

Before the Arbiter for Financial Services

Case ASF 006/2023

CA

(the 'Complainant')

vs

Phoenix Payments Limited

**Trading under brand Paytah Payment
Solutions**

**(C 77764) ('Phoenix' or 'Paytah' or the
'Service Provider')**

Sitting of the 21 July 2023

The Arbiter,

**Having considered in its entirety the Complaint (filed on 12 January 2023),
including the attachments filed by the Complainant,¹**

The Complaint

Where, in summary, the Complainant claimed to have been a victim of a scam orchestrated by *TradoFX*, who were linked to a client of the Service Provider known as 'GOLDENCRYPTO OUE'. The total amount in question is that of €21,000 transferred by the Complainant through his bank account affected in six separate payments between 19 February 2020 and 17 August 2021.^{2 3}

¹ P. 1 -37

² P. 17

³ Schedule shows 5 payments amounting to €32,000 and a first credit entry of €1,000; but the Complaint mentions a figure of €21,000 not €31,000

The Complainant accused the Service Provider that it:

‘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.’⁴

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*, that⁵:

1. Phoenix had failed to make proper due diligence on GOLDENCRYPTO OUE which would have exposed that it was a scam entity.
2. That 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. That 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. That 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’.***⁶

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.⁷

⁴ P. 7

⁵ P. 8 - 37

⁶ P. 7

⁷ P. 11

In fact, the Complainant insisted that:

*'... it became 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.'*⁸

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.⁹

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, 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

Having considered Phoenix's reply¹⁰ 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 GOLDENCRYPTO OUE, 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

⁸ *Ibid.*

⁹ P. 12

¹⁰ P. 46 - 47

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 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.

Furthermore, in the response to the direct complaint filed by the Complainant, Phoenix had informed (on 23 June 2021) that ***'we have no relationship with GoldenCrypto OU the accounts were terminated'***.¹¹

The hearing of 15 May 2023

During the hearing both parties restated their positions.

¹¹ P. 37

The Complainant explained that he was helped by a certain Mr Nelson who was talking to 'them' and referring to the contacts as 'they' having consented to pay back the money. When asked by the Arbiter who are the 'they' and the 'them', the Complainant said:

'I have several emails that I have to sort out, but I did receive an email from Phoenix Payments with a payment offer'.¹²

He said he also claimed from banks that had transferred his money

'but I am probably a too small fish for them to answer me because I never received an answer'.¹³

Under cross-examination, the Complainant when asked if he ever signed or could produce a signed agreement with Phoenix Payments for the provision of any services, replied:

'I just follow the indications of the traders and paid my money to accounts named by them; and they were always foreign accounts and Malta is just one country where these foreign accounts were. I have no direct agreement with Phoenix Payments because the traders just told me to transfer the money to this account in order to make business and I, more or less, thought or expected that then these traders are linked to Phoenix Payments because they offer the service and have a bank account.'¹⁴

The Arbiter requested the Complainant to file within ten working days a copy of the offer he refers to coming from Phoenix Payments direct to him on settlement of this case.

Following this, the Arbiter will proceed to decide about the preliminary plea raised by the Service Provider about whether the Complainant is an 'eligible customer' in case of Act CAP 555 and, consequently, whether the Arbiter has jurisdiction to continue hearing the merits of this case.

¹² P. 50

¹³ *Ibid.*

¹⁴ *Ibid.*

Preliminary Plea

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

Considers:

The Complainant has failed to provide any evidence of any offer purportedly made by the Service Provider as he has indicated during the hearing and as he was requested to provide.

He has also failed to provide any evidence to challenge the plea raised by the Service Provider that he is not an *'eligible customer'*.

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 'TradoFX' ...'*¹⁵

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:

¹⁵ P. 2

'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 customers**.'*¹⁶

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.'

Under cross-examination, the Complainant declared that:

*'I just follow the indications of the traders and paid my money to accounts named by them; and they were always foreign accounts and Malta is just one country where these foreign accounts were. I have no direct agreement with Phoenix Payments because the traders just told me to transfer the money to this account in order to make business and I, more or less, thought or expected that then these traders are linked to Phoenix Payments because they offer the service and have a bank account'.*¹⁷

¹⁶ Article 11(1)(a)

¹⁷ P. 50

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

Above all, the Complainant, when asked if he had ever signed an agreement with the Service Provider, replied bluntly ***'I have no direct agreement with Phoenix Payments'***.¹⁸

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.

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

¹⁸ P. 50