹³ A Fol. 89, Document L

e-mail of the 17 July 2017, and stated that he had never attempted to open a personal account with any Bank and also stated that he was self-employed.¹⁴

The Bank was not satisfied with his answers and confirmed their earlier e-mail of the 11 July 2017.

The only witness produced by the Bank was Charles Grech Soler, who summarised the reason why the Bank refused to open a bank account to the complainant:

'UC is a national of the Netherlands who resides in Italy.

We asked him the reasons why he wanted to open the account and to what purpose.

He told us that he wanted to open a bank account so that the income from his consultancy would be paid into it. We asked him for a character reference and, strangely enough, he never had an account. He is not a young person, and it struck us as strange that he never had an account. We were not comfortable to open a bank account for him.

He wanted a basic account and he felt very awkward to supply information about his past. The fact that he did not have a reference of any sort and never having an account and never divulging the source of funds struck us as strange.'

The Payment Account Directive (PAD)

The complainant is basing his grievance on EU Directive 2014/92/EU. This Directive entitled the *Payments Account Directive* was transposed into Maltese law in virtue of Legal Notice 411 of 2016 and the regulations in question are termed the *Credit Institutions and Financial Institutions (Payment Accounts) Regulations, 2016*.

'(2) The purpose of these regulations is to implement the Payment Accounts Directive.

(3) These regulations lay down rules concerning the transparency and comparability of fees charged to consumers on their payment accounts held in

¹⁴ A Fol. 90, Document M

Malta, rules concerning the switching of payment accounts within Malta and other Member States and rules to facilitate cross-border payment account-opening for consumers.

*(4) These regulations also define a framework for the rules and conditions to which Malta is required **to guarantee a right for consumers to open and use payment accounts with basic features in Malta.***¹⁵

Article 17 of the said Regulations state that:

‘A credit institution shall not discriminate against consumers legally resident in Malta or in another Member State by reason of their nationality or place of residence or by reason of any other grounds referred to in Article 21 of the Charter, the Equality for Men and Women Act and in other provisions contained in any other Maltese law as may be in force and amended from time to time, when those consumers apply for, or access, a payment account.’

This is further reiterated in Article 19(1):

*‘In order to be eligible for a payment account with basic features, a consumer shall be legally resident in Malta **or in another Member State.***¹⁶

(2) Such a right to open and use a payment account with basic features as indicated in sub-regulation (1) shall apply irrespective of the consumer’s place of residence.’

This makes it amply clear that the Bank could not refuse to open a basic bank account to the complainant simply because he is a Dutch national or because he does not reside in Malta.

The Directive also obliges credit institutions not to introduce burdensome procedures to make it difficult for consumers to open a basic payment account:

‘Credit institutions shall not introduce or implement any policies or procedures which may directly or indirectly impose any unnecessary, difficult, or

¹⁵ Bold by the Arbitrer

¹⁶ Bold by the Arbitrer

*burdensome restrictions or processes to dissuade the consumer from exercising such rights as they arise under this regulation.*¹⁷

It is also incumbent on the credit institution to provide the customer with all the information necessary to open the Bank account:

'Credit institutions offering a payment account with basic features shall provide detailed information about the application process for the opening of a payment account with basic features. Such information shall include an application form, as well as a list of any documents required to be submitted with the application'.¹⁸

The Directive makes it clear that an application for a basic payment account can be refused in the following instances:

'A credit institution shall refuse to open a payment account with basic features for a consumer where to do so would be in breach of the Prevention of Money Laundering Act or of any regulations made thereunder or of procedures and guidance issued to carry into effect the provisions of any such regulations and any other applicable and enforceable provisions laid down in Maltese law transposing Directive 2005/60/EC.

Credit institutions shall ensure that they adopt appropriate measures pursuant to Chapter III of Directive 2005/60/EC in regard to cases or situations arising from sub-regulation (1).'

So, the Arbiter has to consider whether the refusal by the Bank to open a basic bank account is justified.

In order to reach a conclusion which is fair, equitable and reasonable in the particular circumstances of the case,¹⁹ the Arbiter has to consider the following:

The Bank sent the complainant the application form and indicated to the complainant what documents were necessary for him to open the bank account, but the complainant refused to comply and was constantly repeating that he

¹⁷ Art. 19(7) of the Regulations

¹⁸ Art. 20 of the Regulations

¹⁹ Chapter 555, Art 19 (3)(b)

should not provide the information because, according to him, the Directive does not require such information.

In the opinion of the Arbiter, the information required by the Bank was in no way a burdensome procedure which is prohibited under Regulation 7 mentioned above.

The Payment Accounts Directive cannot be read in isolation but has to be interpreted in a holistic way in conjunction with other laws and regulations on a community and national level which impose obligations on credit institutions to make thorough due diligence of their clients before the opening of bank accounts and also to monitor them thereafter.

In this respect, the Arbiter makes reference to Article 22(1) of the Legal Notice 411 of 2016, which transposed the PAD into Maltese Law mentioned above, where it makes it clear that credit institutions have to abide by the:

'Prevention of Money Laundering Act or of any regulations made thereunder or of procedures and guidance issued to carry into effect the provisions of any such regulations and any other applicable and enforceable provisions laid down in Maltese law transposing Directive 2005/60/EC.'

Article 7 of Directive 2005/60/EC, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, provides that:

'The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:

(a) when establishing a business relationship;

(b) when carrying out occasional transactions amounting to EUR15,000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;

(c) when there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold;

(d) when there are doubts about the veracity or adequacy of previously obtained customer identification data.

The Directive elaborates on the due diligence process in Article 8:

'1. Customer due diligence measures shall comprise:

(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;

(b) identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Directive is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer;

(c) obtaining information on the purpose and intended nature of the business relationship;

(d) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date.'

The service provider had stated in Case 028/2017,²⁰ that their Handbook had already imposed on them the obligation to follow the *Third EU Anti-Money Laundering Directive* as this Directive has been known.²¹

The Arbiter notes that it has been customary banking practice to conduct a due diligence process to get to '*know your client*'.

Although the complainant had produced certain documents in Case 028/2017, he never produced '*documents, data or information obtained from a **reliable and independent source***', as required by the Third EU Anti-Money Laundering Directive and as implemented by the Bank's Handbook.

²⁰ The records of Case 028/2017 form part of this case as well

²¹ Case 028/2017, a Fol. 95

It is true that the complainant declared that he did not have a payments account and he uses this as a pretext for not producing a bank's reference. But it looks strange to the Arbiter that the complainant never had any banking relationship of any sort when he declared that he operates a commercial company doing business in and from South Africa.

The Arbiter also entertains the Bank's preoccupation why the complainant was very reluctant to produce very basic information at the appropriate moment and is not convinced about the real motive behind his application to open a basic payments account in Malta. He first tried to open a basic payments account for his company, XXX Trading Ltd., and when the service provider replied in Case 028/2017 that the PAD did not apply to commercial companies, he switched his interest to a '*personal bank account*'.

In Case 028/2017, he testified before the Arbiter as follows:

'The meeting lasted about 10 minutes and I got a barrage of questions from Mr Christopher Vella about why I did not have a personal bank account anywhere in the world. I said I did not need to have a personal bank account for two reasons: I use my wife's bank account for my private needs; and if I use my company bank account for private use, I book them as being private spendings; where after a time, our accountant will classify them and it becomes part of my income.' ²²

It seems that the urgency for a personal payments account in his personal name arose when the Bank replied in the first case before the Arbiter, that companies are not covered by the PAD.

While the Arbiter highlights the importance that banks and other financial institutions should scrupulously follow the norms established by the PAD to facilitate basic payments accounts without any undue difficulty, they cannot overlook their duty of a proper due diligence of prospective clients as in this case.

The PAD has made it easier for consumers to have a basic payments account but it did not absolve them from co-operating with credit and financial institutions to carry out their due diligence duties as required by other EU Directives and

²² Ibid., a Fol. 75

national legislation to safeguard the integrity of the financial services sector and the proper functioning of cross-border legitimate transactions.

For reasons known only to the complainant, he refused to co-operate in this due diligence exercise and had the misconception that the opening of a basic payments account did not carry with it the obligation, on the part of the consumer, to co-operate in the obligatory due diligence process expected from the Bank.

It is true that the PAD has made it easier for consumers to open basic payments accounts, and credit institutions should not use excessive bureaucracy to dissuade customers from exercising this right or use the due diligence process as a pretext to discriminate between customers.

Each case must be treated on its own merits.

In this particular case, the Bank did not use excessive bureaucracy and did not use the due diligence process to discriminate or to serve as a pretext not to open the account. In fact, it tried to do a simple due diligence process which is in line with anti-money laundering regulations.

The complainant refused to comply, and the stubbornness shown towards the Bank in his emails could not guarantee a smooth business relationship between the Bank and the customer.

Furthermore, the Arbiter is not convinced that the complainant wanted to open a genuine personal basic payments account because his application to open such an account only surfaced when he was made aware by the Bank that his application to open '*a basic payment account for his company*' was not covered by the PAD. In his attempt to open an account for his company, he had stated that he never needed a personal banking account and, in fact, he never had one.

In the opinion of the Arbiter, the Bank acted within its legal rights and obligations to carry out a proper due diligence of the complainant who refused to comply.

In the context of the circumstances of the case, the Arbiter cannot entertain the complaint and is rejecting it.

Since the Arbiter has also rejected the preliminary pleas raised by the Bank, each party is to bear its own costs.

**Dr Reno Borg
Arbiter for Financial Services**