

## Before the Arbiter for Financial Services

Case ASF 206/2024

**MK**

**('the Complainant')**

**vs**

**OpenPayd Financial Services Malta**

**Limited**

**(C 75580)**

**('OpenPayd' or 'the Service Provider')**

### **Sitting of 14 February 2025**

#### **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<sup>1</sup>**

In her Complaint Form, the Complainant alleged that *The Hasbix Analytics S.R.O.* ('HASBIX') is a client of OpenPayd, and that HASBIX together with its partner XTBCO are a fraud.

She stated:

***'For this purpose, [the Complainant] transferred some money to a bank account attributable to OpenPayd Financial Services Malta Ltd so as to top up her online account on the virtual operating system, in order to start the aforementioned trading activities. [The Complainant] has made four wire transfers which are the following: 1) 28/11/2023, of €5,000.00; 2) 29/11/2023, of €5,000.00; 3) 30/11/2023, of €5,000.00; 4) 07/12/2023, of €10,000.00.***

***[The Complainant] operated on the advice of her account managers who carried out risky operations without informing him about possible risks. The activity carried out by the Company does not comply with current legislation, since the Company is not authorised to provide financial services in Italy by Consob.***

***Please note that in this case some European rules relating to transfers of funds could have been violated.***

***In particular, rule n. 847/2015 stating that the transfers need to be made in compliance with a series of obligations imposed on the payment service provider of the payer and of the payee in this case 'OpenPayd Financial Services Malta Ltd.'***

***Article 7 states the obligation to monitor payments in order to ascertain any lack of information. Where such data are missing or are incomplete, the payment service provider must refuse the transfer or request the data before or after the crediting has been made. The EU Directive 2015/849 on the prevention of the use of the financial system for recycling purposes, requires Member States to draw up internal policies, controls and procedures consisting of risk management practices, adequate customers examination and internal controls.***

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<sup>1</sup> Complaint Form on Page (P.) 1 - 6 with supporting documentation on P. 7 - 15

***Member states must ensure that the parties apply customer due diligence measures. These measures consist in identifying the customer based on documents, data or information and on the constant monitoring of the business relationship.***

***For these reasons and in the light of the above facts, we confirm that in this specific case, obligations would have imposed on you more care on verifying the payments or, at the very least, asking for further information to support the suspicious operation.***

***Furthermore, [the Complainant] has never signed a contract with Hasbix Analytics S.R.O. and, accordingly, there is no evidence nor contract justifying the payment transaction placed in its favour (Hasbix Analytics S.R.O.) by our client. Contrary to the reference regulation on anti-money laundering and terrorist financing, there is no cause nor reason supporting the payment made by [the Complainant] towards a company (Hasbix Analytics S.R.O.) other than 'XTBCO' (the one carrying out the financial intermediation activity towards my client). In light of all the above, it seems that your Company did not comply with the anti-money laundering regulations.***

***Indeed, our client has suffered a quantifiable damage in the amount of €25,000.00 plus interest and monetary revaluation.***

***Therefore we request compensation for the damage suffered by our client regarding the activities carried out by your clients through your Bank.***

... ..<sup>2</sup>

### **Remedy requested**

Complainant requested OpenPayd to refund her loss of €25,000.

For sake of clarity, it is stated that the four transfer payments subject of these complaints were all effected from Unicredit (prominent Italian Bank) all showing as beneficiary HASBIX ANALYTICS S.R.O. with the following details:

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<sup>2</sup> P. 7 - 8

1<sup>st</sup> payment: €5,000 on 28.11.2023 to an IBAN starting MT19CFT of OpenPayd<sup>3</sup>

2<sup>nd</sup> payment: €5,000 on 29.11.2023 to an IBAN starting MT19CFT of OpenPayd<sup>4</sup>

3<sup>rd</sup> payment: €5,000 on 30.11.2023 to an IBAN starting MT19CFT of OpenPayd<sup>5</sup>

4<sup>th</sup> payment: €10,000 on 07.12.2023 to an IBAN starting MT19CFT of OpenPayd<sup>6</sup>

Apart from these four payments, it would appear that the Complainant made two further payments to HASBIX also through her account with UNICREDIT as follows:

€11,000 on 08.12.2023 to an IBAN starting CH45087 of INCORE Bank AG (Switzerland)<sup>7</sup>

€3,000 on 20.12.2023 to an IBAN starting CY95904 ... of ISXPAY (Cyprus).<sup>8</sup>

These last two payments are not part of this Complaint.

The Complainant submitted a copy of their letter to HASBIX in Prague claiming reimbursement of her payments totalling €41,500.<sup>9 10</sup>

There is no evidence that any reply was received.

**Having considered, in its entirety, OpenPayd's reply,<sup>11</sup>**

Where OpenPayd explained and submitted the following:

***'Whilst it is of course unfortunate to hear that the Complainant may have had an unpleasant experience with the online trading platform "XTBCO", we refer to our letter to the Complainant dated 21 February 2024 which makes it clear that the Complainant has never been a customer/client of the Company. There is no legal or contractual relationship between either (i) the Complainant and OpenPayd nor (ii) the online trading platform "XTBCO" and OpenPayd, and that the Complainant has misunderstood the services which we, OpenPayd,***

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<sup>3</sup> P. 46

<sup>4</sup> P. 45

<sup>5</sup> P. 44

<sup>6</sup> P. 42

<sup>7</sup> P. 43

<sup>8</sup> P. 41

<sup>9</sup> P. 47 - 48

<sup>10</sup> £41,500 includes a further payment of €2,500 on 22.12.2023 for which no evidence was submitted.

<sup>11</sup> P. 21 - 25

***provide to our corporate customers. It is important to note that OpenPayd is not a bank nor a crypto asset exchange.***

***The Complainant is therefore not an eligible customer of OpenPayd and, pursuant to provisions of article 11(1)(a) and article 19(1) of the Arbitrator for Financial Services Act (CAP. 555 of the Laws of Malta) the Arbitrator is to, respectfully, deal with complaints filed by eligible customers.***

### ***Background***

***We wish to make clear that OpenPayd has only ever provided its services to its customers, which includes the entity that the letter of the Complainant has made reference to: Hasbix Analytics s.r.o. We have never provided services to the Complainant.***

***Hasbix Analytics s.r.o. is a cryptocurrency exchange who, at the time, was a customer of OpenPayd (the “Merchant”)***

***We understand from the Complainant’s submission that the Complainant may have entered into commercial agreement with the Merchant and been provided with cryptocurrency wallet with them following their communication with the online trading platform “XTBCO”. Please note that any onboarding would have been conducted solely by the Merchant and OpenPayd would have had no involvement in this and cannot comment on whether or not the Complainant was properly onboarded by the Merchant in question.***

***We understand that the substance of the Complainant’s concerns relates to transactions with the Merchant where the Complainant transferred funds for trading activities. Any payments to the Merchant by the Complainant for the purpose of trading activities would be a matter between the Merchants and the Complainant. We have never provided such services to the Complainant.***

### ***OpenPayd’s Services***

***OpenPayd is a provider of payment services registered in Malta under company registration number C75580 and is 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). As you will be aware, OpenPayd is not and has never made itself out to be a bank or provider of***

***investment services. OpenPayd provides payment services to its corporate clients (inter alia the Merchants) in order to assist them in their own reconciliation of payments.***

***Please note that the letter included in the Complaint from Giambrone & Partners suggests that the payments made from the Complainant's bank account and paid to the Merchant were paid to a 'bank account' to OpenPayd. We can confirm that this is not an accurate description of our services – funds were received by OpenPayd as receiving PSP for the Merchant with whom the Complainant had entered into a contract with for the purpose of trading activities.***

***We note for completeness that this client of OpenPayd may, naturally, have their own onward commercial relationships using these reconciliation services that we provide, which in this case appears to be between the Merchant and the Complainant.***

***OpenPayd has never had any commercial or contractual relationship with the online trading platform "XTBCO" who may or may not have operated through the Merchant and/or separately engaged with the Complainant. In this, OpenPayd is not aware, nor could have been or ought to have been aware, of any arrangement between the online trading platform "XTBCO", the Merchant and the Complainant.***

***OpenPayd completed customer due diligence on its customer, Hasbix Analytics s.r.o., before they were onboarded and during their relationship as required by applicable laws and regulations. OpenPayd confirms that it complies with all of its anti-money laundering and counterterrorist financing obligations, including undertaking customer due diligence on all its customers. The law states (as has been applied to OpenPayd's business models in a legal opinion prepared for us by Ganado Advocates) that customer due diligence requirements concerning all Hasbix Analytics s.r.o.'s customers are to be performed by Hasbix Analytics s.r.o. and not by OpenPayd. We have no relationship with Hasbix Analytics s.r.o.'s end customers – including the Complainant.***

### **Eligibility of the Complaint**

**The Laws of Malta (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. If the Complainant does not qualify as an eligible customer of OpenPayd, then, the Arbiter is not able to adjudge the Complaint.**

**“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 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.” (emphasis added)**

**The Complainant’s legal representative, Avv. Vito Anello from Giambrone & Partners, makes it clear in the Complaint that their client, [the Complainant], entered into a contract with the online trading platform “XTBCO”.**

**They also state that their client, the Complainant, made money transfers to a bank account attributable to OpenPayd Financial Services Malta Ltd so as to top up her online account on the virtual operating system:**

**“We write with reference to the above matter as we have been instructed by [the Complainant] to act on her behalf and to explain facts as follows: [the Complainant] entered into a contract with the online trading platform “XTBCO” (hereinafter “the company”). Based on this contract, the Company was due to perform some purchase activities and the sale of financial products on behalf of our client. This Company is not registered under CONSOB, the Authority responsible for the supervision of the investment services market in Italy.**

**For this purpose, [the Complainant] transferred some money to a bank account attributable to OpenPayd Financial Services Malta Ltd so as to top up her**



***online account on the virtual operating system, in order to start the aforementioned trading activities.”***

***“[The Complainant] operated on the advice of her account managers who carried out risky operations without informing him about possible risks.”***

***Here, we would like to once more emphasize that OpenPayd does not provide a(n) (bank) account, payment or investment service to the Complainant. As such, the Complainant is not “a customer who is a consumer” of OpenPayd.***

***OpenPayd can also confirm 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, as OpenPayd only provides its services to corporate clients, could OpenPayd ever have provided any such services to the Complainant) nor has the Complainant “sought the provision of a financial service from OpenPayd”.***

***Similarly, we would like to make exceptionally clear that the basis on which a number of the Complainant’s concerns seem to be based (that OpenPayd is a bank that has accepted deposits or provided the Complainant with a bank account) is similarly entirely incorrect.***

***As there is no contractual relationship between OpenPayd and the Complainant, the Complainant cannot be regarded as an eligible complainant in terms of Article 2 of the Act. We respectfully are of the opinion that the Arbiter does not have jurisdiction to deal with the Complaint.***

#### ***The Complainant’s complaint***

***It is on the above basis that we promptly investigated the Complainant’s initial complaint and, following our investigation, provided the Complainant with our response dated 21 February 2024. OpenPayd has, at all times, followed the applicable law and guidance on its obligations in respect of the Complainant’s complaint.***

***As set out in our response dated 21 February 2024 it remains OpenPayd’s clear position that the Complainant should address their concerns to the provider of the service in its regard.***



***On the Complainant's specific points raised in their letter to the Arbiter, we wish to make clear that:***

- ***OpenPayd has no legal relationship with the Complainant.***
- ***OpenPayd has no relationship whatsoever with the unknown account managers at the online trading platform "XTBCO", and OpenPayd has had no involvement in any of the interactions that the Complainant has chosen to have with the online trading platform "XTBCO".***
- ***In respect of the request to return funds which the Complainant authorised to be paid from their third-party bank account, the Complainant should address this request to the Merchant as a beneficiary of those payments.***

***We hope that the above provides the Arbiter with the further information that you might require, and we remain at your disposal to discuss further, should you wish. Please do not hesitate to contact me if you had any questions regarding this response.***

***Please note that OpenPayd wishes to again make clear to the Complainant that it will co-operate with any police request in respect of the matters raised above.<sup>12</sup>***

## **Hearing**

At the hearing held on 27 January 2025, 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>13</sup>

He invited the Complainant to defend herself from the claim raised by the Service Provider that she was not their 'eligible customer' as contemplated in the ACT CHAPTER 555 of the Laws of Malta.

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<sup>12</sup> P. 21 - 25

<sup>13</sup> P. 26 - 28

## **Submissions by Complainant of Preliminary plea about Arbiter's (non) competence to hear the case**

In the submissions, rather than defend her case for rebuttal of the preliminary plea raised by OpenPayd, the Complainant's representatives:

1. Sent copies of correspondence with Unicredit asking that they make a recall of the funds transferred to the alleged fraudsters.
2. Asked the Arbiter to enforce contumacy on the Service Provider for the late reply.

On the first point, the submissions were in Italian and not translated to Maltese or English so they cannot be accepted as part of these proceedings. In any case, a request for recall is quite different from a complaint against their bank for their potential failure to adopt the level of transaction monitoring as provided under the EU directive PSD2.

On the second point, contumacy will only be an issue if the Arbiter were to deny the Service Provider's preliminary plea and proceeds to hear the merits of the case.

### **Preliminary Plea**

The Arbiter's competence is determined by 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 in Article 11(1)(a) 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.'*

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

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 her Complaint that she was a victim of fraudsters, and no evidence was provided that OpenPayd were in some way directly involved in the scam. The fact that they had an account relationship with the beneficiaries of the funds transferred (it is not clear what relationship such beneficiaries had with the alleged fraudsters XTBCO) does not render the Complainant an eligible customer of the Service Provider. The beneficiaries HASBIX were clearly identified in each of the payment orders.

### **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 the Service Provider 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’ 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 her 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 her funds at the appropriate jurisdiction for their potential failure of their payment monitoring duties under EU Directive 2015/2366 commonly referred to as PSD 2.

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.