

## Before the Arbiter for Financial Services

Case No. 025/2020

SP ('the Complainant')

vs

HSBC Bank Malta plc (C 31779)

('HSBC Malta' or 'the Bank' or 'the Service Provider')

### Sitting of the 13 September 2021

#### The Arbiter,

Having seen **the Complaint** against HSBC Bank Malta plc ('HSBC Malta' or 'the Bank' or 'the Service Provider') relating to the Bank's alleged failure to safeguard the Complainant in respect of various money transfers made by the Complainant by means of his Visa debit card, to a merchant who the Complainant claimed was a known scammer.

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

Where, in summary and in essence, the Complainant claimed that he was a victim of fraud and that: (i) the Bank failed to protect him at the time of the transactions as he expected the Bank to warn him about the allegedly known scam (ii) the Bank failed to properly check and handle his case as it had quickly dismissed his complaint and did not make the required effort to look into his case and assist him to get his lost funds back, failing in the process to also make the requested chargeback.

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<sup>1</sup> A fol. 1-86

The Complainant explained that in March 2018, he fell victim to a forex/binary options trading company, *'Algotechs (DBA: BeAlgo and/or Traders Capital and/or Capital Way and/or UPC Consulting)'*<sup>2</sup> (*'Algotechs'*), which he claimed was a scam. The transactions to this company were made from his VISA Electron.

He claimed that Algotechs prevented him from withdrawing his funds and did not invest but rather stole his money.

The Complainant noted that he sent a dispute notice to HSBC on 7 July 2019, and that on 19 July 2019, the Bank notified him that his request was invalid given that in accordance with the Visa regulations there were only 120 days within which a chargeback request could be made.

A letter of complaint was sent by the Complainant to HSBC on 13 November 2019, but this was declined by the Bank on the 14 November 2019.

The Complainant submitted that he discovered that Algotechs was a fraud and *'that there were numerous warnings issued by scam broker investigators, as well as by the UK FCA, IOSCO and other regulators, warning the banking community against allowing the instruction of payments to this particular merchant: Algotechs.'*<sup>3</sup>

The Complainant further claimed that financial transactions were facilitated by UpayCard who, despite being a regulated entity, did not verify Algotech's details and proof of identity and was accordingly also considered by him as a scam.

The Complainant questioned how HSBC Malta could have approved the said transactions and how it did not protect him as their customer. He asked HSBC Malta to take responsibility and undertake a chargeback as he received no services or investments from the merchant.

The Complainant requested HSBC Malta to undertake a chargeback on, or otherwise credit his account, for the full amount of the disputed payments

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<sup>2</sup> A fol. 7

<sup>3</sup> *Ibid.*

which amount in total to EUR20,000.<sup>4</sup> In his final submissions, the Complainant stated that he was willing to show flexibility and settle for Eur18,500.<sup>5</sup>

**Having considered the Bank's reply including attachments:<sup>6</sup>**

Where, in summary and in essence, the Bank submitted that the Complaint was unfounded in fact and at law as it claimed that:

- (i) HSBC Malta was not responsible for payment transactions undertaken directly by the Complainant with no involvement by the Bank and made to a beneficiary with whom the Bank had no relationship;
- (ii) the disputed transactions did not involve unauthorised or incorrectly executed transactions;
- (iii) the period of 13 months within which the Complainant could have made a claim in terms of Paragraph 47 and 64 of the Central Bank of Malta Directive No. 1 had, in any case, expired;
- (iv) the Bank was not subject to any obligation to undertake due diligence on every recipient of payment instructions;
- (v) the Bank was not responsible for the disputed payment transactions in terms of the '*General Terms and Conditions, Current, Savings & Card Accounts for Individual and Micro-Enterprises*' contract which regulated the account relationship between the parties;
- (vi) the Complainant had not adhered either with the condition found on the Bank's website in respect of disputes, which condition provides for a period of sixty days from the date of the transactions, within which to make a dispute, as the Complainant's initial complaint was dated 3 July 2019, and was in respect of transactions undertaken between 22 March 2018 and 4 May 2018.

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<sup>4</sup> A fol. 4

<sup>5</sup> A fol. 166

<sup>6</sup> A fol. 91-140

## *Background*

The Bank explained that the Complainant made several transactions from his VISA Electron debit card and that a review of his bank account indicated a total payment of €25,050 to 'EW\*Trading' in 13 payments over the period 22 March 2018 to 4 May 2018.

The Bank further noted that a total deposit from 'EW\*Trading' of €5,000 was received over 3 payments on 1 November 2018. This yielded a difference of €20,050 which was close to the amount claimed by the Complainant.<sup>7</sup>

The Bank reserved the right to make further submissions if the said transactions did not constitute the subject matter of the Complaint.

HSBC Malta claimed that the '*Central Bank of Malta Directive No 1 - The Provision and Use of Payment Services*' ('the Directive') was the legislation which regulated the subject matter.

The Bank referred to Paragraph 40 of the said Directive noting that this provided that

*'a payment transaction is considered to be authorised only if the payer has given consent to execute the payment transaction'*.<sup>8</sup>

The Bank further noted that in the case in question, *'the Complainant not only authorised the payment transactions but effected them himself'*.<sup>9</sup>

Reference was also made to Paragraph 47 of the Directive, where the Bank noted that this provided that the

*'payment service user (the Complainant) shall obtain rectification of an unauthorised or incorrectly executed payment transaction from the payment service provider (the Bank) only if the payment service user notifies the payment service provider without undue delay on becoming aware of any such transaction giving rise to a claim, including that under Paragraph 64, and no later than 13 months after the debit date.'*<sup>10</sup>

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<sup>7</sup> A fol. 91

<sup>8</sup> A fol. 92

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

<sup>10</sup> *Ibid.*

HSBC Malta submitted that the payment transactions being the subject of the complaint were not unauthorised or incorrectly executed given that they were undertaken directly by the Complainant and clearly authorised and correct.

The Bank further submitted that rectification of the transactions undertaken during 22 March 2018 to 4 May 2018, was also not possible as the period of 13 months from the debit dates had lapsed given that the first time the Complainant wrote to the Bank was on 3 July 2019.

Reference was also made to Paragraph 64 of the Directive, where the Bank noted that this provided that:

*'where a payment order is initiated directly by the payer (the Complainant), the payer's payment service provider (the Bank) shall, without prejudice to Paragraphs 47, 63(2) and (3) and 68, be liable to the payer for correct execution of the payment transaction'.<sup>11</sup>*

The Bank submitted that there was no issue about the correct execution of the payment transaction. It further noted that Paragraph 63(2) and (3) of the Directive referred to an incorrect unique identifier which was again not relevant to the subject matter of the Complaint, whilst Paragraph 68 of the Directive related to abnormal and unforeseeable circumstances which were also not relevant to the case.

The Bank referred to Paragraph 49 of the Directive and noted that this paragraph dealt with the liability of the payment service provider, where it provided that:

*'without prejudice to Paragraph 47, in the case of an unauthorised payment transaction, the payer's payment service provider refunds the payer the amount of the unauthorised payment transaction immediately, and in any event no later than by the end of the following business day, after noting or being notified of the transaction ...'.<sup>12</sup>*

The Service Provider submitted that the crux of such provisions was that the transactions were unauthorised which was however not the case in this Complaint.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

The Bank further submitted that, as a payment service provider, it had no obligation to undertake due diligence on every recipient of payments issued by the Complainant who it noted was responsible himself for the risk of the payments/investments made by him.

HSBC Malta submitted that, furthermore, it was not responsible for the disputed payment transactions with reference to Part D.5, titled '*Responsibilities*' of the '*General Terms and Conditions, Current, Savings & Card Accounts for Individual and Micro-Enterprises*' contract which, it noted, detailed the Bank's responsibilities, or lack thereof, in the scenario involving the payment transactions undertaken by the Complainant himself.

The Bank also submitted that its website, which was accessed by the Complainant when downloading the Bank's Dispute Form, included a condition that complainants had 60 days from the date of a disputed transaction within which to dispute the transaction.

It was noted that the Complainant breached this condition as the initial complaint of 3 July 2019 was filed well after the lapse of the said period of 60 days in respect of transactions carried out between 22 March 2018 and 4 May 2018.<sup>13</sup>

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

**Considers:**

**The Merits of the Case**

**The Arbiter will decide the Complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.<sup>14</sup>**

***Facts of the Case and other relevant matters***

The following is a summary of the pertinent facts of the case and other important matters as emerging from the documents provided, hearings and submissions made:

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<sup>13</sup> A fol. 93

<sup>14</sup> Cap. 555, Art. 19(3)(b)

- (i) As part of the documentation attached to his Complaint Form, the Complainant presented various payment notifications (from XE Money Transfer)<sup>15</sup> over the period 30 April 2018 to 18 March 2019.

The Complainant is identified as the '*Ordering Customer*' in the said payment notifications whilst the '*Beneficiary Name*' is identified as '*UPC Consulting Ltd*' or '*Toot Capital SL*'. The said payment notifications amount to over Eur700,000 in total.<sup>16</sup>

- (ii) An extract from the website '*https://admin.bealgo.com/manager*', which was also presented by the Complainant as part of the documentation attached to his Complaint Form, included a '*Dashboard*' which indicated a '*Balance*' of '*-36,074.33*', '*Profit*' of '*-1,052,566.99*', '*Credit*' of '*260,000.00*' and '*Total Trades*' of '*2,330*' apart from *inter alia* an '*Activity Log*' featuring the Complainant as the '*User Name*'.<sup>17</sup>

The last post identified in the '*Activity Log*' in the said extract was a '*support ticket to Customer Support department*' created on '*2019-04-30*'. The '*Activity Log*' also featured the latest deposit at the time, where the Complainant '*Posted Direct Wire Deposit Amount 80000*' on '*2019-03-14*'.<sup>18</sup>

- (iii) The Complainant sent a formal letter of Complaint dated 3 July 2019 addressed generally to '*HSBC*'.<sup>19</sup> In the said letter, the Complainant stated *inter alia* that '*Money was transferred from my account via a wire transfer for a total amount of 826,050 EURO utilizing your services*'.<sup>20</sup>

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<sup>15</sup> Formerly HiFX as indicated by the Complainant – A fol. 12

<sup>16</sup> Payment of: Eur3,000 on 30 April 2018 Transaction No. C5707076; Eur30,000 on 2 May 2018 Transaction No. C5715065; Eur47,000 on 14 May 2018 Transaction No. C5748270; Eur3,000 on 15 May 2018 Transaction No. C5752110; Eur50,000 on 22 May 2018 Transaction No. C5772768; Eur50,000 on 23 May 2018 Transaction No. C5776124; Eur50,000 on 14 June 2018 Transaction No. C5845509; Eur50,000 on 15 June 2018 Transaction No. C5849585; Eur50,000 on 18 June 2018 Transaction No. C5854997; Eur50,000 on 19 June 2018 Transaction No. C5859185; Eur50,000 on 20 June 2018 Transaction No. C5864068; Eur7,000 on 21 June 2018 Transaction No. C5867699; Eur43,000 on 21 June 2018 Transaction No. C5867471; Eur50,000 on 13 August 2018 Transaction No. C6025594; Eur50,000 on 14 Aug 2018 Transaction No. C6031079; Eur31,000 on 15 March 2019 Transaction No. C6731195; Eur49,000 on 15 March 2019 Transaction No. C6731195; Eur49,000 on 18 March 2019 Transaction No. C6750695 - A fol. 35-38 & A fol. 59-64

<sup>17</sup> A fol. 29

<sup>18</sup> *Ibid.*

<sup>19</sup> A fol. 12

<sup>20</sup> *Ibid.*

In the said letter, two account numbers were indicated - '12000873 (806,000 Euro)' and '026-252056-050 (25,000 Euro)'.<sup>21</sup>

HSBC Malta had received the complaint letter of 3 July 2019 given that, in its reply to the OAFS, it noted that *'the Complainant first wrote to the Bank on the matter (i.e., 3 July 2019)'*.<sup>22</sup>

- (iv) **The account with number '026-252056-050' is the one held with HSBC Malta as per the Account Statement produced during the proceedings of the case.**<sup>23</sup>

The other bank account number '12000873' is an account held with HSBC UK as evidenced by other Account Statements presented by the Complainant attached to his Complaint Form.<sup>24</sup>

- (v) During the hearing of 30 September 2020, the Complainant confirmed that being *'Asked to confirm that the transactions quoted in the bank's statement of defence are the same that I am complaining about, I say, yes.'*<sup>25</sup>

**Hence, whilst the Complainant made various transactions with the merchant up till March 2019,<sup>26</sup> it is clear that the subject matter of this Complaint involves only the transactions undertaken from the account held with HSBC Malta.**

- (vi) The transactions undertaken from the account held with HSBC Malta (Account no. 026-252056-050) were undertaken over the period 22 March 2018 and 4 May 2018 as emerging from the Account Statement presented by the Service Provider (covering a one-year period from 15 May 2017 till 15 May 2018).<sup>27</sup>

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<sup>21</sup> A fol. 13

<sup>22</sup> A fol. 92

<sup>23</sup> i.e., the Account Statement attached by the Complainant to his Complaint Form (A fol. 31) and the Account Statement attached to the Service Provider's reply (A fol. 95-112).

<sup>24</sup> A fol. 73-81

<sup>25</sup> A fol. 145

<sup>26</sup> As emerging from the 'Activity Log' of the website extract of 'Bealgo.com' (A fol. 29), the payment notifications from XE Money Transfer (A fol. 38) and the account statements of HSBC UK (A fol. 73)

<sup>27</sup> A fol. 95-103

The said statement indicated the following transactions (which are the subject of this Case as indicated above), in total amounting to EUR25,050:

<i>Date:</i>	<i>Withdrawal (payment) to:</i>	<i>Amount in EUR</i>
22 March 2018	EW*TRADING FIN	1,000
04 April 2018	EW*TRADING FIN	2,000
07 April 2018	EW*TRADING FIN	3,000
19 April 2018	EW*TRADING FIN	2,000
20 April 2018	EW*TRADING FIN	2,000
21 April 2018	EW*TRADING FIN	2,000
23 April 2018	EW*TRADING FIN	2,000
25 April 2018	EW*TRADING FIN	2,000
25 April 2018	EW*TRADING FIN	2,000
25 April 2018	EW*TRADING FIN	2,000
26 April 2018	EW*TRADING FIN	2,000
27 April 2018	EW*TRADING FIN	1,050
04 May 2018	EW*TRADING FIN	2,000

(vii) Another Account Statement (for Account no. 026-252056-050) presented by the Service Provider for the period 19 October 2018 till 19 January 2019, indicates three deposits of EUR1,050, EUR2,000 and EUR1,950, amounting in total to EUR5,000, all received by the Complainant from 'EW\*TRADING FIN' on 1 November 2018.<sup>28</sup>

(vii) In its email to the Complainant dated 19 July 2019, HSBC Malta mainly notified the Complainant that

*'the dispute form that we have received is invalid', and that*

*'As per Visa regulations, we have 120 days to raise a chargeback.'*<sup>29</sup>

This position was reiterated in the email dated 14 November 2019 sent by HSBC Malta to the Complainant, where the Bank informed him that *'we can raise a chargeback up to a maximum of 120 calendar days from the date of*

<sup>28</sup> A fol. 108

<sup>29</sup> A fol. 11

*transaction. Thus, in these circumstances we are unable to assist further, and we suggest that you seek legal advice in this matter.'*<sup>30</sup>

### **Considerations**

The Arbiter has considered the various issues raised and submissions made by the parties throughout the proceedings of the case. The Arbiter has the following observations and conclusions to make:

a) *Applicable Directives*

It is noted that in its reply, HSBC Malta referred to the '*Central Bank of Malta Directive No. 1 - The Provision and Use of Payment Services*' ('the CBM Directive').<sup>31</sup> In its submissions, the Complainant criticised the Bank about not referring to the Payment Services Directive II (PSD2), Directive (EU) 2015/2366.

The Arbiter noted that the CBM Directive referred to by the Bank actually is '*modelled on the requisites of the Directive (EU) 2015/2366*' as stipulated in the '*Subject Matter*', Paragraph 3, of the CBM Directive.

The Central Bank of Malta's ('CBM') website notes the following in respect of the CBM Directive:

*'This Directive repeals the previous Directive No. 1 which was modelled on the requisites of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, more commonly referred to as the Payment Services Directive (PSD1).*

*The new Directive transposes Titles III and IV of the revised Payment Services Directive (PSD2) being Directive EU 2015/2366 of the European Parliament and of the Council of 25 November 2015 on the payment services in the internal market, amending Directive 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.'*<sup>32</sup>

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<sup>30</sup> A fol. 10

<sup>31</sup> A fol. 91

<sup>32</sup> <https://www.centralbankmalta.org/regulation>

**Hence, the Arbiter considers that HSBC Bank was correct to refer to the provisions of the CBM Directive and, in so doing, has not excluded the PSD2 Directive in its submissions.**

b) *Provisions of the Directives referred to by the parties*

In its reply, HSBC Malta referred to Paragraphs 40, 47, 49, 63(2), 63(3), 64 and 68 of the CBM Directive.

**The Arbiter concurs with the submissions made by HSBC Malta that the said provisions do not attribute any liability on the Bank in the circumstances of this case. This is particularly so given that the provisions quoted, namely, relate to unauthorised or incorrectly executed payment transactions which are deemed not to be the issues involving this Complaint.**

**In any case, it is noted that the Complainant clearly failed to notify the Service Provider *'without undue delay on becoming aware of any such transaction giving rise to a claim'* and *'no later than 13 months after the debit date'* as provided in Paragraph 47(1) of the CBM Directive which reflects Article 71(1) of the PSD2. This is in view of the timelines outlined above, namely the initial complaint letter of 3 July 2019 and the dates of the disputed transactions (i.e., 22 March 2018 and 4 May 2018) as confirmed above.**

It is also noted that Paragraph 47(1) of the CBM Directive further provides that

*'The time limits for notification as specified in Paragraph 47(1) do not apply where the payment service provider has failed to provide or make available the information on the payment transaction in accordance with this Directive.'*

The Arbiter has found no evidence that HSBC Bank failed to provide or make available such information.

**The Arbiter ultimately notes that the Complainant never contested that the transactions subject of this Complaint were unauthorised.**

In its final submissions, the Complainant himself *inter alia* points out that:

*'Considering all of the evidence, the starting position here is that I authorized the payments ...',*<sup>33</sup> and further confirmed that

*'At no point I made the claim that I did not authorize the transactions in question'.<sup>34</sup>*

**It is also undisputed that the Complainant had himself given consent to undertake the transactions in question.**

**Having considered the particular circumstances of this case neither can the Arbiter arrive to a reasonable conclusion that the disputed transactions were incorrectly executed payment transactions given also that the case in question does not involve non-execution, defective or late execution of payment transactions within the meaning of the CBM Directive or the PSD2 Directive.**

The Arbiter notes that, in his final submissions, the Complainant referred to Article 68 of the PSD2 Directive, where he highlighted provisions relating to the *'fraudulent use of the payment instrument'* and specifically Articles 68(2)-(4) which provide as follows:

- '2. If agreed in the framework contract, the payment service provider may reserve the right to block the payment instrument for objectively justified reasons relating to the security of the payment instrument, the suspicion of unauthorised or fraudulent use of the payment instrument or, in the case of a payment instrument with a credit line, a significantly increased risk that the payer may be unable to fulfil its liability to pay.*
- 3. In such cases the payment service provider shall inform the payer of the blocking of the payment instrument and the reasons for it in an agreed manner, where possible, before the payment instrument is blocked and at the latest immediately thereafter, unless providing*

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<sup>33</sup> A fol. 157

<sup>34</sup> A fol. 159

*such information would compromise objectively justified security reasons or is prohibited by other relevant Union or national law.*

*4. The payment service provider shall unblock the payment instrument or replace it with a new payment instrument once the reasons for blocking no longer exist.'*

The Arbiter observes, however, that Article 68(2) relates to the right of the service provider to block the payment instrument in justifiable circumstances and relates to fraudulent use of the payment instrument.

**Moreover, the Arbiter considers that there is no sufficient and convincing basis either that there was fraudulent use of the payment instrument of the VISA card issued by HSBC Malta in this case, considering not only that the Complainant had undertaken the payments himself but that the Complainant kept depositing and transacting with the merchant (using other account/s) for various months after the disputed transactions.<sup>35</sup>**

**Further to the above considerations, the Arbiter accordingly finds no clear and sufficient legal basis, in terms of the Directives referred to by the parties, on which HSBC Malta can be held liable for the disputed transactions.**

- c) *Chargeback* - The Complainant requested the Bank to undertake a chargeback. The Arbiter notes that, as notified by the Bank in its emails to the Complainant of 19 July 2019 and 14 November 2019, the period within which a chargeback could be raised had, however, lapsed as per the VISA regulations given that the Bank had 120 days to raise a chargeback from the date of the transaction.<sup>36</sup>

**Whilst the '*Visa Core Rules and Visa Product and Service Rules*' include various scenarios, the Arbiter considers that there is no sufficient basis on which the Complainant's request with respect to the chargeback can be considered further by the Arbiter taking into consideration:**

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<sup>35</sup> Whilst the last disputed transaction involving the account held with HSBC Malta was of 4 May 2018, further deposits with the merchant kept being undertaken by the Complainant at least up to March 2019 and thus till around 10 months thereafter.

<sup>36</sup> *A fol.* 10-11

- (i) **the delay by the Complainant of over 13 months, from the last date of the disputed transactions, in raising a complaint with the Bank, and,**
- (ii) **also given that it has not satisfactorily emerged either that the Complainant had not received the trading service for which the disputed transactions were made. Had he not received the trading service, the Complainant would not have kept transferring (from other account/s) much higher amounts to the merchant not just shortly thereafter<sup>37</sup> but also for so many subsequent months<sup>38</sup> after the disputed transactions.**

**The Arbiter would like to remark, on a general note, that in case where a customer's notification of dispute is to be turned down by the service provider, it would be reasonable and helpful if a comprehensive explanation of the matters the service provider has considered in its review, including the basis of its refusal, is provided to such a complainant as practicable and appropriate.**

d) *Other key matters - Internal safeguards & Monitoring of the Complainant's account*

One key remaining aspect which needs to be considered by the Arbiter is whether HSBC Malta had sufficient internal safeguards and monitoring systems in place to counter risks in financial transactions and prevent scams and fraud.

The question is accordingly whether HSBC Bank should have reasonably intervened in the transactions made by the Complainant and stopped or warned the Complainant from making the transactions undertaken between 22 March 2018 and 4 May 2018.

The following aspects are considered to be particularly relevant in this regard:

- (i) *Claim of known scam* - Firstly, it is noted that the regulatory warnings and negative online reviews presented by the Complainant about

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<sup>37</sup> Such as in June 2018 and August 2018 - A fol. 29-30 & 36-37

<sup>38</sup> Up to March 2019

Algotechs Capital Traders and/or Bealgo were all published or made in 2019 and, hence, **various months after the disputed transactions** which are the subject of this Complaint.<sup>39</sup>

This is apart that the relationship/link between Algotechs and '*EW\*Trading Fin*', the latter being the party to whom the payments were made from the HSBC Malta account, is not apparent either.

No clear and evident link has also emerged between other parties such as '*UpayCard*'/'X'/'*HiFX*' which were mentioned in this case and in respect of which negative online reviews were presented by the Complainant<sup>40</sup> and the party to whom the payments were made, that is, '*EW\*TradingFin*'.

**The Arbiter accordingly considers that no clear and sufficient evidence has been presented or has emerged during the proceedings of this Case about warnings on '*EW\*Trading Fin*' and/or even the forex/binary options trading company dealt with by the Complainant prior to or during the dates of the disputed transactions. Hence, the allegation that this was a known scam has not been adequately and sufficiently proven and determined.**

- (ii) *Pattern of transactions* - As to the question whether the disputed transactions were unusual and/or out of character, this needs to be considered particularly with reference to the annual account statement presented by HSBC Malta.<sup>41</sup>

The annual account statement does not indicate abnormal amounts per single transaction given that the size of each disputed transaction was between EUR1,000 to EUR3,000.<sup>42</sup>

There were, however, multiple withdrawals undertaken by the Complainant over a short period of time - involving 11 transactions of mostly EUR2,000 each, all undertaken in April 2018.

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<sup>39</sup> A fol. 14-15; A fol. 18-19; A fol. 39; A fol. 82, 83, 84, 86

<sup>40</sup> Such as in A fol. 20-22; 25-28

<sup>41</sup> A fol. 95-107

<sup>42</sup> Previous withdrawals of similar or higher amounts had taken place albeit limitedly - A fol. 95 & 98

As indicated in the affidavit presented by the Senior Legal Counsel of HSBC Malta,<sup>43</sup> the Bank had however contacted the Complainant in the beginning of April 2018 with respect to one of the first payment transactions, for the amount of €3,000 to 'EW\*Trading Fin', which payment ultimately went through on the 7 April 2018, but was initially declined as it was in excess of the limit.

The said transaction went through after a call with the Bank's representative where the Bank had increased, for a short time, the withdrawal limit for single transaction to allow the transaction to proceed. It is further noted that multiple payments were subsequently made by the Complainant to the same party, 'EW\*Trading Fin', mostly of Eur2,000 each and below the limit which gave rise to the initial call.<sup>44</sup>

Whilst the Bank could have contacted the Complainant again to verify once more that the multiple transactions were being authorised, the Arbiter is not convinced that such an enquiry would have, however, altered the transactions being made by the Complainant in the case in question.

**On a general note, the Arbiter remarks that in order to further assist customers in avoiding scams, frauds or prevent other potential difficulties in financial transactions, payment service providers should ideally willingly draw the customer's attention about the customer's responsibility to verify that a trading company they are dealing with truly exists, is *bona fide*, and for the need to exercise greater care to avoid risks when dealing with unregulated entities.**

However, this does not affect the merits of this case for the above-stated reasons and other reasons to be mentioned in this decision, especially, the fact that transactions were authorised and even repeated after the period to which the Complaint relates.

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<sup>43</sup> A fol. 151-152

<sup>44</sup> A fol. 101

**Other Considerations:**

- (i) *Complainant made various other substantial transactions (from another account/s) of a much higher value after the period of the disputed transactions*

During the hearing of 30 September 2020, the Complainant testified that:

*'There were several transactions which were made up on this amounting to €25,050 where €5,050 were actually reimbursed leaving me with €20,000 deficit.'*<sup>45</sup>

Despite being 'reimbursed' for part of the sum on the 1 November 2018,<sup>46</sup> the Complainant, however, kept making transactions, and even substantial ones of a much higher value than the total sum of the disputed transactions.<sup>47</sup> Such transactions were made in subsequent months, at least, till March 2019 and, thus, up to 10 months thereafter.

- (ii) *Possible limited impact of HSBC Malta's intervention*

It is noted that, in its final submissions, the Complainant submitted *inter alia* the following:

*'I consider a diligent and prudent banker ought reasonably to have realized there was a real possibility that I may have been defrauded. HSBC Malta did not take further steps to question or warn me of the risk of increasing the card limit in the circumstances. If HSBC Malta had done so, I may have stopped and thought twice about:*

- *increasing the card limit which enabled the subsequent disputed transactions*
- *making any further transactions to the merchant(s)*
- *dealing with the scammer*

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<sup>45</sup> A fol. 143

<sup>46</sup> A fol. 108

<sup>47</sup> Such as various additional deposits of Eur50,000 in June 2018 (A fol. 59, 61-62) and even a deposit of Eur80,000 in March 2019 as apparent from the payment notifications of XE Money Transfers (A fol. 38) and the 'Activity Log' of (A fol. 29-30)

*and may not have suffered the resulting loss.'*<sup>48</sup>

The Complainant seems to have himself acknowledged that there was the possibility that he would not have stopped, or still suffered the resulting losses, even if HSBC Malta had questioned the transaction or warned him about the card limits. The uncertainty about the possible outcome had HSBC Bank intervened further weakens, in the context of the events of this case, the request for compensation from the Bank.

**For the reasons explained, and taking into consideration the particular circumstances of this case, the Arbiter is not convinced that the losses suffered by the Complainant were the cause of HSBC Malta, nor that the Bank could have done more strictly in terms of its obligations under applicable rules, regulations and/or Directives to prevent the losses given also the considerable delay by the Complainant in raising a complaint with the Bank.**

**There is a balance that needs to be sought in the identification of potentially fraudulent payments and the interference with legitimate payments, and a customer has on his/her part to also meet and exercise the required level of care.**

### **Conclusion**

**In the particular circumstances of this case, and for the reasons mentioned, the Arbiter considers that HSBC Bank is not responsible and liable in respect of the disputed transactions. The Complaint is accordingly being rejected.**

**Given the particular nature of this complaint, each party is to bear its own costs of these proceedings.**

**Dr Reno Borg  
Arbiter for Financial Services**

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<sup>48</sup> A fol. 158