

Before the Arbiter for Financial Services

Case ASF 070/2024

ZJ

(the 'Complainant')

vs

Openpayd Financial Services Malta Ltd

Reg. No. C 75580

('OPFS' or 'Service Provider')

Sitting of 10 May 2024

The Arbiter,

Having considered in its entirety, the Complaint filed on 28 March 2024, including the attachments filed by the Complainant,¹

The Complaint

Where, in summary, the Complainant claimed to having fallen victim to a fraud scam by fraudsters posing as HM Treasury in London, to whom he transferred in various payments totalling €71,455 between 07 and 27 December 2023.

These funds were transferred from his account with Caixa Geral & Deposito in Portugal to an account with IBAN No MT67CFTE.....8617 held with an institution with a Bank Identifier Code CFTEMTM1 with beneficiary indicated as TRF CXDOL.²

¹ Page (P.) 1 - 5 and attachments p. 6 - 89

² P. 9 - 22; 70 - 72

Complainant requests that as the Bank Identifier Code above indicated seem to refer to the Service Provider, he accuses OPFS of being responsible for his losses as:

'Based on European Law relating to money laundering the OpenPayd has to contact me after the payment reach 15,000. They didn't do nothing (anything). Even in case of duty of care, which is also a European law they didn't do nothing (anything). In the weekend of Christmas I found out that my ETH wallet was scammed by HM Treasury. The way of working everybody can do transactions with OpenPayd without limitation, even organisations like Hamas, Hezbollah or IS. There is no control or duty of care at all.'

By way of remedy, Complainant is seeking full refund of his loss quantified at €71,455.

Reply of the Service Provider

Having considered OPFS's reply dated 22 April 2024³, whereby it raised a preliminary plea of incompetence of the Arbiter to hear this Complaint in terms of Chapter 555 of the Laws of Malta which obliges the Arbiter to deal with complaints filed by eligible customers. They maintained that Complainant was not an eligible customer of the Service Provider. They maintained that OPFS had no legal relationship with the Complainant, they had no relationship with the alleged scammers and, consequently, they cannot be expected to return the funds which were credited to the account of one of their customers.

OPFS maintained that the account where the Complainant's funds were credited was in name of OKCoin Europe Ltd to whom they provide financial services in accordance with their licence and that they comply with all their legal and regulatory obligations. They had completed due diligence on OKCoin at onboarding in terms of regulation and that they comply with all their obligations including AMLCFT regulations.

³ P. 97 - 99

They suggested to the Complainant that he should direct his complaint to OKCoin Europe Ltd who were the beneficiary of the account where the Complainant had transferred his funds.

Hearing

At the hearing held on 06 May 2024, the Arbiter informed the parties that he will give a ruling on the preliminary plea regarding his competence before proceeding to hear the merits of the case.

Preliminary Plea

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

It is therefore necessary to decide on the preliminary plea raised by the Service Provider before considering the merits of the case. If it results that the Complainant does not qualify as an eligible customer of the Service Provider, then, the Arbiter will have no competence to adjudge this complaint.

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

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

Consideration and Analysis

The Arbiter, having heard the parties and seen all the documents and submissions made,

Considers:

The Complainant has failed to provide any evidence to challenge the plea raised by the Service Provider that he is not their *'eligible customer'*. In fact, the Complainant has explicitly accepted that:

*'I have never opened an account with you (OPFS) and have never instructed anyone to open an account for me.'*⁴

Accordingly, he does not qualify as eligible customer of the Service Provider, who also contended without contradiction that they never offered him any service nor has he sought any service from them.⁵ The Complainant's point of contact with OPFS was simply to try to recover the funds he was scammed when he transferred them to an account of one of the customers of OPFS.

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

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

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

The 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**:

⁴ P. 6

⁵ P. 100

*'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**.'*⁶

Thus, the Arbiter has to primarily decide whether the Complainant is, in fact, an **eligible customer** in terms of the Act.

Eligible customer

Article 2 of the Act defines an '*eligible customer*' as follows:

'a customer who is a consumer of a financial services provider, or to whom the financial services provider has offered to provide a financial service, or who has sought the provision of a financial service from a financial services provider.'

The Complainant makes it clear in his Complaint that he was a victim of *fraudsters*, and no evidence was provided that OPFS were in some way directly involved in the scam. The fact that OPFS had an account relationship with the beneficiaries of the funds transferred (it is not clear what relationship such beneficiaries had with the alleged fraudsters) does not render the Complainant an eligible customer of the Service provider.

Decision on determination of eligibility

Considering the above and having reviewed the circumstances of the case in question, it is evident that there was no contractual relationship between the Service Provider and the Complainant.

In view of the above, it results that the Complainant was not '*a customer who is a consumer*' of OPFS neither that OPFS '*has offered to provide a financial service*' to the Complainant, nor that the Complainant '*has sought the provision of a financial service from OPFS for the purposes of the Act.*'

⁶ Article 11(1)(a)

Decision

For reasons explained above, the Complainant cannot be deemed as an '*eligible customer*' in terms of Article 2 of the Act.

Consequently, the Arbiter does not have the competence to deal with the merits of this Complaint.

This without prejudice to the right of the Complainant to take his case to a competent court or tribunal. It is also without prejudice to any right that the Complainant may have to file a complaint against the remitter and beneficiary of his funds at the appropriate jurisdiction.

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

Alfred Mifsud
Arbiter for Financial Services

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbitrator's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.
