

Before the Arbiter for Financial Services

Case ASF 112/2024

CA

('the Complainant')

vs

OpenPayd Financial Services Malta

Limited (C 75580)

('OpenPayd' or 'the Service Provider')

Sitting of 8 August 2024

The Arbiter,

Having seen **the Complaint** against OpenPayd Financial Services Malta Limited ('OpenPayd' or 'the Service Provider') relating to the transfer of money the Complainant made to a corporate client of the Service Provider. The Complainant requested to receive back the money paid as she claimed that the said corporate client was involved in fraudulent activity with an online trading company the Complainant used for investments, which, she claimed, turned out to be a scam.

*The Complaint*¹

In her Complaint Form, the Complainant alleged that *The Hasbix Analytics sro* ('Hasbix') is a client of OpenPayd, and that Hasbix together with its partner *ToroAssets Trading Co.* ('ToroAssets') are a fraud.

¹ Complaint Form on Page (P.) 1 - 6 with supporting documentation on P. 7 - 54

The Complainant submitted that Hasbix and ToroAssets must be investigated as she claimed they are thieves. She requested the Arbiter help her and others like her who trusted ToroAssets online.

As part of her complaint form, the Complainant attached a copy of the WhatsApp messages exchanged between her and ToroAssets and noted in particular the part which, she claimed, showed that the money was sent by transfer to Hasbix.²

The Complainant also attached a copy of the reply she received from Hasbix, where they claimed that they did not know ToroAssets. She alleged that this was a lie and requested help to recover her money as she claimed this involved money laundering activity.

A copy of the request for a refund of her payment to OpenPayd in respect of Hasbix's account was also attached.³ She noted that she transferred Euro 14,100 as ordered by the alleged fraudulent trading company, ToroAssets, which she explained received the money from Hasbix and placed it on her account in the ToroAssets platform for investment trading.

The Complainant noted that she placed Euro 17,000 in total with ToroAssets, who informed her that she had earned Euro 181,000 on her account, but that she had to first send Euro 14,100 to Hasbix to pay tax to the Italian Government. She pointed out that this was, however, a lie and that they were just thieves. She noted that when she paid Euro 14,000, she was then told that the sum of Euro 181,000 could not be sent to her account because she must pay again another amount of Euro 12,000 at which point she realised that the arrangement was a fraud.

The Complainant explained that she sent to Hasbix the following payments: Euro 5,000 in a Lithuanian bank, Euro 10,000 in another bank (which she explained was sent back to her by ToroAssets), Euro 9,097 in a Swiss bank and at least Euro 14,100 at OpenPayd.

She submitted that OpenPayd must control his client and help her get back her Euro 14,000.

² P. 15 - 35

³ P. 8

The Complainant noted that OpenPayd informed her that she is not their client. She further noted that Hasbix, on their part, informed her that they do not know ToroAssets. She claimed that this was, however, false as Hasbix received money from her as instructed by ToroAssets. She further noted that ToroAssets had given her the name of the beneficiary and the name of the bank to whom she had to transfer her money.

The Complainant requested the Arbiter to help her, given that the money she had sent was all of her life savings.

Remedy requested

To receive back part of her Euro 14,100 life savings.

Having considered, in its entirety, OpenPayd's reply,⁴

Where OpenPayd explained and submitted the following:

1. That whilst it was unfortunate to hear that the Complainant may have fallen victim to a scam perpetrated by unknown scammers, its letter dated 25 March 2024 sent to the Complainant made it clear that the Complainant has never been a customer/client of OpenPayd.

It submitted that there is accordingly no legal or contractual relationship between either (i) the Complainant and OpenPayd nor (ii) these unknown scammers and OpenPayd, and that the Complainant misunderstood the services which OpenPayd provides to its corporate customers.

It further submitted that the Complainant is, therefore, not an eligible customer of OpenPayd and, pursuant to the provisions of article 11(1)(a) and article 19(1) of the Arbiter for Financial Services Act (Cap. 555), the Arbiter is to, respectfully, deal with complaints filed by eligible customers.

Background provided in its reply

2. The Service Provider highlighted that it has only provided its services to its customers, which include Hasbix. It understood, from the Complainant's

⁴ P. 62 - 65

submissions, that Hasbix may have a contractual relationship with 'ToroAssets Trading Co' ('the Merchant') – this being the entity with whom the Complainant has a contractual relationship with and has been the beneficiary of payments made by her. OpenPayd reiterated that it never provided services to the Complainant or the Merchant.

OpenPayd's services as explained in its reply

3. It noted that OpenPayd is a provider of payment services registered in Malta under company registration number C 75580, and licensed and regulated by the Malta Financial Services Authority as a financial institution in terms of the Financial Institutions Act (Chapter 376, Laws of Malta). It further noted that OpenPayd is not and has never made itself out to be a provider of investment services. OpenPayd provides payment services to its corporate clients (*inter alia* Hasbix) in order to assist them in their own reconciliation of payments. It also noted, for completeness, that these clients of OpenPayd may, naturally, have their own onward commercial relationships which in this case appears to have been between Hasbix and the Merchant from which the Complainant alleges to have transacted with.

The Service Provider reiterated that it has not facilitated the transaction in question, nor did it have any relationship with the Merchant in question.

4. It noted that OpenPayd simply provided Hasbix with payment reconciliation services which did not involve remittance, acquisition or facilitation of the transaction. Hasbix may have provided its own payment services to the Merchant. OpenPayd noted that it has never provided any services (including payment services or the sale of investment products) to the Complainant or the Merchant.
5. The Service Provider further submitted that it had, at no time, any involvement in the Complainant's relationship with the Merchant nor has OpenPayd ever had any commercial or contractual relationship with the unknown scammers who may or may not have operated through the Merchant and/or separately engaged with the Complainant. It submitted that OpenPayd is not aware, nor could have been or ought to have been aware, of any arrangement between these alleged scammers, the Merchant and the Complainant.

6. OpenPayd submitted that it completed customer due diligence on its customer, Hasbix, before it was onboarded and during its relationship as required by applicable laws and regulations. It confirmed that it complies with all of its anti-money laundering and counter-terror financing obligations, including undertaking customer due diligence on all its customers. OpenPayd further submitted that the law states (as has been applied to its business models in a legal opinion prepared by Ganado Advocates), that customer due diligence requirements concerning all Hasbix's customers are to be performed by Hasbix and not by OpenPayd. It emphasised that it has no relationship with Hasbix's end customers – including the Merchant.

Eligibility of the Complaint as explained in its reply

7. OpenPayd noted that the Laws of Malta, Chapter 555, ('the Act') 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**.⁵ It submitted that if the Complainant does not qualify as an eligible customer of OpenPayd, then the Arbiter is not able to adjudge the Complaint as:

'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'.⁶

8. The Service Provider further noted that Article 2 of the Act defines an 'eligible customer' as:

'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'.⁷

⁵ Emphasis added by OpenPayd

⁶ P. 64

⁷ *Ibid.* – Emphasis added by OpenPayd

9. It noted that the Complainant makes it clear in her Complaint that she was a victim of fraudsters, and that OpenPayd is not, in any way, involved in the scam, quoting her as saying that:

*'The openpayd has been very kind answer to me. The fraud person is Hasbix Analytics and its partner Toroassets trading co.' [sic].*⁸

10. The Service Provider pointed out that the Complainant is correct in the Complaint to say *'Openpayd Financial Services ltd [sic] said that I am not a client of theirs'*.⁹ It submitted that it did not provide an account, payment or investment service to the Complainant and, as such, the Complainant is not *'a customer who is a consumer'* of OpenPayd.¹⁰
11. The Service Provider further confirmed that it has never *'offered to provide a financial service'* (including, for the avoidance of doubt, any account, payment or investment service) to the Complainant (nor could it ever have provided such services to the Complainant, as OpenPayd only provides its services to corporate clients). It also noted that nor has the Complainant *'sought the provision of a financial service from OpenPayd'*.¹¹
12. It reiterated that as there is no contractual relationship between OpenPayd and the Complainant, then the Complainant cannot be regarded as an eligible complainant in terms of Article 2 of the Act. Accordingly, it respectfully is of the opinion, that the Arbiter does not have jurisdiction to deal with the Complaint.

Concluding remarks in its reply

13. The Service Provider submitted that it was on the above basis that it promptly investigated the Complainant's initial complaint and, following its investigation, provided the Complainant with its response dated 25 March 2024. It further submitted that it has, at all times, followed the applicable law and guidance on its obligations in respect of the Complainant's complaint.

⁸ P. 64

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

14. As set out in its response of 25 March 2024, OpenPayd remains of the position that the Complainant should address her concerns to the provider of service.
15. In conclusion, OpenPayd submitted that, with respect to the Complainant's specific points raised in her complaint to the Arbiter, OpenPayd wished to make it clear that:
 - a) It has no legal relationship with the Complainant;
 - b) It has no relationship whatsoever with the unknown scammers and OpenPayd has had no involvement in any of the interactions that the Complainant chose to have with these individuals;
 - c) In respect of the request to return funds which the Complainant authorised to be paid from her third-party bank account, the Complainant should address her request to the Merchant as beneficiary.

Hearing

At the hearing held on 15 July 2024, the Arbiter informed the parties that he will first rule on the preliminary plea raised regarding his competence before proceeding to consider the merits of the case.¹²

Preliminary Plea

Chapter 555 of the Laws of Malta ('the Act'), 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 in terms of law.

¹² P. 67

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 she is not an 'eligible customer' for the purposes of the Act.

In fact, the Complainant has never contested the Service Provider's claim that she was not a client of OpenPayd. It is indeed noted that, in her Complaint, the Complainant acknowledged that *'Openpayd Financial Services Ltd said that I am not a client of theirs'*.¹³ During the hearing of 15 July 2024, the Complainant furthermore testified that *'I did not know about OpenPayd before I made this transfer...I confirm that I did not know about OpenPayd before making the transfer and I have never contacted OpenPayd'*.¹⁴

The Complainant's point of contact with OpenPayd was simply to try to recover the funds she alleged to have lost when she transferred them to an account of one of the corporate customers of OpenPayd.

The Arbiter further notes that the alleged shortfalls on the Service Provider's conduct with respect to this Complaint has not been really indicated or identified by the Complainant and the Complainant was rather more requesting *'OpenPayd's help to have back part of the money of a life savings euro 14.100,00'*.¹⁵

The Arbiter's competence

Article 22(2) of the Act stipulates that, *'Upon receipt of a complaint, the Arbiter shall determine whether the complaint falls within his competence.'*

Moreover, by virtue of Article 19(1) of the Act, the Arbiter can only deal with complaints filed by eligible customers given that, as provided in the said article:

¹³ P. 3

¹⁴ P. 67

¹⁵ P. 3

'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.'

Article 11(1) of the Act further stipulates 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 customers.'* 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:

'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.'

The Complainant explained that she was a victim of fraudsters, where she identified Hasbix and ToroAssets as the parties involved in the alleged scam.

The fact that one of the parties, Hasbix, to whom the Complainant had transferred money from her SEPA account,¹⁶ had a relationship by way of an account with OpenPayd, does not render the Complainant an eligible customer of OpenPayd in terms of the provisions provided for under the Act.

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 is not *'a customer who is a consumer'* of OpenPayd, and neither that OpenPayd *'has offered to provide a financial service'* to the Complainant, nor that the Complainant *'has sought the provision of a financial service'* from OpenPayd for the purposes of the Act.

¹⁶ P. 77

Decision

For reasons explained above, the Complainant cannot be deemed as an *'eligible customer'* as defined under article 2 of the Act.

Consequently, the Arbiter does not have the competence to deal with the merits of this Complaint and is hereby dismissing it.

This without prejudice to the right of the Complainant to take her case against the Service Provider 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 her funds at the appropriate jurisdiction.

Recommendation

Without entering into the merits of this case, the Arbiter, however, wishes to recommend, in a non-binding manner and without prejudice and obligation, that OpenPayd Financial Services Malta Limited considers a gesture of goodwill and offer an *ex-gratia* payment to the Complainant.

The Arbiter is motivated to make this recommendation taking into consideration that the disputed payment of Euro 14,100 done by the Complainant on 19 February 2024 to Hasbix,¹⁷ occurred at a time when Hasbix had already been (on 25 January 2024), *'added to OpenPayd's Fraud Monitoring Programme'* and thus operating under such programme for nearly a month, after OpenPayd had

'In January 2024 ... noted an increase in external requests for information from banking partners related to Hasbix, as well as recall requests from individuals (such as the Complainant) for payments made by them for the benefit of Hasbix'.¹⁸

Hasbix was seemingly left operating without suspension under a *'60-day grace period'* permitted by OpenPayd before the relationship and account of Hasbix with OpenPayd was eventually *'fully terminated on 29 May 2024'* after *'a 60-day notice for Hasbix to cease operations and stop any transactions on the account, in line with OpenPayd's terms and conditions'*.¹⁹

¹⁷ P. 77

¹⁸ P. 71

¹⁹ *Ibid.*

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 Arbiter'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.