

## **Before the Arbiter for Financial Services**

**Case ASF 107/2022**

**GZ (the ‘Complainant’)**

**vs**

**Lazurus Long Limited (formerly  
Phoenix Payments Limited  
(C 77764) (‘Phoenix’ or ‘Service  
Provider’)**

**Sitting of 24 November 2023**

**The Arbiter,**

**Having considered in its entirety, the Complaint (filed on 05 September 2022),  
including the attachments filed by the Complainant,<sup>1</sup>**

### **The Complaint**

Where, in summary, the Complainant claimed to have been a victim of a scam orchestrated by “ASKoBID”, whom he considers as fraudsters, who were somehow linked to a client of the Service Provider known as ‘Vivaro Quadra OU’.

The total amount in question is that of €4,999, transferred by the Complainant through his bank account with ERSTE SPARKASSE on 08 June 2020 showing as beneficiaries the said Vivaro Quadra OU to their account with the Service Provider.<sup>2</sup>

The Complainant by letter of 16 September 2021,<sup>3</sup> accused the Service Provider of having:

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<sup>1</sup> Pages (P.) 1 – 36

<sup>2</sup> P. 17

<sup>3</sup> P. 6 - 16

***“facilitated the fraud to begin with, you are undeniably an involved player in the scam’s ecosystem, by providing infrastructure which fraudsters exploit to make their scams more plausible”.***<sup>4</sup>

The Complainant stated that despite his attempt to resolve the matter directly with Service Provider, the latter failed to co-operate and acknowledge their responsibility.

The Complaint further accused, *inter-alia*, that:<sup>5</sup>

1. Phoenix had failed to make proper due diligence on Vivaro Quadra OU which would have exposed that it was a scam entity.
2. The Service Provider had a duty of care in relation to transactions being made on its platform which would have made it obvious that the Complainant was being defrauded.
3. The Service Provider breached its fiduciary duties to the Complainant by failing to exercise the diligence required in the performance of its obligations, resulting in a significant loss to the Complainant.
4. The Service Provider had possibly neglected legal provisions for measures against money laundering. Further, he accused the Service Provider of participation in fraud, unjust enrichment and violations of international law.

He submitted that had the Service Provider ***“looked at the wider circumstances surrounding the above-referenced transaction(s), this illicit transfer of wealth could have been prevented.”***<sup>6</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 profile; and when the movement of large sums of money is concerned, the service provider should verify the legality and legitimacy of its sources.<sup>7</sup>

In fact, the Complainant insisted that:

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<sup>4</sup> P. 7

<sup>5</sup> P. 6 - 16

<sup>6</sup> P. 7

<sup>7</sup> P. 11

*“... it has become glaringly obvious to me that no adequate information or/and documentation were sought by your organization, at best, and at worst – no appropriate safeguards were implemented at all.”<sup>8</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 fashion.<sup>9</sup>

The Complainant further stated that as a regulated and licensed financial institution, Phoenix should have analysed their client’s activities to be able to distinguish between what is a normal activity, and that which might suggest an illegal enterprise.<sup>10</sup>

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, a full refund of losses was sought as compensation together with full disclosure of details of the holders of the account where Complainant transferred the lost funds subject to the Complaint.

### **The reply of the Service Provider**

The Service Provider replied to the Complainant on 04 November 2021<sup>11</sup> stating:

*“Good afternoon GZ*

*I apologise if you were unhappy with our last response however please allow us to explain.*

*As we have explained regarding the company Vivaro Quadro OU is no longer a client of ours. We have terminated already closed all accounts with this company*

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<sup>8</sup> *Ibid.*

<sup>9</sup> P. 12

<sup>10</sup> P. 13

<sup>11</sup> P. 25

*and do not hold a relationship with such entity any longer and we do not hold any funds pertaining to this entity.*

*You explained you were allegedly scammed by AskOBID to which we also have never held a relationship.*

*Please know that our Compliance Functions has already taken action in terms of the Laws of Malta and the respective authorities have been notified and we suggest that you seek redress against said third parties in the respective jurisdiction and with the relevant authority.*

*Should you have any further queries please don't hesitate to contact us.*

*Regards,*

*Customer Support”.*

**In their official reply to the Complaint filed with the OAFS, the Service Provider replied:**<sup>12</sup>

*“Reference is made to the Complaint submitted to the Office of the Arbiter for Financial Services (‘Arbiter’) by Mr GZ against our Company on 5 September 2022 – OAFS Ref: ASF 107/2022 – (‘GZ case’).*

*In this respect, we express our full availability for a mediation meeting, if so requested by the Arbiter, so as to ensure an open and transparent collaboration with the Arbiter.*

*However, we do wonder if such a measure would be necessary at all, as we firmly believe that:*

- *The GZ case presents exactly the same structure and background facts of other several similar complaints submitted to the Arbiter against our Company (‘similar cases’).*
- *Such ‘similar cases’ were eventually all rejected by the Arbiter since the complainant was deemed ‘not eligible customer’.*

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<sup>12</sup> P. 42

- *The GZ case indeed falls within the category of ‘similar cases’, all rejected by the Arbiter.*

*In light of the above, we hereby express our availability for a mediation meeting, if so requested by the Arbiter as a result of an evaluation which takes into account the nature of the GZ case together with the potential impact on the economic and time resources of our Company as well as of the Arbiter itself.*

*We remain at the Arbiter’s full disposal.*

*Yours sincerely,*

*Mr Marco Lavanna*

*Director.’*

## **Hearings**

At the first hearing of 30 November 2022, it was reported that the Complainant had informed the Office of the Arbiter for Financial Services (OAFS) that he had language problems<sup>13</sup> and therefore proceedings were then held in writing.

The Complainant’s written submission of 06 February 2023<sup>14</sup> repeated what was basically already contained in the complaint form.

The Service Provider then submitted cross-examination questions to be presented to the Complainant. These were replied to on 26 July 2023<sup>15</sup> as follows:

1. *‘Did you sign an agreement or accepted the terms and conditions of VIVARO QUADRA OU?’*

*No, I have absolutely no contact with VIVARO QUADRA OU.*

2. *Are you aware that VIVARO QUADRA OU is licensed in Estonia?’*

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<sup>13</sup> The complaint is well filed in fluent English and, in spite of not declaring having any assistance in the complaint form, it is evident that the Complaint was formulated with technical, possibly legal, assistance, who were not available to represent him at the hearings.

<sup>14</sup> P. 46

<sup>15</sup> P. 64 - 65

Vivaro Quadra OU, Registry code: 14603707, Registration date: 09.11.2018, Status:

<https://www.teatmik.ee/en/personlegal/14603707-Vivaro-Quadra-O%C3%9C>

<https://www.inforegister.ee/en/1463707-VIVARO-QUADRA-OU>

Website: [www.speedybits.net](http://www.speedybits.net), Status: inactive

*July 27, 2023 snapshot: **Speedybits** is an independent legal entity which provides service of cryptocurrency exchange only. Speedybits has no connection to any other legal entity nor service provider or third party (bank and investment services, commerce, goods, marketing and etc.) Speedybits has no control and bears no responsibility for the funds moved by you (client) to another Wallet/Service Provider after receiving the cryptocurrency purchased from us. This website is operated by Vivaro Quadra OU, a company regulated by the Financial Intelligence Unit ('FIU') in Estonia and holding a license for financial services, providing a virtual currency service with license number FVT000264.*

<https://web.archive.org/web/20220626093204/https://www.speedybits.net/>

3. Did you file a formal complaint about VIVARO QUADRA OU in Estonia?

*No, I did not.*

4. Did you ever sign an agreement with Phoenix Payments Limited? (can you file a copy of the agreement you might have signed with Phoenix?)

*No, I did not. Phoenix Payments Ltd is the beneficiary bank. I cannot imagine what kind of agreement could potentially be signed in such relations character”.*

The Complainant also made reference to fines published on the Regulator’s website levied on the Service Provider, but these are not relevant to this case.

The Service Provider made the following submissions in support of their case on 30 August 2023:<sup>16</sup>

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<sup>16</sup> P. 69 - 70

*"I, Marco Lavanna, holder of Italian passport YC2056388, currently hold the position of Director within Lazarus Long Ltd. ('Lazarus').*

*I confirm the following statements under oath. Moreover, my statement is intended to clarify that the proper due diligence and Anti-Money Laundering processes were carried out by Lazarus with respect to 'Vivaro Quadra OU' (the 'Customer') at on-boarding stage.*

- 1. On the 2<sup>nd</sup> June 2020, the Customer received a transfer into the payment account no: MT82PHPY270070PHOENIX0000054443 held at Lazarus in the amount totalling €4,999.00.*
- 2. I can confirm that, at the point in time that the Customer was on-boarded as a customer of Lazarus, Lazarus carried out all processes and obtained all documentation to ensure that met its Anti-Money Laundering and KYC-related requirements at law. The documentation was compiled into what is known as a Customer Risk Assessment ('CRA').*
- 3. Amongst other things, the CRA indicates the main activity of the account's holder. In this case, the CRA stipulated that the Customer provides cryptocurrency exchange services.*
- 4. The Customer Risk Assessment for the Customer ranked the Customer as a 'High-risk' customer and as a result it was decided that enhanced monitoring was to be carried out with respect to each and every single incoming and outgoing transaction in the Customer's account with Lazarus, with particular attention being given to the payer/payee's name and the amount and reason of the payment to ensure that everything was in line with the Customer's risk profile. The Customer was considered to be a 'High-risk' client owing to its activities in the crypto-exchange market.*
- 5. Accordingly, I can confirm that all necessary KYC and ongoing transaction monitoring checks were carried out on the Customer by Lazarus. Lazarus regularly screened transactions which raised any form of suspicion to the effect that such transaction might not be in line with the risk profile of the Customer.*
- 6. With respect to the particular transaction relating to the claim, which took place on the date referred to in paragraph 1 of this affidavit, I can confirm*

*that it was decided by Lazarus that, objectively, the transfer raised no red flags. The reason for this was that the transactions involved a customer from an EU Jurisdiction and payment originated from a reputable bank, being Erste Sparkasse in Vienna. Furthermore, given that the payment was of €4,999.000 no further scrutiny needed to be carried out as the transaction was considered to be 'run of the mill'. For these reasons, the need to delve further into the origin of the request for the transfer executed by Mr GZ was not felt by the compliance team at Lazarus at the time. Lazarus did not have a legitimate basis upon which to assume that this transaction was not in line with the risk profile of the client.*

- 7. I can confirm that I am and have never been aware of any fraudulent profile linked to the Customer.*
- 8. I can confirm that Lazarus has never had any relationship contractually or otherwise with Mr GZ."*

As the Complainant did not submit any cross-examination questions, the parties were invited to make their final submissions. The Complainant did not make any submissions while the Service provider filed their submissions on 15 November 2023<sup>17</sup> restating their case but in particular that:

- 8. "Moreover and without prejudice to the above, the Complainant is not considered to be an 'eligible customer' in terms of the AFS Act, since:  
  
'eligible customer' 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 provisions of a financial service from a financial services provider. It includes the lawful successor in title of the financial product which is the subject of the relevant Complaint.*
- 9. Accordingly, the Complainant is not, nor has it ever been, a consumer/customer of Lazarus. Additionally, the Complainant has never (neither directly nor indirectly) sought the financial services of Lazarus, and neither has Lazarus ever offered to provide its financial services to the Complainant. Consequently, the Complainant cannot ever be considered*

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<sup>17</sup> P. 78 - 81



*an eligible customer in the manner defined by the AFS Act. In fact, in this context, the customer of Lazarus was Vivaro Quadra OU.”<sup>18</sup>*

They also submitted that the Arbiter had already dismissed several cases similar to this particular Complaint.<sup>19</sup>

## **Considerations**

**Having considered Phoenix’s reply<sup>20</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.<sup>21</sup>

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

Phoenix also stated that although 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, 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

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<sup>18</sup> P. 80, para. 8 and 9

<sup>19</sup> P. 79, para. 6, making reference to Arbiter’s decisions re cases ref. 043/2021; 053/2021; 064/2021; 086/2021; 121/2021.

<sup>20</sup> P. 42

<sup>21</sup> P. 80, note 7

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.

As explained above the Complainant categorically admits that he is not a customer of the Service Provider. In fact, he simply sent a payment to a client of the Service Provider who incidentally is different from ASKoBID which he termed as the fraudsters.

The relationship between the beneficiary of the transfers “Vivaro Quadra OU” and the alleged fraudsters does not emerge in the case but the Service Provider make strong assertions about their compliance to Act Chapter 373 of the Laws of Malta, the Prevention of Money Laundering Act, and affirmed that they carry out full due diligence on its customers and Ultimate Beneficial Owners.<sup>22</sup>

In any event, the OAFS is not the right medium through which any allegations regarding possible infringements of Anti-Money Laundering obligations should be made.

**The Complainant accordingly failed to provide any evidence to challenge the plea raised by the Service Provider that he is not a ‘customer’ much less an *eligible customer*.**

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 ‘ASKoBID.*<sup>23</sup>

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<sup>22</sup> P. 80 - 81

<sup>23</sup> P. 2

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:*

*(a) To deal with complaints filed by **eligible customer**."*<sup>24</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."*

The Complainant makes it clear in his Complaint that he was a victim of *Fraudsters* and not of Phoenix. In spite of his suspicions and allegations, no evidence was provided that Phoenix were, in some way, directly involved in the scam.

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<sup>24</sup> Article 11(1)(a)

Above all, the Complainant categorically admitted that he was never a customer of the Service Provider.

### **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.

### **Decision**

For reasons explained above, the Arbiter does not have the competence to deal with the merits of this Complaint and hereby dismisses it.

This without prejudice to the right of the Complainant to take his case to a competent court or tribunal.

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**