

## Before the Arbiter for Financial Services

**Case ASF 121/2021**

**RE**

**(the 'Complainant')**

**vs**

**Phoenix Payments Limited**

**(C 77764) ('Phoenix' or the**

**'Service Provider')**

**Sitting of the 24 May 2022**

**The Arbiter,**

**Having considered in its entirety, the Complaint including the attachments filed by the complainant,<sup>1</sup>**

Where, in summary, the Complainant claimed to have been a victim of a scam orchestrated by *CapitalXP*, a client of the Service Provider. The total amount in question is that of EUR50,000.

The Complainant stated that despite his attempt to resolve the matter directly with Phoenix, the latter failed to investigate the alleged fraudster's accounts.

He submitted that should the Service Provider adequately reviewed such account, it would have '*... probably realized those funds are associated with fraud and financial crime, rather than some other legitimate revenue/activity.*'<sup>2</sup>

He also submitted that a financial institution should seek further information and/or documentation from the client in order to help create a proper KYC

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<sup>1</sup> Page (P.) 3 - 66

<sup>2</sup> P. 25

profile; and when the movement of large sums of money is concerned, the service provider should verify the legality and legitimacy of its sources.

In fact, the Complainant insisted that:

*'... it became glaringly obvious to me that no adequate information or/and documentation were sought by Paytah, at best, and at worst – no appropriate safeguards were implemented at all.'*<sup>3</sup>

He insisted that the Service Provider knew, or should have known, that the funds being liquidated did not rightfully belong to the fraudsters, and that the assets being liquidated through its services were not profits earned in a legitimate and lawful way.

The Complainant further stated that as a regulated and licensed financial institution, Phoenix/Paytah should have analysed their client's activities to be able to distinguish between what is a normal activity, and other illegal activity.

He stated further that the Service Provider has strict statutory and regulatory obligations to monitor client's transactions and report suspicious activities to the law enforcement authorities accordingly.

In view of the above, the Complainant is

*'... seeking compensation. 50,000 EUR was sent to scammers, and the bank opened an account for scammers. And bank does not follow all the requirements and laws that they have to follow.'*<sup>4</sup>

**Having considered Phoenix's reply**<sup>5</sup> whereby, primarily, the Service Provider declared that it is not the legitimate respondent vis-à-vis the Complainant and his actions. It declared that it has no relationship with the Complainant, whether contractual or otherwise, and was not involved or in contact with the same Complainant when the alleged claim arose.

Phoenix stated that as submitted by the Complainant himself, the alleged dispute and claim is against *CapitalXP*, a third party incorporated in a separate jurisdiction and, thus, if the Complainant has any claim, this should have been

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<sup>3</sup> P. 26

<sup>4</sup> P. 3

<sup>5</sup> P. 72

instituted against third party companies and directors as applicable, and not against Phoenix. It stated further that, as also admitted by the Complainant himself, he never engaged Phoenix to provide any service to him and, consequently, the Service Provider has no contractual or any other obligation towards him.

The Service Provider declared that in the eventuality that the Complainant files a complaint against a third party registered in a separate jurisdiction, the Arbiter would have no competence to deal with such a complaint.

Phoenix also stated that in spite of the fact that it had no legal relationship with the Complainant, when he contacted it, Phoenix referred the Complainant to the rightful respondent.

The Service Provider reiterated that there is no relationship between the Complainant and itself and, therefore, has no obligation to answer the complaint as submitted or to disclose any privileged information. It insisted that it always acted in good faith in the provision of its services and any fraudulent actions on the part of third parties cannot be in any manner attributed to it.

Phoenix emphasised that it has no obligation to reimburse the Complainant for acts or omissions carried out by himself and/or third parties. It denies all allegations put forward by the Complainant, whilst insists that it accepts no responsibility for his negligence and/or acts or omissions carried out by third parties.

In conclusion, Phoenix explained how, in terms of Chapter 373 of the Laws of Malta, the Prevention of Money Laundering Act and Subsidiary Legislation 373.01 entitled Prevention of Money Laundering and Funding of Terrorism Regulations, it is obliged to carry out due diligence on all customers, and has thus carried out full customer due diligence on its customers and the Ultimate Beneficial Owners.

**Having heard the parties and seen all the documents and submissions made,**

**Considers:**

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 client's' accounts which were 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.

Based on the content of the complaint form and the enclosed documentation, it is clear that despite the fact that the Complainant points out to the Service Provider's alleged failures he declared that he '*... fell victim to a multi-layered scam operation orchestrated by CapitalXP ...*'.<sup>6</sup>

The Service Provider declared that it is not the legitimate respondent in this case, as it had no contractual obligations towards the Complainant, and he has never been their client.

### **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:*

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<sup>6</sup> P. 2

*(a) To deal with complaints filed by **eligible customer**.*<sup>7</sup>

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.’*

In the complaint form, the Complainant declared that:

*‘... I fell a victim to a multi-layered scam operation orchestrated by CapitalXP (the “Fraudsters” or “Companies”), with the design, development, manufacture, promoting, marketing, distribution, labelling, and/or sale of illegal and outright fraudulent “investment services”, all of which aim at contributing to the goal of robbing and defrauding clients, through a pre-determined cycle of the client’s losses to their gains.’<sup>8</sup>*

He declared further that *‘I believe it can be a great opportunity for PAYTAH to help me and customers like me who can easily fall victim to fraud companies like CapitalXP.’<sup>9</sup>*

In correspondence exchanged with the Police department, the Complainant claimed that:

*‘I was scammed by CapitalXP. They told me to transfer money to .... It should be noted that the Company “**CapitalXP**” is a client of the Paytah ... Capital XP used leverage on me to send them more and more money.’<sup>10</sup>*

The Complainant makes it clear that he was a victim of *CapitalXP* and not of Phoenix/Paytah. He did not prove that Phoenix/Paytah were in some way directly involved in the scam.

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<sup>7</sup> Article 11(1)(a)

<sup>8</sup> P. 2

<sup>9</sup> P. 33

<sup>10</sup> P. 77

Above all, the Complainant clearly affirmed that:

*'I have had no direct relationship with Phoenix Payments.'*<sup>11</sup>

### **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 Phoenix and the Complainant.

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

Accordingly, the Complainant cannot be deemed an *'eligible customer'* in terms of Article 2 of the Act.

Therefore, the Arbiter does not have the competence to deal with the merits of this complaint.

However, the Arbiter would like to make a further comment. Without entering into the merits of the case, the Arbiter noted the correspondence sent by the Service Provider to the Complainant whereby it stated that if the Complainant would send further correspondence on the matter, it reserved the right to take legal action against the Complainant.

The Arbiter is of the opinion that the Service Provider should not have used such harsh language keeping in mind that the Complainant was passing through a difficult time being the victim of such a scam and losing such a substantial sum of money.

The Arbiter therefore directs the Service Provider to be more compassionate with persons finding themselves in such difficulties.

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

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<sup>11</sup> P. 89

**Dr Reno Borg**  
**Arbiter for Financial Services**