

## Before the Arbiter for Financial Services

Case ASF 135/2024

HC

('the Complainant')

vs

OpenPayd Financial Services Malta

Limited (C 75580)

('OpenPayd' or 'the Service Provider')

### Sitting of 15 October 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 he claimed that the said corporate client was involved in fraudulent activity with an online trading company the Complainant used for investments, which, he claimed, turned out to be a scam.

#### ***The Complaint***<sup>1</sup>

In his Complaint Form, the Complainant alleged that he fell victim to a multi-layered scam operation run by FinMarketHub which involved his making deposits for a total amount of Singapore Dollard (SGD) 210,033 from his account with DBS Bank. The payments were made in four separate transactions<sup>2</sup>

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<sup>1</sup> Complaint Form on Page (P.) 1 - 5 with supporting documentation on P. 6 - 84

<sup>2</sup> P. 16 - 20

between 26 October 2023 and 22 December 2023 to an account indicated by the alleged fraudsters in name of DripOTC UAB held with Openpayd.

The Complainant is holding the Service Provider as responsible for his loss as he claims that FinMarketHub is their client and was committing financial fraud *“right under your nose, which involves amongst other things, stealing and laundering large sums of money on a regular basis.”*<sup>3</sup>

The Complainant accuses OpenPayd of misconduct, gross negligence that renders them complicit in fraud, violations of international law, facilitation of unjust enrichment, aiding and abetting fraud and deceit, and failure to operate a fit for purpose transaction monitoring system capable of detecting fraudulent transactions.<sup>4</sup>

The Complainant requested the Arbiter to find the Service provider responsible for his loss and order their paying him full compensation of SGD 210,033.

### **The Service Provider’s reply**

Having considered in its entirety, OpenPayd’s reply dated 12 July 2024,<sup>5</sup>

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 20 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)

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<sup>3</sup> P. 6

<sup>4</sup> P. 10 - 14

<sup>5</sup> P. 92 - 96

and article 19(1) of the Arbitrator for Financial Services Act (Cap. 555), the Arbitrator 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 Drip OTC UAB trading as 'Vault'. It understood, from the Complainant's submissions, that Vault may have a contractual relationship with 'FinMarketHub' ('the Merchant') – this being the entity with whom the Complainant has a contractual relationship with and has been the beneficiary of payments made by him. 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* Vault) 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 Vault 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 has at no time had 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. 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.

5. OpenPayd submitted that it completed customer due diligence on its customer, Vault, 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 Vault's customers are to be performed by Vault and not by OpenPayd. It emphasised that it has no relationship with Vault's end customers – including the Merchant.

*Eligibility of the Complaint as explained in its reply*

6. 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**.<sup>6</sup> 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".<sup>7</sup>*

7. 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*

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<sup>6</sup> Emphasis added by OpenPayd

<sup>7</sup> P. 94

*service, or who has sought the provision of a financial service from a financial services provider”.*<sup>8</sup>

8. It noted that the Complainant makes it clear in his Complaint that he was a victim of fraudster, and OpenPayd is not, in any way, involved in the scam.

*“As I mentioned I fell victim to a multilayered scam operation orchestrated by FinMarketHub (the Fraudsters)”.*

*“Granted, the fraud has taken place entirely outside the domain of the financial institution [OpenPayd]”.*

9. The Service Provider pointed out 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.<sup>9</sup>
10. The Service Provider further confirmed that it does not provide an account, payment or investment service to the Complainant and as such he is not *“a customer who is a consumer”* of Openpayd.
11. They also affirm that they 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’*.<sup>10</sup>
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.

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<sup>8</sup> *Ibid.* – Emphasis added by OpenPayd

<sup>9</sup> *Ibid.*

<sup>10</sup> P. 95

*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 20 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.
14. As set out in its response of 20 March 2024, OpenPayd remains of the position that the Complainant should address his concerns to the provider of service.
15. In conclusion, OpenPayd submitted that, with respect to the Complainant's specific points raised in his 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 his third-party bank account, the Complainant should address his request to the Merchant as beneficiary.

## **Hearing**

At the hearing held on 10 September 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.<sup>11</sup>

## **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

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<sup>11</sup> P. 97

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.

In reply to Arbiter's questions to the Complainant to get his views on the preliminary plea raised by the Service Provider, the Complainant stated:

***"Asked by the Arbiter whether I have ever had an account with OpenPayd, I say, so far, no.***

***Asked whether OpenPayd ever contacted me to offer me any financial services, I say, OpenPayd, no, but they asked me to send my money overseas from my DBS to their account in OpenPayd.***

***They did not contact me directly to offer me any service but the customer of OpenPayd confirmed that they received that particular lump sum. And then the transactions proceeded.***

***The Arbiter states that he has to decide whether I am an eligible customer of OpenPayd or whether I am a customer of a customer of OpenPayd.***

***I say that I am a customer of the customer of OpenPayd.***

***The Arbiter states that I made four transfers between 26 October and 22 December of last year which in total amount to roughly Singapore Dollars 210,000, and they all went into the account of a company called Drip OTC UAB and this company is a customer of OpenPayd.***

***Asked whether my intention when sending the money was to send the money to Drip OTC UAB, I say that according to the history, I sent two times: one is on 18 December 2023 and the second time is on 22 December 2023. Earlier than this, there is 1 November 2023 and 26 October 2023, so there were four payments.***

***It is being said that these four payments were all in favour of a company called Drip OTC UAB, they established an online investment called FinMarketHub. They promised to have online transactions of stocks or crypto, whatever. So,***

***they issue a letter to me saying that I already have the bonus. The bonus is up to 80,000.***

***The Arbiter states that he does not want to enter into the merits of the case. He states that when I sent the money, I gave instructions for the money to be credited to a particular account (which has a long number starting with MB and finishing with 0356).***

***Asked who gave me this number, I say that this is the person of FinMarketHub and under this OpenPayd, their customer.***

***I say, yes, the number was given to me by the fraudster.***

***Asked whether I used this number given to me by the fraudster in order to transfer the money, I say, yes.***

***I say, yes, the money was sent from my bank in Singapore. The name is DBS.***

***Asked whether I made a claim against my bank in Singapore to reclaim my money, I say, yes. The thing is that they gave me a letter with a signature of a person called Kevin Martins in FinMarketHub.***

***Asked whether I contacted my bank in Singapore and told them that they sent four payments which I have just learnt to be fraudulent and whether I made a claim against the Singapore banks because they made these payments without warning me that they were fraudulent, I say that they sent me a text message to authenticate which means they were trying to protect me, DBS bank.***

***Asked by the Arbiter in what way, I say that 1) the limit of the transfer as I set a higher limit, 2) the authentication – asked whether I was sure that I wanted to send that lump sum out of my account to the overseas account. I shouldered the risk myself.***

***I say, yes, they warned me, but I still confirmed the payments.***

***Asked when I realised that OpenPayd were somehow involved in these transactions, I say that I was aware of OpenPayd after I made the transfers when I checked that number.<sup>12</sup>***

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<sup>12</sup> P. 98 - 99



In reply to Arbiter's questions to Lara Barbuto representing the Service Provider, she stated:

***"Asked whether we received a recall of funds for these four payments, I say, no recall of funds was received in any way.***

***Asked whether we tried to contact our customer, Drip OTC, to see whether they could return the funds, I say not for these particular transactions. What we can see from our end, the transactions went in and then, Drip OTC paid them out as well from their end.***

***So, Drip OTC has an account for transactions coming in, and Drip OTC transferred these transactions to an account in the name of CLTS Technologies with Clear Junction.***

***So, we can see that the funds went out from Drip OTC account with OpenPayd to another bank account. We did not make an official recall as we could see that the transaction moved on.***

***Asked whether we still have Drip OTC as a customer, I say, no. It was a client requested termination. The client requested us to close their account on 2 August 2024."***<sup>13</sup>

### **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 an "eligible customer" for the purposes of the Act.

In fact, the Complainant has never contested the Service Provider's claim that he was not a client of OpenPayd. During the hearing of 10 September 2024, the Complainant furthermore testified that:

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<sup>13</sup> P. 99 - 100

***“I was aware of Openpayd (being somehow involved in these transactions) after I made the transfers when I checked the number.”***

He also confirmed that:

***“I am a customer of a customer of Openpayd”.***<sup>14</sup>

The Complainant’s point of contact with OpenPayd was simply to try to recover the funds he alleged to have lost when he 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 cannot be considered on their merits if the plea of non-competence prevails.

### **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:

*“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,*

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<sup>14</sup> P. 98 - 99

*or who has sought the provision of a financial service from a financial services provider.”*

The Complainant explained that he was a victim of fraudsters, where she identified FinMarketHub as the party involved in the alleged scam.

The fact that one of the parties, Drip OTC UAB trading as Vault, to whom the Complainant had transferred money from his Singapore account, 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.

### **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 his 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 beneficiary of his fund transfers 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.

## **Recommendation**

The Arbiter recommends that the Complainant should explore whether there is a case he could make against Drip OTC UAB trading as Vault, a company registered in Lithuania,<sup>15</sup> to establish any possible connection between this company and the fraudster Merchant. The Service Provider is urged to offer all legally possible co-operation to the Complainant in making the necessary contact with Vault.

The Arbiter also wishes to remind the Complainant about his irresponsible behaviour not only in parting too easily with his money in favour of people whom he did not properly check out, but particularly in disregarding the warnings of his DBS Bank in Singapore, who responsibly tried to protect him before effecting the transfers.

**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.

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<sup>15</sup> P.83

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.