



QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-25 ta' Frar, 2026

Appell Inferjuri Numru 21/2025 LM

Diane Flaye (K.I. Ingliza Nru. 4424301206)
(l-appellata')

vs.

OpenPayd Financial Services Malta Ltd (C 75580)
(l-appellanta')

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mill-intimata **OpenPayd Financial Services Malta Ltd (C 75580)** [minn issa 'l quddiem 'l-appellanta'], mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'], mogħtija fit-28 ta' Frar, 2025, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha

iddeċieda l-ilment tar-rikorrenti **Diane Flaye (K.I. Ingliza Nru. 4424301206)**

[minn issa 'l quddiem 'l-appellata'], billi ddikjara kif ġej;

“Decision

For the reasons stated, the Arbiter considers the Complaint to be fair, equitable, and reasonable in the particular circumstances and substantive merits of the case and is accepting it in so far as it is compatible with this decision.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter accordingly orders OpenPayd Financial Services Malta Limited to pay to the Complainant the sum of GBP 23,300 (twenty-three thousand, three hundred pounds Sterling).

With interest at the rate of 4.5% p.a. (fn. nru. 77: Equivalent to the current Bank of England Bank Rate) from the date of this decision till the date of payment. (fn. nru. 78: It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision).

The costs of these proceedings are to be borne by the Service Provider.”

Fatti

2. Ir-rikorrenti tallega li sfat vittma ta' frodi meta kienet vittma ta' frodi u *scammers* li ppersegwitawha bl-użu ta' messaġġi u telefonati qarrieqa sabiex tinvesti flusha fi *cryptocurrency* ma' *Hudson Trust*, u sostniet li hija wettqet tliet trasferimenti ammontanti għal GBP £23,300 mill-bank tagħha fir-Renju Unit 'Wise', permezz ta' *virtual IBAN* li kien amministrat mis-socjetà intimata, bir-riżultat li hija tilfet dawn il-flus.

Mertu

3. Permezz tar-rikors tagħha, ir-rikorrenti qalet li s-socjetà intimata kellha tipprovdi sigurtà aktar rigida sabiex adulti vulnerabbli bħalha jkunu protetti minn

atti frawdolenti, speċjalment fil-kuntest ta' mezzi teknoloġiċi li mhux dejjem ikunu faċli sabiex jinftiehem. Spjegat li hija kienet mħajira tiftaħ kontijiet ma' diversi banek, u l-frodista 'scammer' kellu aċċess għall-*mobile phone* tagħha, u kien saħansitra fetħilha kontijiet bankarji f'isimha. Hija kienet konvinta li dan kollu kien sigur, hekk kif il-kontijiet kienu nfetħu f'isimha stess. Kompliet tgħid li kienet mexxiet flusha minn *Natwest Bank* għal *Chase Bank*, u wara għal *Wise (UK)*, u imbagħad għal ġewwa kont f'isimha mas-soċjetà intimata. Jirriżulta li wara dan hija tilfet flusha. Tgħid li s-soċjetà intimata naqset milli tipproteġiha, u konsegwentement talbet lis-soċjetà intimata tirrifondilha l-flus kollha li kienet tilfet.

4. Is-soċjetà intimata sostniet li r-rikorrenti ma kienitx klijenta tagħha, u li ma kien hemm l-ebda relazzjoni legali jew kuntrattwali bejniethom, jew saħansitra bejn l-intimata u l-frodista. Qalet li r-rikorrenti ma kienitx fehmet is-servizzi offruti mis-soċjetà intimata, u insistiet li hija ma kienitx xi bank jew *Cryptoasset Exchange*, iżda kienet tipprovdi servizzi ta' pagamenti (*payment services*) lill-klijenti *corporate* tagħha sabiex tassistihom fir-rikonċiljazzjoni tal-pagamenti tagħhom. Fir-rigward tal-każ odjern, l-intimata tgħid li l-klijenti tagħha kienu *Octo Liquidity OU ('SWAPS')* u *GLOBUS SOLUTIONS SPÓŁKA Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ ('Roobic')*, li huma *cryptocurrency exchanges*. Qalet ukoll li l-flus kienu għaddew mingħandha bħala *payment service provider (PSP)* għal dawn il-klijenti tagħha, u ma' liema ir-rikorrenti kienet daħlet f'kuntratt sabiex tixtri *cryptocurrency*. Konsegwentement l-intimata eċċepiet li r-rikorrenti ma kienitx klijent eligibbli f'għajnejn il-liġi Maltija, u sostniet għalhekk li l-Arbitru ma kellux l-ġurisdizzjoni meħtieġa sabiex jiddetermina din il-kwistjoni li ngabet quddiemu.

Id-Deciżjoni Appellata

5. L-Arbitru, fid-deciżjoni tiegħu tat-28 ta' Frar, 2025, iddeċieda billi laqa' it-talba għall-kumpens, u dan wara li għamel is-segweni konsiderazzjonijiet:

"Preliminary

Competence of the Arbiter

In their reply of 23 August 2024, OPFS raised the plea of the Arbiter's competence to hear the merits of this case.

The Arbiter, after gathering both views on the preliminary plea that challenged his competence, issued a decree on 18 October 2024 (fn. nru.8: P. 97 – 103) whereby he dismissed the preliminary plea and ruled that the Complainant was deemed an eligible customer as defined in Article 2 of CAP 555. As a result, the proceedings continued to hear the Complaint on its merits.

The following table provides an extract from the decree of 18 October 2024:

"Extract from the decree of 18 October 2024

...

The hearing

At the hearing of 14 October 2024, the Arbiter invited the Service Provider to explain the rationale of their preliminary plea given the fact that in terms of WISE letter (fn. nru. 9: P.14 – 17) attached to the Complaint, all the 3 payments complained of were showing the Complainant as the beneficiary not just as the transferor.

Ms Lara Barbuto, on behalf of the Service Provider, explained:

"The Arbiter states that when the service provider received the three transfers, in the letter from Wise (which is a licensed bank in the UK), they give a table on page 1 of the first payment of 16 November (£1,000), 30 November (£18,800) and 12 December (£3,500). They list their beneficiary which is not the company that the service provider mentioned. They say that the beneficiary is [the Complainant].

Yes, because it is the way the model operates from OpenPayd's perspective. OpenPayd is a provider of virtual IBANs. We are not a bank,

so we do not provide bank accounts. We are a payment service provider which acts as a link between our corporate customers and our banking providers themselves. So, we are not in any way a bank ourselves. So, this is not a bank account.

Now, the way this model operates is Octo Liquidity is given a payment account and under that payment account, they can issue virtual IBANs which are linked virtual IBANs in their customers' own names basically. [The Complainant], when she came to make a transfer automatically Octo Liquidity would have issued a linked virtual IBAN in the name of [the Complainant].

However, this is not a bank account. There are no funds in this account. The funds go in immediately and are held within Octo Liquidity's main account. So, it is not a payment account in any way.” (fn. nru. 10: P. 93 – 94).

In her reply, the daughter of the Complainant, who is representing her, stated that in this process, her mum being a vulnerable old age person, was under total control of the fraudster but that her mum knew that the funds were being transferred to OpenPayd and to SWAPS because she found handwritten notes in her mum's record as, for example, p. 75 attached to her Complaint.

When asked by the Arbiter if the Complainant knew that the money was being sent to SWAPS via OpenPayd, the representative replied:

“I say possibly not in that order, but she knew that there were these names of these companies being mentioned along the way.” (fn. nru. 11: P.96).

Decision re Preliminary Plea

The Arbiter is obliged to give a decision regarding whether he has competence to hear this case before proceeding to hear evidence on its merits.

Having heard the parties and seen all the documents and submissions made, the Arbiter proceeds to decide on the preliminary plea raised by the Service Provider that Complainant is not an eligible customer in terms of Chapter 555 and, consequently, the Arbiter has no competence to adjudge this Complaint.

The transfers complained of show as beneficiary the Complainant and without any reference to any third-party beneficiaries. Nowhere in the transfer payment is there any reference to the Merchant to whose account the Service Provider is claiming to have credited the funds.

On the contrary, the beneficiary is indicated clearly as being the remitter herself.

In the circumstances, the Arbiter cannot accept that the Complainant:

“never sought the provision of a financial service from OPFS.”

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.**” (fn. nru. 12: Article 11(1)(a)).

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.**” (fn. nru. 13: Emphasis added by Arbiter).

Decision

Considering the above and having reviewed the circumstances of the case in question, the Arbiter cannot accept the Service Provider’s pretension that the Complainant never sought a service from them. The fact that the transfers

were showing the Complainant as the beneficiary, *prima facie* implies she was seeking a service from the Service Provider.

This is irrespective of whether the Complainant was also a customer of the Merchant, being a customer of OPFS, which will be considered further when proceeding with hearings on the merits of the case.

Accordingly, the Complainant is deemed to be an “eligible customer” in terms of Article 2 of the Act.

Therefore, the Arbiter has the necessary competence to deal with the merits of this Complaint.

...”.

Further support to “eligible customer” status emerging from proceedings on merits

The Arbiter would, furthermore, like to add in this decision that the evidence produced and information emerging during the proceedings of this case gives further credence and support to the position that the Complainant qualifies as an “eligible customer” for the purposes of Cap. 555. (fn. nru. 14: Other explanations about the operation of the virtual IBAN’s are outlined and quoted later on in this decision in the section dealing with the merits of the case.).

Whilst there may be no legal obligation to conduct customer due diligence by OpenPayd on the merchant’s clients’ (as may have been outlined in the legal opinion prepared to OPFS referred to in its reply), (fn. nru. 15: P.85) such aspect, however, relates purely to obligations relating to anti-money laundering and countering the financing of terrorism. (fn. nru. 16: Even if such legal opinion specifically covered virtual IBANs (which is not evident as no copy was presented), in any case, the aspect of anti-money laundering checks for virtual IBANs is not such a clear-cut matter either as emerging from the EBA Report on Virtual IBANs – EBA/REP/2024/08 – May 2024 (E.g. Sections 3.3/ 3.4 and para.47 / 48 of the said report)).

The point raised that OpenPayd was not required to undertake due diligence on the clients of its merchants for AML purposes should not, however, be taken to mean that in the context of virtual IBANs, such underlying clients are automatically excluded from being an ‘eligible customer’ for the purposes of Cap. 555. The latter is a distinct matter that merits to be considered in its own right.

The Arbiter further points out that it cannot also be ignored or discounted that the Complainant was intrinsically deemed as a customer of OpenPayd even by the payment service provider of the Complainant, WISE UK, as clearly emerging in the

final response that WISE sent to the complaint made by the Complainant with WISE. In its reply of 1 March 2024, WISE replied:

'Our Investigation

*From my investigation, I found that you have fallen victim to an impersonation scam. Having read your report, I understand that a financial advisor helped **open another bank account with Openpayd on your behalf** and the funds you lost to the scam **were sent to this account on your name**. To support the transfers, the funds were transferred from your external bank account to Wise and then to Openpayd which were created by the scammer.*

*Transfers **sent to your Openpayd account***

*Once a transfer is sent out to the recipient bank, the funds are no longer under Wise's control. **For the purpose of these transfers the recipient is a customer of the recipient bank ...***

*... Once we were made aware of **the recipient bank account created on your name** possibly being used for scam purposes'. (fn. nru. 17: P. 14 & 15 – Emphasis added by the Arbitrator).*

Whilst OpenPayd is not a bank, and such references were incorrect, it is clear, however, that WISE considered the transfers to be made to the Complainant as a customer of another payment service provider, OpenPayd.

It is also noted that the reply issued by WISE indicated the Complainant as being the 'Beneficiary' for all of the three disputed transfers. The 'Purpose chosen' for the transfer was to 'Yourself' for the largest payment of GBP 18,800 of 30 November 2023. (fn. nru. 18: P. 16). The 'GBP statement' issued by WISE for the period up to 4 December 2023, also indicated the transfer outs (of GBP 1,000 and GBP 18,800) as 'Sent money to [name of the Complainant]'. (fn. nru. 19: P. 60).

The 'screenshots of payments received from the Complainant's WISE account as seen on the portal of [OpenPayd's] banking partner (Clearbank) through which the transactions were received and processed', as presented by the Service Provider in its final submissions, additionally indicate the 'Beneficiary Account' being in the name of the Complainant, the same as for the 'Remitting Account'. (fn. nru. 20: P. 170).

Whilst there was no payment account in the name of the Complainant with OpenPayd (as explained by OpenPayd's representative during the hearing of 14 October 2024), the payment account was given to Octo Liquidity who was given the facility by

OpenPayd to issue virtual IBANs within OpenPayd's payments infrastructure with the resulting consequences. During the said sitting it was inter alia explained that:

'OpenPayd is a provider of virtual IBANs ... Octo Liquidity is given a payment account and under that payment account, they can issue virtual IBANs which are linked virtual IBANs in their customers' own names basically ... I say, there will be a named virtual IBAN which is not a payment account in the name of [the Complainant] but it is under the whole account of Octo Liquidity'. (Fn. nru. 21: P. 94).

In the sworn declaration of 18 November 2024, the Director and Compliance Officer of OpenPayd further explained the operation of virtual IBANs as follows:

'(4) As detailed in our reply to the Complainant, OpenPayd provides services to and only has a contractual relationship with corporates. In this case, OpenPayd provides SWAPS with an e-money account that can be used by SWAPS to receive and make payments from third parties (such as the Complainant) in return for the purchase or sale of crypto-assets.

(5) OpenPayd enable corporate customers like SWAPS to have an e-money account with a virtual IBAN ("vIBAN") attached to them. The e-money account shall, for the purposes of this declaration, be referred to as Merchant E-Money Account. The use of vIBANs has expanded rapidly in recent years and are often used by corporate entities to automate payment reconciliation or to facilitate the tracking of incoming payments.

(6) In simple terms, an IBAN (fn. nru. 22: Definition of IBAN in the SEPA Regulation (EU) No. 260/2023 which establishes technical and business requirements for credit transfers and direct debits in euro and amending Regulations (EC) no. 924/2009.) is an international payment account number identifier which identifies an individual payment account. Therefore there is one physical account linked to an IBAN. In contrast to a traditional IBAN, virtual IBAN's are not directly linked to a single bank account, but rather any number of virtual IBANs (sub-IBANs) can be issued. The vIBAN system directs incoming payments to one designated 'master' IBAN and corresponding bank account. OpenPayd maintains a physical bank account and associated IBAN through its banking partner. This account is dedicated to safeguarding client funds. The banking partner not only manages the origination of this account but also authorises OpenPayd to allocate vIBANs linked to it.

(7) SWAPS (and [many] other corporate customers of OpenPayd) have one Merchant E-money Account with one unique “master” vIBAN and with multiple “linked” vIBANs which are allocated to SWAPS end customers. One important aspect to consider is that virtual IBAN’s look identical to IBAN codes but do not have the capacity to hold any actual balance; they are only used to re-route incoming payments to a regular IBAN linked to a physical bank account. All payments made towards a vIBAN are credited directly to the physical bank account – in this case – OpenPayd’s safeguarding account ...’. (fn. nru. 23: P.111 – 112).

Although the Complainant did not herself have a payment account with OpenPayd, she was ultimately allocated a sub-account or a linked account within OpenPayd’s systems and payments infrastructure.

OpenPayd's contestation that no consumer relationship existed rather corroborates (and needs to be seen and considered also in the context of), the risks and challenges of virtual IBANs as highlighted by the European Banking Authority (“EBA”). Various matters raised by the EBA in its ‘Report on Virtual IBANs’ of May 2024 - EBA/Rep/2024/08 (“the EBA Report”) (which shall be considered in detail later in this decision), are indeed relevant to the considerations in question. (fn. nru. 24: European Banking Authority (EBA) Report on Virtual IBANs – EBA/REP/2024/08 – May 2024 <https://www.eba.europa.eu/sites/default/files/2024-05/612f03de-965a-4157-b638-1b4c5b081f87/EBA%20Report%20on%20virtual%20IBANs.pdf> virtual IBANs).

At this stage, it is to be pointed out that the divergent interpretations and lack of clarity involving virtual IBANs (“vIBANs”) and ensuing consumer relationships was inter alia itself highlighted in the EBA Report on Virtual IBANs. The EBA even suggested clarifying the definition of a ‘payment account’ in the Payment Services Directive (fn. nru. 25: Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.) (“PSD2”) to clearly capture vIBANs to mitigate such risks. For example, the EBA Report outlined inter alia that:

“70. If the vIBAN is deemed as an identifier of the master account to which it is linked, as explained in paragraph 12 above, then where the end users of the vIBANs are not the holder of the master account, the master account cannot be deemed as the payment account of those end users, since it is held in the name of another person. This is because PSD2 defines a payment account as

‘an account held in the name of one or more payment service users which is used for the execution of payment transactions’ (Article 4 (12) of PSD2).

71. In such cases, a risk arises that those end users may not have a payment account, within the meaning of PSD2, and therefore they may not benefit from all the safeguards and rights in PSD2 associated with having a payment account (including in terms of disclosure requirements, application of strong customer authentication and access by account information and payment initiation service providers to payment accounts).

72. Where the end users of the vIBANs do not have a payment account, this also has ramifications about the legal qualification of the payment services provided by the respective PSPs to the end users (e.g. as money remittance vs credit transfers). In this regard, while money remittance implies that no payment account is created in the name of the payer, a credit transfer implies that funds are transferred from the payer’s payment account. This creates a risk of divergent interpretations across NCAs about the qualification of the payment services provided by the PSPs offering the vIBANs to the end users, in the specific case mentioned above, which can lead to an unlevel playing field and regulatory arbitrage issues.

73. The risk could be mitigated by the PSD2 clarifying the definition of a ‘payment account’ and in particular whether users of vIBANs that are not the holder of the master account holder, such as in Use Cases 2 and 3 above, are considered to have a payment account within the meaning of PSD2.”

The points raised further support the basis and justification for the consideration of a consumer relationship de facto existing between the Complainant and OpenPayd, as ultimately seen and understood not just by the Complainant herself, (fn. nru. 26: The Complainant’s impression that she was the beneficiary of the account with OpenPayd further emerges in the call log produced by the Complainant as attached to her email to the OAFS of 20 December 2024 (P. 137, 143, 144 & 146 refer).) but even by WISE UK as the Complainant’s payment service provider.

In the circumstances, the Arbiter considers that the required criteria applicable to an ‘eligible customer’ for the purposes of Cap. 555 as defined in Article 2 of the Act are, in substance and essence, deemed to be satisfied in the Complainant’s case in the context of virtual IBANs and the manner how this operated in practice.

The argument that the Complainant is not an ‘eligible customer’ just because she did not have a payment account herself but only allocated a virtual IBAN is not deemed justified in the circumstances considering that the payment orders identified her as

the beneficiary and also the debates on the risks and challenges of this area and also the spirit of the law.

The provision of virtual IBANs is ultimately a relatively novel and particular financial service offered by OpenPayd for which it is ultimately responsible.

The Arbiter would like to add that he has seen and decided other cases in favour of the Service Provider, which may initially look similar but are quite distinct from the case in question. (fn. nru. 27: Example: ASF 70/2024 - <https://financiararbiter.org.mt/sites/default/files/oafs/decisions/1842/ASF%20070-2024%20-%20ZJ%20vs%20OpenPayd%20Financial%20Services%20Malta%20Limited.pdf> ASF 112/2024 - <https://financiararbiter.org.mt/sites/default/files/oafs/decisions/2037/ASF%20112-2024%20-%20CA%20vs%20Openpayd%20Financial%20Services%20Malta%20Limited.pdf> ASF 135/2024 - <https://financiararbiter.org.mt/sites/default/files/oafs/decisions/2122/ASF%20135-2024%20-%20HC%20vs%20Openpayd%20Financial%20Services%20Malta%20Limited.pdf>. ASF 206/2024 (not yet uploaded on OAFS's website).).

All other cases (where the Arbiter accepted the Service Provider's plea about his competence, given the complainant was not deemed an eligible customer for the purposes of the Act) involved material differences to the case under consideration as pointed out. In those other cases, either the issue of the virtual IBANs did not transpire (in the way it has emerged in the Complainant's case); and/or the third-party corporate client of OPFS had been clearly and solely named as the beneficiary in the payment order (contrary to the Complainant's case where she was the only beneficiary featured in the payment order) and also in such other cases there was clear evidence that the remitter had clear and ample knowledge that the funds were being transferred to the corporate client of OPFS and not to a payment account in their name. In such other cases, the complainant was furthermore never as vulnerable as the Complainant.

The Merits of the Case

The Arbiter will decide the Complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. (fn. nru. 28: Cap. 555, Art. 19(3)(b)).

The Arbiter is considering all pleas raised by OpenPayd relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555 (fn. nru. 29: Art.19 (3)(d)) which stipulates that he should deal with complaints in 'an economical and expeditious manner'.

Asserted scam

The Arbiter has no reason to doubt the veracity of the Complainant's claims and is satisfied that there are no reasonable doubts on this aspect. Even on the balance of probabilities, there is sufficient comfort that the Complainant had fallen victim to a scam.

Consideration has, in this regard, been given to various factors including: the particular circumstances of this case; the nature and credibility of the events as outlined in the Complaint and the testimony and the evidence produced; the call logs with the scammer; (fn. nru. 30: P. 21 – 28 & 42 – 49) the activities of Octo Liquidity OU (trading under the name SWAPS in Estonia), which involved cryptocurrency (and with Octo seemingly no longer remaining a customer of OpenPayd); (fn. nru. 31: P. 84) the apparent lack of regulatory status of Octo Liquidity OU ('Octo') which did not feature as a supervised entity on the website of Finantsinspeksioon (the financial services regulator in Estonia) (fn. nru. 32: <https://www.fi.ee/en/supervised-entities?closed=1&keys=Octo%20Liquidity>) despite the statement on Octo's website that "Swaps is a fully regulated business. We are registered in Estonia"; (fn. nru. 33: <https://help.swaps.app/en/articles/5206942-is-swaps-a-regulated-business>) copies of exchanges with SWAPS; (fn. nru. 34: E.g. P. 52 - 53; 55 - 56 amongst others) and official payment statements produced. (fn. nru. 35: P. 60 – 74).

Other hearings

At the hearing of 4 November 2024, EE confirmed that her mother (Complainant) has:

"... MS and this has significantly affected her mental health because she has lost all her money in this scam and is facing having to move out of her home. So, every time that all of this is discussed, she spirals into a severe depression." (fn. nru. 36: P. 104).

EE also stated she has no further proof to present other than what is filed in the Complaint and what she had stated in the first hearing of 14 October 2024, namely:

"I think by the time this had all happened, my mum was completely above any form of making any decisions or knowing what was happening because she was being controlled by this person who was the scammer, and she was telling her to make these transactions. She was showing mum what to do. She was giving her scripted messages of what to say when she was ringing up banks, persuading them to allow her to make these transactions, overriding scam warnings. She told her, 'This happens all the time. Trust me.

I'm here to help you. We're going to make money'. And she was constantly spinning this yarn in her ear.

The Arbiter states that in my narrative, it seems that she knew to whom she was transferring the money, to somebody trading under the name of SWAPS.

I say only in the sense that she'd initially sought some help for investing in what she felt was an appropriate thing to do to invest in cryptocurrency. So, the whole start of this process was that she had seen a local presenter who is supposed to be a money expert suggesting that people invest in cryptocurrency. That in itself had been a scam that she had seen.

The Arbiter is referring to part of (the Complainant's) complaint (p. 9) which says:

"She told me that she was going home for Christmas to Poland to meet her Mum and Dad and 3 sisters and said it would be advisable to put the money into the hands of "SWAPS".

So, when making these transfers, she was aware that this money was intended to be sent to SWAPS.

I say, she did but she did not understand what SWAPS meant.

She was totally under the control of the fraudster.

She did know about SWAPS before transferring the money.

Asked whether she knew about OpenPayd at that time, I say she's written some notes down about OpenPayd because she's written account numbers saying that she's a beneficiary, but to a layman a person being called a beneficiary versus an account holder, she doesn't understand the difference between those. She just was writing down what she thought was her account number. So, she has written about OpenPayd in her notes at the time when she was speaking to the scammer.

It is said so she knew that the money was being sent to SWAPS via OpenPayd.

I say possibly not in that order, but she knew that there were these names of these companies being mentioned along the way." (fn. nru. 37: P. 95 – 96).

Upon cross-examination during the second hearing of 4 November 2024, EE continued:

“It is being said that in the complaint, I started by saying that my mother was a victim of a scam.

Asked whether it is correct to say that my mother found Hudson Trust herself online and that she had contacted them herself showing an interest in cryptocurrency, I say that that is correct to the point that she had fallen for a scam of a local money saving expert in the UK called Martin Lewis who ‘supposedly’ advised people to invest in cryptocurrency. And that, in itself, had been a scam.

But the way that my mother’s health was at the time, led her to panic about the money that she had left in her bank, and she wanted to try and do something about it. She had always gone to her brother for financial advice before and the brother she used to go to passed away a few years ago. So, she did not have that person anymore. She lives on her own and she has always been fiercely independent and has very rarely wanted to ask me for advice because she’d seen that as a weakness.

And, so, she did all of this because she wanted to try and make some more money from the money that she had left. And as there were a lot of people around her dying, and she did not want to end up with no money; and she was foolish in not researching and not taking advice.

It is being said that in the emails it seems that my mother first put in £200 in her account thinking that within two/three weeks she was supposedly going to make £349.

Asked why when that money was not received initially, she continued investing in this crypto without any returns and continued sending money to the same account, I say that she wouldn’t know how to check. She’s very, very poor with technology. She has never used a banking app and she often misses going to the bank branch because of her MS, and she does not get up very early in the morning. So, by the time she goes out to the bank, it is closing time.

She just believed what she was being told and she did ask but was not sent any information. She was being fobbed up all the time saying that she will get her return and she would get the money and my mum trusted this person. She’s got a very trusting nature, and this person has essentially groomed mum into building up that trust.

It is being said that in the emails there were a number of authentication passwords and verification documents which were asked for. Asked whether my mother would share all these codes with the financial advisor; if the merchant would send a code to verify whether she would share all this with the alleged financial advisor, I say that no, she wouldn't know how to.

So, they made her download Anydesk app which allows the scammers access to mum's phone, as all this was done in the background, without mum knowing what was going on. Mum does not know the difference between Whatsapp and a text message. There is no way that she would be able to send and do that. So, there are emails that I found going through mum's phone, so I sent them in terms of timelines and all the things that have been going on in the background because it has been such a complex web of transactions.

It is being said that when we complained to WISE, they said that they sent a transaction report (on page 16 of the complaint) where they confirmed that the payment instructions came from the details that they had pertaining to my mother, and they said that there was a scam warning which she ignored.

Asked whether I know anything about this, I say she raised this quite a few times with the scammer and she was always reassured that this was a common thing that happens. You just need to override it.

Asked whether she told the scammers about this warning, I say, yes. It is written in the call log, and you can see that she said, 'They are warning me,' and the scammers had reassured her that 'It happens all the time. We can sort this. We can do this. We are so close now. Your investments are growing. We just need to get on and do this.' Those sorts of things." (fn. nru. 38: P. 105 – 106).

...

"It is being said that on the transaction that my mother made she indicated that the funds were going to herself.

I say that she didn't make those transactions; she wouldn't know. All she's done is being the person who has been in the background, so she did not choose to make them. She did not even set up the bank details or the account details with OpenPayd as a beneficiary. She was given them, and this is proven in the call log. The scammer has given mom those details of her account – name and details.

So, mum did not set them up; the scammers had done it.

It is being said that OpenPayd is not a bank and does not hold the money and that the IBAN number was the merchants', of Octo Liquidity and Roobic.

I say that this does not make any difference to a layman person who thinks that they are investing in something. Even I wouldn't know or understood this.

What you've got to try to understand is that, ultimately, you've got a vulnerable person who is just trusting what is being told to her. And if it has been explained by the scammer that it's going to this bank next and to this bank, that was how it was explained.

I say my mum has not chosen OpenPayd, she has not chosen Swaps. She has not chosen anything; the only thing she chose was Hudson Trust and that was due to her naivety.

It is being said that the bank numbers (the bank IBAN or code) were given to her by the person who was communicating with her, by the financial advisor.

I say, yes." (fn. nru. 39: P. 107).

Following this hearing, the Service Provider presented a Sworn Declaration (fn. nru. 40: P. 111 – 126) explaining why and how the funds remitted by Complainant were credited to the account of their corporate clients Octoliquidity OU (trading as SWAPS) and Globus Solutions OO (trading as ROOBIC) even though the beneficiary of the payment orders received from WISE reportedly showed as beneficiary the Complainant herself, without any mention of the concerned corporate clients of OPFS.

This in accordance with the system referred to as virtual-IBANs, which is not covered by specific regulation. (fn. nru. 41: In May 2024, the European Banking Authority has issued a Report reference EBA/Rep/2024/08 REPORT ON VIRTUAL IBANs where it inter alia highlighted certain risks applicable to virtual IBANs such as 'risks that consumers may be misled to think they are paying to an account held in one country (e.g. their own country), which may give more comfort to the consumer, when in fact the funds are transferred to a master account in a different country' (page 26 of the Report).).

At the hearing of 3 December 2024, the Service Provider represented by Andre Schembri submitted:

“I say basically what happens is this. SWAPS was our client and any kind of merchant can be our client. We set up an account for them and, depending where they want to operate, we can give them links, IBAN or else an account wallet.

But let us stick to this one. If an individual wants to make use of the services of SWAPS, the first thing they would do will start a customer relationship with them. And that would involve the client going to the individual customer and going to the websites. And through there, they open an account with SWAPS and that would entail the customer providing certain details which may vary from merchant to merchant but, let’s say, it would be name, surname, address, ID, some form of verification to SWAPS.

Then, from their end, SWAPS can, since they were a customer of OpenPayd, relay certain information to the OpenPayd system in order to create what we call a linked vIBAN. The linked vIBAN is associated with the details provided by SWAPS. So, if SWAPS say, ‘Listen, please create a vIBAN with the name of XYZ,’ the OpenPayd system can create that vIBAN.

The purpose of the linked vIBAN is to facilitate the payment for the end customer to SWAPS via bank transfer. So, then, if the customer wants to proceed and invest some of his/her money with SWAPS, what would happen is that the customer would go to their banking portal, whichever bank that may be, HSBC, Barclays, whatever (in this case it was WISE), and there instruct a transfer from their account to the linked vIBAN that SWAPS provides to the individual customer.

The customer would input the details and their banking portal, whichever bank they operate with, and they would instruct the transfer. Once the transfer gets executed from their bank, goes through the payment scheme and hits the OpenPayd system, the OpenPayd system knows that the link with the virtual IBAN is linked to SWAPS and automatically that money is transferred as rerouted to the main account of SWAPS.

So, that is the way the money flows.

If the client, the customer, wants to invest, let’s say, in cryptocurrency, then it is up to SWAPS to make the movement to the cryptocurrency exchange and buy the cryptocurrency.” (fn. nru. 42: P.128).

Following this explanation and other subsequent explanations during the said hearing of 3 December 2024, the Arbiter remarked:

“The Arbiter states that the client (fn. nru. 43: In this context client refers to the corporate clients of OPFS) is not part of this complaint. This complaint is between [the Complainant] and OpenPayd. So, [the Complainant] is asking: ‘I sent money to myself with you,’ and instead of saying, ‘(Complainant), you do not have an account with me. I’m going to send this money back,’ OpenPayd just took the liberty to put the account, the funds, in the name of a third party who’s not mentioned in any way in the transfer.

That is what the Arbiter understands.” (fn. nru. 44: P. 130).

The Arbiter insisted on having information from the Service Provider whether in the payment orders received from WISE there was any reference to their corporate clients to whom they credited the transfers, which had shown the Complainant as the beneficiary.

The Arbiter further stated:

“I need to understand what instructions were sent by WISE to OpenPayd. I have the letter of WISE and that is the only letter that I have.

OpenPayd have shown in their submissions a lot of documentation which is generated internally which obviously pick up the vIBAN number and generates that. But I want to understand exactly what information was received from WISE.

The Arbiter requests [EE] to send the Call Log again in its entirety to the secretary for distribution to the parties concerned.

The Arbiter requests Mr Andre Schembri to confirm exactly what they received from WISE (not how it was processed internally).

WISE, in their communication for the payment, apart from giving the IBAN number, they made reference to a name. The Arbiter wants to know who the beneficiary is because, ultimately, he is relying on a WISE letter, but he wants to see exactly what they sent to ensure it corresponds to what they are saying.

The Arbiter states that the whole issue is who was the beneficiary of that transfer and whether OpenPayd were correct in ignoring that beneficiary and putting it into a third-party name with whom the beneficiary might have had an account.

The Arbiter wants to know what instructions OpenPayd received from WISE.

The Arbiter requests from the complainant the document – Call Log – she referred to earlier.

The Arbiter requests from the service provider evidence of the instructions received from WISE showing who was the beneficiary of this transfer.” (fn. nru. 45: P. 135).

Final submissions

Preceding her final submissions, (fn. nru. 46: P. 158 – 159) EE submitted (as requested by the Arbiter) eighteen pages of call logs between her mother and the fraudsters (fn. nru. 47: P. 137 – 155) making particular reference to instructions from fraudsters mentioning OPFS, namely:

“09/11/2023 at 12:51:11

Beneficiary Name: [the Complainant]

Account number: xxxxx895

Sort code: xxx679

Bank name: Openpayd Financial Services LTD

Bank Address: 133 Houndsditch, London EC3A 7BX, United Kingdom

Reference ID: 44a07a68.” (fn. nru. 48: P. 143 – 144).

Same information was repeated on 09/11/2023 at 17:04:03 (fn. nru. 49: P. 144) and on 15/11/2023 at 13:21:38. (fn. nru. 50: P. 146).

Consequently, the Complainant argued that the Service Provider had no right to credit the funds transferred to an account in the name of the Complainant with a third party who is not named in the transfer order. She stated:

“Misleading Transfer Details: The transaction details and account information presented to (the Complainant) during the transfer process appeared legitimate. It looked like the money was going to OpenPayd account and would be credited to her own account. SWAPS is not mentioned at all. As no Openpayd account existed, the funds should have been returned.” (fn. nru. 51: P. 159 – Emphasis added by the Arbiter).

In their final submissions, (fn. nru. 52: P. 162 – 170) OPFS, while re-explaining their business model and how vIBANS operate, claimed that they have no obligation to match the beneficiary named in the transfer to the vIBAN account holder quoting

article 88 of PSD2 Directive (reproduced in Central Bank of Malta (CBM) Directive 1 Section 3 Liability – 63 [1]) which states:

“if a payment order is executed in accordance with the unique identifier, the payment order shall be deemed to have been executed correctly with regard to the payee specified by the unique identifier.” (fn. nru. 53: P. 165).

The Arbiter has given specific authority for the argument regarding regulatory authority to credit funds to a beneficiary account not named in transfer to be treated in the final submissions. (fn. nru. 54: P. 132; 133; 135; 156). Therefore, the Arbiter will consider these arguments, which were made in the final submissions, in his next analysis which will lead to the decision.

Analysis and consideration

In terms of Article 19(3)(b) of CAP. 555 of the Laws of Malta, the Arbiter shall determine and adjudge a complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.

In the proceedings, it has emerged clearly that the Complainant was unquestionably a vulnerable, old person who was being aggressively manipulated by fraudsters. The latter carefully cultivated her trust to the point of extracting her authority for total control of her communications with banks whereby her funds were transferred between UK banks (fn. nru. 55: From Natwest to Chase and then to Wise - p. 60 – 74) until they were transferred by Chase to an account in the Complainant’s name with WISE in UK through four transfers dated 15, 21, 29 November 2023 and 12 December 2023. (fn. nru. 56: P. 69 – 71; p. 60).

For the purpose of this Complaint, what really matters is the process whereby funds were transferred from Complainant’s account with WISE and how with the intervention of OPFS these ultimately finished in the accounts of ROOBIC and SWAPS held with OPFS. From there, the funds came under full control of the fraudsters who, having clinched their reward, evaporated into thin air.

Payments between banking and payments institutions in UK are governed by an elaborate complaint handling procedure issued by the UK regulator Financial Conduct Authority (FCA) (fn. nru. 57: <https://www.handbook.fca.org.uk/handbook/DISP/INTRO/?view=chapter>) commonly referred to as DISP (Dispute Resolution). This explains how complaints unless resolved in accordance with the set procedures can be referred for resolution through the UK Financial Ombudsman (FSO).

In cases of fraud scams complaints, FSO generally protects consumers where a UK financial institution allows payments by an inexperienced investor directly to a crypto exchange. The following extract from the FSO's website, for example, refers:

'We thought the spending on Marta's account was very unusual for her and – after the first few payments – the pattern of transfers from her account should have caused the bank some concern meaning that it ought to have intervened. We thought that if the bank had asked Marta about the transactions she would have told it what she was doing. Even though the payments went to a crypto account in her own name, we felt that the bank was sufficiently aware of the common features of this kind of scam and should have warned about the risk of being scammed and the need for her to make further enquires at this point.

As Marta's circumstances had many of the hallmarks of a cryptocurrency scam and taking into account what we learnt about Marta through the course of the complaint, we thought a conversation would have made a difference and would, more likely than not, have prevented further loss.

In deciding fair compensation, we also considered if would be fair for Marta to bear any additional responsibility for what happened. However, as we thought the trading platform and correspondence with the fraudsters was very convincing, we decided against that on the facts of this case. So, we asked the bank to refund all the transactions which took place after the point we thought it should have intervened.' (fn. nru. 58: <https://www.financial-ombudsman.org.uk/decisions-case-studies/case-studies/consumer-contacts-us-complain-cryptocurrency-investment-scam>).

In the case of this particular Complaint, however, the payment was made from NATWEST to CHASE, from CHASE to WISE and then, from WISE to OPFS (using their UK address and thus offering a service in the UK).

In all these strings of payment, the beneficiary was shown to be the remitter herself with no indication that there was going to be either a change of beneficial ownership of the funds being transferred or that the funds would end up from a presumed same beneficiary account with OPFS to an account of an institution not covered by DISP which was essentially a crypto service institution like SWAPS or ROOBIC. Indeed, nowhere did it feature in the payment system that the Complainant's funds were going to be transferred to a third-party account (which third parties were in practice 'cryptocurrency exchanges'). (fn. nru. 59: In its reply of 23 August 2024, OpenPayd described 'SWAPS' and 'Roobic' as 'cryptocurrency exchanges' – P. 84).

The screenshots of payments received from the Complainant's WISE account as presented by the Service Provider indeed indicated the Complainant's name for the Beneficiary Account. (fn. nru. 60: P. 170).

There is a fair consideration that if WISE had known that the funds transferred to OPFS to credit the account of their client, the remitter (Complainant), were actually being directed to another party, (involving crypto-related transactions), rather than to her own account, then, they would have likely further warned their client and possibly even stopped from executing such transfers.

Any failure by WISE to warn their client or restrict/block the transfers would have quite probably led to a successful case being brought to the UK – FSO who, as the above-quoted example, would have in all probability found in favour of the consumer and ordered full refund.

The fact is that through their internal systems, OPFS took it upon themselves, and just proceeded to credit the funds to the remitter's account with a third party client of OPFS, which at that point in time was unbeknown to the remitter and also the Complainant's payment provider (WISE UK). (fn. nru. 61: P. 51 - 59 show that direct communication from SWAPS was received by Complainant only after the bulk of the funds remitted (GBP 18,800 out of GBP 23,300) had been directed to their account with OPFS.)

The crediting of the funds to the remitter's account of a third-party client of OPFS occurred without seemingly any specific authority from the remitter and/or without proper system warnings/adequate intervention to ensure clarity and transparency about the payment transfers involving a virtual IBAN (and not a transfer to the Complainant's own payment account).

This scenario ultimately resulted in material adverse consequences and lack of protection to the Complainant – inter alia resulting in a lack of transparency that the Complainant had no payment account with OpenPayd, and the circumvention or dilution of effective protection and redress that the Complainant would have had under the UK financial system, prejudicing her position in the process.

The Arbiter considers that innovation should not be used or result in the material detriment of a financial services consumer, even more, a vulnerable consumer as was the Complainant.

Consequently, the Arbiter considers that whilst the innovative systems of virtual IBANs, though unregulated or not specifically addressed in the regulatory framework, have certain benefits which are well explained in the EBA report earlier referred to in

this decision, this should not involve or end up denying consumers from payment protection in their home country systems and neither in enabling a system which lacks transparency and/or lack of clarity in the payment process, including in the exchanges between payment service providers.

One needs to, furthermore, stress that the Service Provider had clear regulatory obligations to onboard corporate clients after thorough due diligence of both their own status as well of the robustness of their systems not to allow their abuse by fraudsters apart from obligations to ensure that the virtual IBANs are not operated in a way to the disadvantage and detriment of the end users.

It is noted that, in its final submissions, the Service Provider referred to Articles 88(1) and 88(5) as well as Articles 45(1) and 52(2)(b) of the PSD2 in its defence. (fn. nru. 62: - Article 45(1) of PSD 2 provides that: “Member States shall ensure that the following information and conditions are provided or made available by the payment service provider to the payment service user: (a) a specification of the information or unique identifier to be provided by the payment service user in order for a payment order to be properly initiated or executed; ...”

- Article 52(2)(b) of PSD 2 provides that: “Member States shall ensure that the following information and conditions are provided to the payment service user: ... 2. on use of the payment service: (b) a specification of the information or unique identifier that has to be provided by the payment service user in order for a payment order to be properly initiated or executed; ...”

- Article 88(5) of PSD 2 provides that: “If the payment service user provides information in addition to that specified in point (a) of Article 45(1) or point (2)(b) of Article 52, the payment service provider shall be liable only for the execution of payment transactions in accordance with the unique identifier provided by the payment service user”.). The Service Provider highlighted inter alia that:

“Once again focus is placed on the fact that payment service providers may rely on the IBAN, or vIBAN linked to a master IBAN, as the unique identifier and that there is no obligation to match or to check for any discrepancy by and between the beneficiary’s name and the IBAN”. (Fn. nru. 63: P. 166).

The term ‘unique identifier’ is defined under Article 4(33) of the PSD2 as:

“means a combination of letters, numbers or symbols specified to the payment service user by the payment service provider and to be provided by the payment service user to identify unambiguously another payment service user and/or the payment account of that other payment service user for a payment transaction.”

The Arbiter has considered the defence raised by OPFS that they had no “regulatory obligation to verify whether the IBAN and the name of the payee as provided by the Complainant match”. (fn. nru. 64: *Ibid*).

The Arbiter has to decide whether what applies to normal IBANs in terms of Article 88 of PSD2 (fn. nru. 65: Directive (EU) 2015/2366 on payment services) and CBM Directive 1 also automatically applies to virtual IBANs which are not specifically covered by the said PSD2 and CBM Directive 1. (fn. nru. 66: Article 88(1) of PSD 2 provides that: “If a payment order is executed in accordance with the unique identifier, the payment order shall be deemed to have been executed correctly with regard to the payee specified by the unique identifier.”).

The Arbiter relies in his analysis on the EBA Report referred to earlier in this decision.

The very existence of such a Report clearly shows that vIBANS are not covered by what the legislator had in mind when issuing the PSD2. Yet, the Service Provider is using the existing IBAN framework to justify its actions/inactions regarding virtual IBANs.

As stated in section 3 of such Report, vIBANS represented risks and challenges that are specific and additional to normal IBANs. The Report highlights various risks and challenges arising for consumers ‘stemming from lack of transparency’, (fn. nru. 67: P. 26 of the EBA/Rep/2024/08) amongst others, as outlined in the said section 3 of the Report. (fn. nru. 68: P. 12 to 28 of the EBA/Rep/2024/08).

In particular, the Report refers to inter alia:

“risks arising for the end users of vIBANs where they are not the master account holders, and associated unlevel playing field and regulatory arbitrage issues stemming from divergent interpretation across NCAs about the qualification of the relevant payment services in such cases;” (fn. nru. 69: P. 12 of the EBA/Rep/2024/08).

“risks of vIBANs being used by non-EU financial institutions or by EU non-PSPs to provide payment services without the required authorisation;” (fn. nru. 70: P. 13 of the EBA/Rep/2024/08).

*“risks arising for consumers using vIBANs and for consumers making a payment to a vIBAN, stemming from lack of transparency;” (fn. nru. 71: *Ibid*).*

*“risks arising to users of vIBANs stemming from inappropriate disclosure about which DGS [Deposit Guarantee Scheme] protects their deposits, and risks arising to DGSs.” (fn. nru. 72: *Ibid*).*

It is noted that the EBA Report of May 2024 explains that,

“There is currently no legal definition of vIBANs at EU level, and no uniform understanding across NCAs and the industry of what vIBANs are.” (fn. nru. 73: Point 6, Page 6 of the EBA Report on vIBANs).

The said EBA Report also stated inter alia that:

“For third parties, vIBANs are typically indistinguishable from a regular IBAN. For example, where a payment is made by a payer to the user of a vIBAN, the payer’s PSP would not be able to discern that the account identifier provided is a vIBAN (instead of a regular IBAN) and will not know the master account to which the funds are transferred.” (fn. nru. 74: Point 13, Page 7 of the EBA Report on vIBANs).

The Arbiter also notes the explanation provided under section 3.6 of the EBA Report which deals with the risks for end users of vIBANs where they are not the master account holder as outlined earlier in the preliminary plea section.

The Arbiter also notes the matters raised by the EBA in section 3.11 of the Report related to risks for consumers making a payment to a vIBAN, stemming from lack of transparency, in particular:

95. In addition, vIBANs can also increase risks for consumers in case of inappropriate disclosure in the pre-contractual information, which may lead to consumers not understanding the product/service they are contracting, or in case of inappropriate disclosure in the contractual information for vIBANs.

97. vIBANs may also raise risks and challenges for consumers making a payment to a payee which uses vIBAN. These include:

- risks that consumers may be misled to think they are paying to an account held in one country (e.g. their own country), which may give more comfort to the consumer, when in fact the funds are transferred to a master account in a different country.
- challenges in the enforcement of consumer claims towards the payee, and in the prosecution of fraudulent activities, especially where the vIBAN and the IBAN of the master account have different country codes. (fn. nru. 75: P. 26 – 27 of the EBA/Rep/2024/0).

It has not emerged in this case that throughout the service of vIBANs, the Service Provider has reasonably ensured that there was transparency in the payment process and offer of the vIBAN financial service.

The Complainant as the end user of the vIBAN and her payment service provider were not aware that the Complainant had no payment account in her name with OPFS but that the transfer involved a virtual IBAN with the ensuing implications.

As explained earlier on, it clearly emerged that there was a lack of clarity, information and transparency in the use and application of the virtual IBAN. (fn. nru. 76: Even if, for argument's sake, vIBANS were covered by the same regulation provisions of IBANs, it is doubtful if the protection would apply in cases where the remitter names himself as the beneficiary while the IBAN belongs to a third party in the same way that it applies where the beneficiary is a third party who is different from the holder of the IBAN account.).

Consequently, the Arbiter does not accept the Service Provider's defence that their action to credit the funds in question to a beneficiary not named in the transfer order was adequately covered and satisfied the provisions of the PSD2 and CBM Directive 1 referred to earlier and/or reflected the general principle of transparency advocated in the PSD2 and/or ultimately reflected the legitimate and reasonable expectations of consumers.

In light of the lacunae and lack of uniform understanding, approach and transparency about virtual IBANs as clearly emerging from the EBA Report, it was even more necessary, as well as only reasonable and legitimate to expect OpenPayd to have taken appropriate action and adequately intervened in the payment process or ensured in some other way that there was clarity to the user of the vIBAN (and her payment service provider) who had indicated herself as the beneficiary in the payment order about the nature of the service and transactions.

This was in the interest and for the protection of payment service user, fraud prevention and integrity of the payment system.

The information involving the transfer of funds was ultimately misleading or incomplete and did not ensure a clear and adequate understanding by the Complainant and her payment service provider.

The Arbiter does not accept that the Service Provider has no responsibility for the damages suffered by the Complainant when it was the Service Provider who offered and enabled the vIBANs service to the third party and, also, given the way the vIBAN was applied to the Complainant's detriment as amply explained above.

This is particularly so when the named beneficiary in the transfer orders was the Payer herself as also amply described and evidenced in this decision.

By its very nature, this inter alia resulted in a reduced level of transaction monitoring protection, as provided under the PSD2 and regulations applicable in the UK financial system, on the part of the remitter's bank/payment institutions on the presumption that the transaction represented a 'me to me' payment to a licensed EU institution without any change of ultimate beneficiary when this was not the case in reality.

In this particular case, a 'me to me payment' had already happened twice when funds were transferred from Natwest to Chase and then from Chase to WISE, and there was a fair presumption on the part of WISE that the same would happen when they transferred funds to OpenPayd seemingly believing that the transfer involved another payment to the Complainant's own account when this was not truly the case."

L-Appell

6. L-appellanta ipprezentat ir-rikors tal-appell tagħha fl-20 ta' Marzu, 2025, fejn talbet lill din il-Qorti sabiex:

"jogħgobha (1) tilqa' dan l-appell u (2) tħassar is-sentenza tal-Arbitru għas-Servizzi Finanzjarji tat-28 ta' Frar 2025 bl-ispejjeż ta' dan l-appell u tal-proċeduri fl-intier tagħhom kontra l-appellata."

7. L-appellanta bdiet ir-rikors tal-appell tagħha billi tat sfond mill-ġdid tal-fatti li fil-fehma tagħha wasslu għal dawn il-proċeduri. Fost l-oħrajn, l-appellanta tenfasizza li hija qatt ma kellha relazzjoni kuntrattwali diretta jew indiretta mal-ilmentatriċi, u li qatt ma kienet irċeviet xi formola ta' applikazzjoni mingħandha. Tgħid anzi li jekk xejn, kellhom ikunu l-banek Ingliżi li kellhom ikunu konxji tal-istat vulnerabbli tal-ilmentatriċi, u mhux hi. L-appellanta qalet li hija mhijiex liċenzjata bħala bank b'kontijiet kurrenti, iżda hija liċenzjata sabiex tiffacilita pagamenti u servizzi ta' ħlas lill-kummerċjanti 'merchants', u għalhekk il-

konsumaturi tagħha huma dejjem dawn in-negozjanti kummerċjali. Tgħid li hija m'għandha l-ebda konnessjoni mal-persuna, f'dan il-każ l-ilmentatriċi, li qiegħda tinvesti ma' terzi jew li qiegħda tawtorizza l-ħlas jew it-trasferiment tal-flus tagħha minn kont bankarju għal kont ieħor. L-appellanta tgħid li minkejja dan, l-Arbitru xorta waħda ivvinta ness kummerċjali bejnha u bejn l-ilmentatriċi, minkejja li dan in-ness ma jeżistix. Tkompli tgħid li fi kliem sempliċi, l-ilmentatriċi kienet ftehmiet ma' *merchant* tagħha, f'dan il-każ magħruf bħala *SWAPS*, li ser tittrasferixxi ammont ta' flus lill-imsemmi *merchant* permezz tas-soċjetà appellanta, sabiex dawn il-flus imbagħad jiġu investiti kif trid hi. L-imsemmi *merchant* imbagħad jitlob lis-soċjetà appellanta permezz ta' sistema awtomatika sabiex jinħoloq *virtual IBAN* li jkun konness mal-kont tal-*merchant*, sabiex il-flus ittrasferiti minn konsumaturi differenti għall-istess *merchant*, jiġu mdaħħla f'dak li issejjaħ bħala *pooled account*, miżmum mis-soċjetà appellanta għall-perijodu qasir sabiex b'hekk il-*merchant* ikun jista' jwettaq eżerċizzju ta' rikonċiljazzjoni. Minn hemmhekk imbagħad il-flus jiġu sussegwentement, u fl-istess ġurnata, ittrasferiti fil-*master merchant account*. Is-soċjetà appellanta għalhekk tirritjeni li s-servizz minnha pprovdut huwa hekk ipprovdut lill-*merchants* sabiex ikun hemm titjib fl-ipproċessar tal-pagamenti tagħhom, u għal rikonċiljazzjoni faċli għal trasferimenti frekwenti. Konsegwentement tgħid li l-Arbitru messu wettaq eżami aktar profond dwar dan il-punt, u mhux jiddeciedi din il-kwistjoni fuq grad ta' *prima facie*. L-appellanta kompliet tgħid li mhuwiex minnu li l-ilmentatriċi qatt setgħet tkun meqjusa bħala '*klijent eligibbli*' tagħha, u tgħid li ġie muri li (a) l-ilmentatriċi qatt ma kienet klijenta tagħha; (b) li s-soċjetà appellanta qatt ma pprovdiet xi servizz finanzjarju lill-ilmentatriċi; u (ċ) li l-ilmentatriċi qatt ma talbet il-provvediment ta' xi servizz mingħand s-soċjetà appellanta. Tinsisti li fil-fatt tul

il-proċeduri kien ċar li l-ilmentatriċi ma kienitx taf bis-servizz tas-soċjetà appellanta, u li kien l-Arbitru li gwidaha sabiex tagħmel id-difiża tagħha. Is-soċjetà appellanta hawnhekk tgħid ukoll li l-Arbitru kien b' mod *ultra vires* għamel riferiment għal-*EBA Report on Virtual IBANs*, liema rapport tgħid li kien inħareġ wara li saru t-tranzazzjonijiet in mertu, u li jittellem dwar obbligi ta' għaqaq mistħoqq tal-klijent tal-*merchant* u r-rappurtar ai finijiet ta' *money laundering*, minkejja l-fatt li atti ta' frodi u hasil ta' flus, assolutament ma jaqawx taht il-kompetenza tal-Arbitru. Tgħid għalhekk li huwa ċar illi ma hemm l-ebda ness bejnha u bejn l-ilmentatriċi, u għalhekk l-Arbitru ma kellux kompetenza jisma' din il-kwistjoni. Tkompli tgħid ukoll li kienet l-ilmentatriċi li b'negligenza grossolana tat aċċess lil *scammers* għall-informazzjoni kollha tagħha, inklużi *passwords* u dokumenti kunfidenzjali oħra. Tgħid li hija qatt ma setgħat tkun taf jew tippreżumi li l-persuni wara t-tranzazzjoni kienu frodisti. Tgħid wkoll li l-Arbitru ħoloq regola *ad hoc*, meta qal li kien mistenni li s-soċjetà appellanta tintervjeni u twaqqaf il-proċess ta' ħlas. Dan wassal lis-soċjetà appellanta sabiex tressaq iż-żewġ aggravji tagħha. Permezz tal-ewwel aggravju tagħha, s-soċjetà appellanta tgħid li l-Arbitru applika l-liġi skorrettament meta ddecieda li l-ilmentatriċi kienet '*klijent eliġibbli*' għall-finijiet tal-artikolu 2 tal-Kap. 555 tal-Liġijiet ta' Malta. Fit-tieni aggravju tgħid li l-Arbitru kien imbagħad skorrett fid-deċiżjoni dwar l-inapplicabbiltà tal-*Payment Services Directive 2* ('PSD 2') u d-*Directive 1* maħruġa mill-Bank Ċentrali (*CMB Directive 1*) ai termini tal-Kap. 204 tal-Liġijiet ta' Malta.

8. L-appellata wiegħbet li d-deċiżjoni appellata hija ġusta u għandha tiġi kkonfermata minn din l-Qorti, u tgħid li huwa ċar li s-soċjetà appellanta kienet ipprovdiet servizz lill-appellata, u dan peress li l-appellata baqgħet tidher bħala benefiċjarja. Spjegat kif hija kienet giet imqarqa minn Hudson Trust, u kienet giet

konvinta sabiex tittrasferixxi flusha mill-bank tagħha għal kont ġdid f'isimha, mas-soċjetà appellanta. Tgħid li l-Arbitru iddeskriva b'mod ġust l-aġir tal-frodist, u tgħid li f'dak iż-żmien hija kienet emmnet li kollox kien sigur billi l-kontijiet kienu f'isimha stess. Tgħid li s-soċjetà appellanta ammettiet li l-flus kienu daħlu fil-kontijiet tagħha, u kompliet tgħid li l-Arbitru kien korrett meta sab li t-tranzazzjonijiet li dwarhom sar l-ilment kienu jindikaw isem l-appellata bħala l-benefiċjarju, u mhux ta' xi parti terzi oħra. Tgħid li ma hemm l-ebda riferiment għall-*merchant*, u cioè f'liema kont il-fornitur tas-servizz qiegħed jgħid li ġew ikkreditati dawn il-flus. Tisottometti wkoll li matul il-proċeduri, irrizulta li l-fondi trasferiti ġew ikkreditati fil-kontijiet tal-*corporate clients* tas-soċjetà appellanta, u dan minkejja li l-benefiċjarju indikata fl-irċevuti tal-ħlas mill-bank *Wise*, kienet l-appellata stess. Tgħid għalhekk li l-Arbitru kien ikkunsidra li meta l-fondi ġew trasferiti f'*sub-account* li nfetaħ mis-soċjetà appellanta għall-klijent tagħha, minflok ma rritornathom, is-soċjetà appellanta poġġiet il-flus f'isem terzi li ma kienu msemmija mkien fid-dettalji tat-trasferiment. Tgħid għalhekk li l-Arbitru kien ikkunsidra l-kwistjoni tal-'*klijent eligibbli*' b'raġunament ċar u mmotivat.

Konsiderazzjonijiet ta' din il-Qorti

L-Ewwel Aggravju:

[L-Arbitru applika l-liġi skorrettament meta ddecieda illi l-ilmentatriċi hija 'klijent eligibbli' ai termini u għall-finijiet tal-artikolu 2 tal-Kapitolu 555 tal-Liġijiet ta' Malta].

9. L-appellanta tgħid li l-Arbitru kien skorrett meta ċaħad l-eċċezzjoni tagħha u kkonferma li huwa kellu l-kompetenza jisma' l-vertenza odjerna, peress li l-

ilmentatriċi għandha titqies bħala *'klijent eligibbli'* skont l-artikolu 2 tal-Kap. 555 tal-Liġijiet ta' Malta. Tgħid ukoll li l-apprezzament tal-Arbitru kien jeħtieġ li jsir fir-rigward tat-talbiet proposti u fid-dawl tal-provi prodotti. Qalet li f'dan il-każ, l-Arbitru qagħad fuq ix-xhieda ta' bint l-ilmentatriċi, u filwaqt li tapprezza li l-għan tal-uffiċċju tal-Arbitru huwa li jħares id-drittijiet tal-konsumatur, dan m'għandux jissarraf f'obbligi iebes u unilaterali li jservu għall-protezzjoni ta' kontraent wieħed biss. Tgħid li kull deċiżjoni għandha tkun ekwibrata u ġusta għall-partijiet kollha għaliex f'dan il-każ, bl-iskuża tal-ekwità, l-Arbitru ħoloq obbligu li jmur lil hinn minn dak li tipprova il-liġi. Qalet ukoll li l-Arbitru kien ikkummenta fuq din il-kawża fi żmien meta din kienet għadha *sub judice* quddiemu. Qalet ukoll li l-Arbitru ħa dak li sejjhet *mental shortcut* sabiex jiġġustifika l-ħsieb tiegħu li peress li hemm isem l-ilmentatriċi bħala beneficijarja fid-dettalji tat-tranzazzjoni, mela allura bilfors hemm ness bejn l-ilmentatriċi u s-soċjetà appellanta. Tgħid li l-Arbitru wasal għall-konkluzjoni tiegħu mingħajr ma qies il-*modus operandi* tagħha, u l-elementi legali kruċjali. Tgħid li hija qatt ma tidhol f'relazzjoni kuntrattwali mal-klijenti tal-*merchant* tagħha, u wisq anqas ma tkun taf l-intendiment tal-konsumatur wara kull trasferiment li tirċievi. Tisottometti wkoll li l-liġi Maltija tagħti awtonomija kuntrattwali, b'dak li jrid l-artikolu 960 tal-Kodiċi Ċivili. Tgħid li fil-każ odjern, l-ilmentatriċi ma kellha l-ebda obbligu lejn il-provditur tas-servizz, u lanqas viċi-versa, għaliex ma kien hemm l-ebda relazzjoni kuntrattwali bejniethom, la diretta u lanqas indiretta. Is-soċjetà appellanta tikkontendi li l-ilmentatriċi ma tistax titqies bħala klijent eligibbli għaliex m'hemmx relazzjoni ġuridika bejnha u s-soċjetà appellanta, u ma kien hemm l-ebda servizz li ġie offrut jew mogħti. Tgħid li l-appellata għandha relazzjoni ġuridika mas-soċjetà SWAPS u mhux magħha, u l-fatt li s-soċjetà appellanta

pproċessat il-pagament u aġixxiet bħala *conduit* bejn l-appellata u SWAPS, ma jfissirx li inħoloq xi ness bejnha u l-appellata bħala konsumatur. Is-soċjetà appellanta tkompli tgħid li hija qiegħda tintuża għall-konvenjenza, għaliex SWAPS qed tinnega r-responsabbiltà tagħha, u tinsisti li l-appellata kienet responsabbli li tivverifika li l-IBAN kien korrett, u tivverifika jekk flusha kienux ser jigu investiti kif xtaqet. Is-soċjetà appellanta tagħmel riferiment ukoll għal ittra miktuba mill-bank *WISE*, u tistaqsi għaliex l-Arbitru ma kienx skartaha għal kollox peress li kienet dubjuża. Tgħid li huwa minnu li l-Arbitru huwa mogħni bil-fakultà li jaqta' l-kawzi skont l-ekwità, mingħajr il-ħtieġa tal-aqwa prova, imma tgħid li dan m'għandux jiġi interpretat bħala xi forma ta' rilassament awtomatiku tal-oneru tal-provi. Tgħid li fil-każ odjern, l-appellata kellha tipprova fuq bilanċ ta' probabbiltajiet, li l-pretensjoni tagħha hija fondata, u li hemm ness bejn dak li qed jintalab u l-provditur tas-servizz. Għalhekk tagħmel riferiment għall-artikolu 562 tal-Kap. 12 tal-Liġijiet ta' Malta. Tikkonkludi li mhuwiex loġiku jew raġonevoli li tenut kont tal-provi, l-Arbitru wasal għall-konklużjoni illi peress li nħoloq *virtual iban* minn struttura tas-soċjetà appellanta, mela allura konsegwenza ta' dan inħoloq ness bejn l-ilmentatriċi u s-soċjetà appellanta. Min-naħa tagħha s-soċjetà appellata straħet primarjament fuq is-sejbien tal-Arbitru, u dan kif jirriżulta mir-risposta tagħha fir-rigward.

10. Il-Qorti tqis li dan l-aggravju jittratta b'mod dirett il-kwistjoni ta' jekk l-Arbitru kellux l-kompetenza skont il-liġi jiddeċiedi l-kwistjoni odjerna, fid-dawl tal-eċċezzjoni dwar jekk l-appellata hijiex '*klijent eligibbli*' skont artikolu 2 tal-Kap. 555 tal-Liġijiet ta' Malta. Il-Qorti tqis li fil-każ odjern, l-Arbitru sab li l-appellata kienet fil-fatt tikkwalifika bħala '*klijent eligibbli*'. L-Arbitru qal li l-appellata kienet

talbet il-provediment ta' xi servizz finanzjarju mingħand il-provditur¹, u jgħid dan għaliex fil-fehma tiegħu “*the fact that the transfers were showing the complainant as the beneficiary, prima facie implies she was seeking a service from the service provider*”.² Il-Qorti tirrileva wkoll li l-Arbitru jispeċifika li l-każ odjern kien differenti minn każijiet oħrajn fejn kien irrizultalu li l-klijenti ma kienux klijenti eliġibbli f'għajnejn il-liġi, u fejn għalhekk kien sab li ma kellux il-kompetenza sabiex jisma' dawk l-każijiet. L-Arbitru qal ċar u tond li l-każ odjern huwa differenti minn dawk il-każijiet, għaliex f'dawk il-każijiet ma kienitx tqajjmet il-kwistjoni tal-*virtual IBANs*, u l-benefiċjarji tal-kontijiet kienu dejjem indikati l-kumpanniji terzi, bħala klijenti tas-soċjetà appellanta, u mhux f'isem min kien qed jilmenta quddiemu. Ikkunsidra wkoll il-pożizzjoni aktar vulnerabbli tal-ilmentatriċi f'dawn il-proċeduri.

11. Il-Qorti għalhekk issib li f'dan l-istadju hija għandha tqis u tikkunsidra jekk l-eżami mwettaq mill-Arbitru f'dan ir-rigward huwiex wieħed korrett, u allura għandha tara jekk huwiex minnu li l-appellata kienet talbet xi servizz mingħand s-soċjetà appellanta. Il-Qorti tqis li fil-każ odjern, u minħabba n-natura u l-mezz li bih saru t-tranzazzjonijiet in kwistjoni, jidher biċ-ċar illi m'hemm l-ebda ness dirett bejn l-appellata u s-soċjetà appellanta, u fil-fatt ir-relazzjoni tal-appellata kienet mal-bank tagħha *Wise*, u mal-klijenti tas-soċjetà appellanta, primarjament SWAPS. Il-Qorti tgħid li l-implikazzjoni *prima facie* li jaċċenna għaliha l-Arbitru fid-deċizzjoni tiegħu, ma tissodisfax il-kliem tal-liġi, u dan hekk kif il-liġi tagħti definizzjoni ċara ta' kif u min għandu jitqies bħala klijent eliġibbli. L-appellata fil-fatt kienet talbet lill-bank tagħha *Wise* sabiex jittrasferixxi flusha, u fl-ebda waqt

¹ Ara paġna 10 tad-deċizzjoni tal-Arbitru, fejn saret ukoll enfasi dwar dan il-punt.

² Paġna 11 tad-deċizzjoni.

ma kienet għamlet xi talba, la b'mod dirett u lanqas b'mod indirett, lis-soċjetà appellanta, sabiex din b' xi mod jew ieħor tipproċessa xi tranzazzjoni f'isimha. Il-Qorti lanqas ma hija konvinta li l-appellata kellha imqar l-intenzjoni li tagħmel użu minn xi servizz li tipprovdi s-soċjetà appellanta, tant hu hekk li mill-provi jirriżulta li l-appellata ma kienitx konxja tar-rwol, u tas-servizz li s-soċjetà appellanta kienet qed tipprovdi fil-proċess kollu. Għalhekk bl-ebda tiġbid tal-immaginazzjoni ma jista' jitqies li l-appellata kienet talbet li tingħata servizz mingħand is-soċjetà appellanta. Fil-fatt mix-xhieda jirriżulta ċar u tond li hija ma kienitx għażlet is-servizz tas-soċjetà appellanta, iżda naturalment kienu l-frodisti li abbużaw mis-sitwazzjoni tagħha u kkordinaw it-tranzazzjonijiet relattivi. Fi kwalunkwe każ, jirriżulta li l-klijent tas-soċjetà appellanta dejjem kienu SWAPS jew Roobic, u li s-servizz tas-soċjetà appellanta kien fil-fatt ipprovdut lil dawk il-klijenti, u mhux lill-appellata jew lill-frodisti. Jirriżulta wkoll li l-appellata kienet konxja li t-trasferiment kien qed isir favur xi ħadd li kien qiegħed jaġixxi taħt l-isem SWAPS, u mhux fir-rigward tas-soċjetà appellanta.³ Filwaqt li l-Qorti tifhem l-interpretazzjoni li ta l-Arbitru, xorta tqis li dak li għandu u kellu jiġi segwit huwa proprju l-kelma tal-liġi. Ma jirriżultax lil din il-Qorti li d-definizzjoni li kienet tagħti l-liġi fiż-żmien meta seħħew it-tranzazzjonijiet in mertu, kienet wiesgħa biżżejjed sabiex persuna bħall-appellata titqies li kienet klijent eliġibbli ta' soċjetà li tipprovdi servizzi bħas-soċjetà appellanta. Dan aktar u aktar meta din il-Qorti qed issib li mhuwiex minnu li l-appellata kienet talbet xi servizz mingħand is-soċjetà appellanta, u dan fid-dawl tal-fatt li l-appellata kienet konxja li hija kienet qed tittrasferixxi flusha favur SWAPS. Il-Qorti hija konvinta minn dan anki fid-dawl tal-

³ Ara xhieda ta' Ms Elizabeth Eastwood *a fol.* 95 u 96 tal-proċess tal-Arbitru -"So, when making these transfers, she was aware that this money was intended to be sent to SWAPS. I say, she did but she did not understand what SWAPS meant ... She did know about SWAPS before transferring the money".

emendi legislattivi introdotti riċentement fil-Kap. 555 tal-Liġijiet ta' Malta, u li speċifikament issa jagħtu l-possibbiltà lill-vittmi ta' frodi f'kazijiet ta' pagamenti frawdolenti suspettużi li jinvolve fornituri tas-servizzi finanzjarji, sabiex jikkwalifikaw bħala klijenti eliġibbli. Possibbiltà li l-liġi ma kienitx tipprovdi għaliha qabel, u li għalhekk kienet eskluża. Il-Qorti fl-aħħarnett tqis ukoll dak li qal l-Arbitru fir-rigward tad-differenzi bejn dan il-każ, u kazijiet oħra fejn kien għe meqjus li l-klijent ma kienx klijent eliġibbli. Il-Qorti hawnhekk ukoll tqis li dawk id-differenzi ma humiex differenzi li għandhom xi portata legali, u għalhekk ma tistax tqis li dawk id-differenzi huma biżżejjed sabiex jinstab li l-appellata kienet klijenta eliġibbli. Fid-dawl ta' dan kollu, il-Qorti tqis li s-soċjetà appellanta għandha raġun f'dan l-aggravju tagħha, u għalhekk sejra tilqgħu.

12. Il-Qorti f'dan l-istadju tqis li ladarba ser jiġi milqugħ dan l-ewwel aggravju, peress li l-appellata ma kienitx klijent eliġibbli, konsegwentement jirriżulta li l-Arbitru ma kellux il-ġurisdizzjoni meħtieġa sabiex jiddeċiedi l-każ. Għalhekk, din il-Qorti tqis li d-deċiżjoni tal-Arbitru għandha tiġi mħassra fit-totalità tagħha, u li fl-istess waqt m'hemm l-ebda ħtieġa li din il-Qorti tikkunsidra it-tieni aggravju, li jikkonċerna l-mertu. Għalhekk, il-Qorti sejra tastjeni milli tieħu konjizzjoni tal-imsemmi tieni aggravju.

Decide

Għar-raġunijiet premeżzi l-Qorti taqta' u tiddeċiedi l-appell, billi filwaqt li tastjeni milli tieħu konjizzjoni tat-tieni aggravju, tilqa' l-ewwel aggravju u tħassar id-deċiżjoni tal-Arbitru tat-28 ta' Frar, 2025.

L-ispejjeż taż-żewġ istanzi għandhom ikunu bla taxxa bejn il-partijiet.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Christian Sammut
Deputat Registratur