

Before the Arbiter for Financial Services

Case ASF 115/2023

OD

(Company Number XXXX XXXX)

(‘the Complainant’)

vs

Truevo Payments Limited

(C 62721) (‘Truevo’ or ‘Service Provider’)

Sitting of 30 April 2024

The Arbiter,

Having seen the **Complaint** made by *OD*, a company registered in Cyprus in 2017 (with company registration number XXXX)¹ against *Truevo Payments Limited* (‘Truevo’ or the ‘Service Provider’), the latter being a local financial institution licensed by the *Malta Financial Services Authority* (‘MFSA’) in terms of the *Financial Institutions Act* to provide payment services.²

The Complaint, in essence, relates to the Complainant’s claims that Truevo failed to undertake its obligations under the Merchant Agreement entered into between the parties. This is particularly in view of the claim that Truevo withheld the Complainant’s funds in respect of alleged fines imposed by VISA and Mastercard and also unjustifiably applied withdrawal and monthly service fees on its account. The Complainant further claimed that Truevo also failed to provide it with detailed account statements and reconciliation reports on transactions and balances held on its account.

¹ Page (P.) 437

² <https://www.mfsa.mt/financial-services-register/>

*The Complaint*³

In its Complaint to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant explained that it had entered into a Merchant Agreement with Truevo on 2 July 2018, in terms of which Truevo was obliged to proceed with the settlement of all funds received on behalf of the Complainant through transactions relating to the agreed services.

It noted that on 24 April 2020, Truevo informed the Complainant of its intention to initiate the procedure to terminate the Merchant Agreement with effective termination of 8 May 2020. It further noted that, as per the said notification, any amounts held by Truevo on behalf of the Complainant had to be paid back to the Complainant upon the lapse of four months from the last chargeback received by the merchant but not earlier than six months after the last transaction.

In June 2020, the Complainant observed that Truevo had stopped releasing funds to the Complainant's account, which funds Truevo had been receiving on the Complainant's behalf under the Merchant Agreement. It submitted that despite several requests, Truevo neglected to credit the said funds to the Complainant's account, breaching its contractual obligations.

The Complainant explained that, in addition, it also noticed that in February 2020, Truevo had deducted from its funds, the amount of USD 27,100 without providing any reasoning, information and notice relating to such action. The Complainant further claimed that only after it had noticed the deduction of funds did Truevo provide an explanation, which explanation was, however, limited to a general allegation that the amount was deducted due to an alleged fine imposed on Truevo in relation to the Complainant's transactions (the 'Alleged Fine').

It claimed that despite its numerous requests, Truevo failed to provide a detailed explanation regarding the Alleged Fine and deprived the Complainant the opportunity to dispute the Alleged Fine within the applicable timeframes as per the relevant Card Scheme rules and regulations. The Complainant further claimed that Truevo has deprived it from receiving justified information relating

³ Complaint Form on Page (P.) 1 - 6, description of Complaint on P. 35 - 40 and extensive supporting documentation on P. 7 - 437.

to the imposition of the Alleged Fine and from the opportunity to potentially allow it to dispute and possibly succeed in overturning the Alleged Fine and avoid the deduction of funds.

The Complainant claimed that, furthermore, Truevo unjustifiably neglected to provide it with detailed account statements and reconciliation reports as to the transactions taking place in relation to the services and balances held.

It noted that, as per the Merchant Agreement,⁴ clause 8(r), Truevo ought to have provided it at least once a month with *inter alia* (i) a reference enabling it to identify payment of transactions made during the relevant month, (ii) the amount of payments of transactions made during the relevant month in Euro, (iii) the amount and breakdown of the charges in respect of the payment of transactions made during the relevant month and (iv) the credit value date, which the Service Provider failed to do until after numerous requests.

The Complainant further noted that as per clause 17(d) of the Merchant Agreement in case of termination, Truevo was also under the obligation to provide it with the latest available yearly statement and an interim statement covering the period from the last date of the statement until termination, which it had also failed to provide to the Complainant despite several requests.

As a result of all the said events, the Complainant sent Truevo a number of letters including from its Legal Representatives, requesting, *inter alia*, the release of all funds withheld by Truevo, the provision of detailed reconciliation reports as to the transactions taking place in relation to the services under the Merchant Agreement and supporting documents evidencing the receipt and payment of the Alleged Fine.⁵

The Complainant explained that following a meeting on 28 March 2022, Truevo provided an extensive Excel sheet and numerous statements detailing all transactions. It was claimed that upon examination of the said documents, a number of shortcomings transpired and, despite Truevo being called upon to rectify these mistakes through several legal letters and a judicial letter, Truevo remained in default.

⁴ Copy of the Merchant Agreement attached in Annex 3 to the Complaint Form (P. 69 – 102)

⁵ Copy of the said letters included in Annex 1 to the Complaint Form (P. 9 – 26).

The following complaints were accordingly highlighted by the Complainant in relation to the dealings with Truevo:

1. *Retention of Client Funds*

The Complainant alleged that further to the Termination Notice and the subsequent termination of the Merchant Agreement, Truevo neglected to proceed with the release of all funds held on its behalf under the Merchant Agreement at the time and continued to withhold a substantial amount of funds, at the time of the Complaint, despite the Complainant's several requests.

It further claimed that as a direct result of Truevo's misconduct and failure to comply with the Complainant's legitimate requests, the Service Provider's actions caused, and continued to cause the Complainant, on a daily basis, serious prejudice and damage.

The Complainant pointed out that Truevo continued to withhold its funds even after the completion and lapse of the 540 days of the withholding period of funds provided by the Card Scheme Rules. It submitted that only further to the several letters sent, as well as its judicial letter,⁶ Truevo proceeded on 17 December 2021, with a partial release of its funds in the amount of USD 136,861.56. It submitted that, however, at the date of its Complaint, Truevo continued to unjustifiably withhold further of its funds amounting to USD 100,149.15 and Euro 1,800 (which the Complainant referred to as the 'Pending Withheld Funds').

It noted that the Pending Withheld Funds include the amounts relating to the Alleged Fines and the wrongfully charged Withdrawal Fees and Monthly Services fees.

2. *Wrong Reporting in Statements*

The Complainant claimed that Truevo unjustifiably neglected to provide it with detailed reconciliation reports as to the transactions taking place in relation to the services, in breach of its contractual obligations under the Merchant Agreement.

⁶ As per Annex 4 to its Complaint Form (P. 143).

It further claimed that from the documents provided, the Complainant identified a number of shortcomings and inconsistencies. The Complainant noted that the said documents were, in addition, provided in a manner which made it considerably difficult for the Complainant to verify the correctness of the documents and identify the specific transactions performed.

It claimed that, as a result of Truevo's failure to maintain and share with it, up to date, clear and detailed reports of all transactions taken place under the Merchant Agreement, (as per the contractual and regulatory obligations applicable to Truevo as an authorised payment institution), the Complainant was forced to spend a considerable amount of time as well as resources to understand the documents provided.

The Complainant explained that information on funds relating to its account was normally issued through two separate merchant statements, and such statements were issued on a weekly basis until June 2020 and on a monthly basis thereafter.⁷ It was further claimed, that there were errors in the reporting of funds upon examination of other statements.⁸

3. Alleged Fines

The Complainant explained that in February 2020, it noticed that Truevo had deducted from its funds, the amount of USD 27,100 which Truevo claimed to be for purposes of the Alleged Fine.

The Complainant noted that, further to various letters sent to Truevo seeking clarifications regarding the Alleged Fine, on 24 June 2020, Truevo informed the Complainant that it had received a number of fines imposed by Card Schemes on behalf of the Complainant and that it was going to proceed to debit the Complainant's Merchant Account with the additional amount of Euro 60,000.⁹ The Complainant pointed out that Truevo

⁷ The statements issued by Truevo were annexed as Annex 5 (Statements marked as 'XX1XX1 Statements') (P. 144 - 256) and Annex 6 (Statements marked as 'XX2 Statements') (P. 257 - 363) to the Complaint Form.

⁸ The statements under Annex 7 (marked as 'Wrong XX1XX1 Statements') (P. 364 - 385) and Annex 8 (marked as 'Wrong XX2 Statements') (P. 386 - 425) to the Complaint Form.

⁹ As per Annex 9 attached to the Complaint Form (P. 426 - 427).

eventually deducted the amount of USD 67,354 with regard to additional alleged fines.

The Complainant also explained that, further to its repeated requests for the provision of supporting documents with regards to the Alleged Fines, Truevo provided a letter allegedly received from Mastercard. The Complainant submitted that it has reasonable grounds to question the legitimacy of such letter as there are obvious reductions and discrepancies (given that it *inter alia* claimed that there was no signature on the letter, the attachments to the letter do not bear Mastercard logo and there are typo mistakes on the Acquirer's name).¹⁰

It was, furthermore, claimed that the amount of the alleged fine of the mentioned letter is lower than the amounts which were eventually deducted by Truevo.

The Complainant re-iterated that it could not reply to contest the abovementioned letter and has repeatedly requested supporting documents with regards to the payments of the Alleged Fines by Truevo, which Truevo neglected to provide.

4. Unjustified Percentage on Withdrawal Fees

The Complainant alleged that the documents have also shown that Truevo has charged a total of USD 5,695.15 as a percentage fee on withdrawals.

It explained that these fees can also be derived from the identification number provided to such transactions.¹¹

The Complainant claimed that the Withdrawal Fees have been unjustifiably charged as such fees were never agreed to by the parties under the Merchant Agreement and the Complainant alleged that it was not informed prior to Truevo imposing such fees.

5. Monthly Service Fees

The Complainant also claimed that as per the documents submitted, Truevo has also unjustifiably charged it a Monthly Service Fee between the

¹⁰ Copy of the said letter included as Annex 10 to the Complaint Form (P. 428 - 430).

¹¹ Copy of the transactions were included as per Annex 11 to the Complaint Form (P. 431- 435).

period of 01/07/2020 and 01/12/2021 amounting to the total sum of EUR 1,800.00. It was claimed that these fees were charged despite the fact that the Merchant Agreement was terminated on 8 May 2020.

The Complainant also alleged that, up to the date of the Complaint, Truevo continued to withhold the mentioned amount and neglected to release the said amount.

The Complainant noted that Truevo is regulated by the *Financial Institutions Act (Safeguarding of Funds) Regulations* which provide that a financial institution in receipt of funds shall be liable for any loss or prejudice suffered due to the financial institution's fraud, wilful default, misconduct or negligence, including the unjustifiable failure to perform in whole or in part the financial institution's obligations arising under these regulations. It claimed that it is evident that Truevo failed to undertake its obligations under the Merchant Agreement.

It submitted that, in addition, Truevo actively failed to provide it with justified reasons for the imposition of the Alleged Fines and the opportunity to defend itself in relation to the fees imposed. It further claimed that Truevo also failed to justifiably inform and involve the Complainant in their alleged contestation of fines allegedly imposed by VISA and Mastercard in relation to the Complainant's accounts.

The Complainant submitted that in accordance with Article 62(1) of Directive (EU) 2015/2366 of the European Parliament and Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC:

'the payment service provider shall not charge the payment service user for fulfilment of its information obligations or corrective and preventive measures under this Title, unless otherwise specified in Article 79(1), Article 80(5) and Article 88(2). Those charges shall be agreed between the payment service user and the payment service provider and shall be appropriate and in line with the payment service provider's actual costs.'

The Complainant claimed that it is quite clear in this case that Truevo is in breach of this provision as the fees mentioned in this Complaint were never agreed to between them.

Remedy requested

The Complainant requested the Arbiter to undertake the following:

- a) Condemn Truevo to pay the Complainant the sum of USD 94,454 representing the withheld client funds;
- b) Condemn Truevo to pay the Complainant the sum of USD 5,695.15 representing the claimed unjustified percentage on withdrawal fees;
- c) Condemn Truevo to pay the Complainant the sum of Euro 1,800 representing the unjustified charge of Monthly Service Fees;
- d) Condemn Truevo to pay the Complainant interest as well as add index-adjustment, to the amounts claimed in (a) to (c) above for the period withheld;
- e) To liquidate any other amount due as damages suffered by the Complainant due to the Service Provider's defaults together with any applicable interest at law;
- f) Condemn Truevo to pay the Complainant any legal fees incurred to date as a result of the legal actions the Complainant has taken to retrieve its withheld funds from Truevo;
- g) To determine any additional measures as allowed by law.

Having considered, in its entirety, the Service Provider's reply, including attachments,¹²

Where the Service Provider explained and submitted the following:

1. That, as a general note Truevo is a company duly licensed by the MFSA as a financial institution and is also licensed by VISA and Mastercard ('the Card Schemes') in order to act as a licensed Acquirer. To this effect, Truevo is able to process VISA and Mastercard transactions for its merchants and partners situated in Europe.

¹² P. 443 - 446.

2. That the allegations brought forward by the Complainant are unfounded both in fact and in law while the remedies sought have no foundation.
3. That Truevo categorically denies being in breach of its fiduciary obligations and being uncooperative with the Complainant. It also denied ever providing documentation with the intent to misguide the Complainant. It submitted that such a claim is absolutely false and that, on the contrary, it was always forthcoming with the Complainant and provided as much information and supporting documentation as possible.

Preliminary Plea raised by Truevo in its reply

4. That preliminary, and without prejudice to the pleas raised, the action proposed by the Complainant is time-barred in terms of Article 21(1)(c) of Chapter 555 of the Laws of Malta.
5. That Truevo informed the Complainant of its intent to terminate the Merchant Agreement. The Service Provider submitted that, by its own admission, as of February 2020, the Complainant had noted the deduction from the account following the imposition of fines by the Card Schemes. It claimed that it was accordingly clear that the facts leading to the present Complaint have been known for over three years.
6. That, in addition and without prejudice to the pleas already indicated, the action was also time-barred in terms of Article 2153 of Chapter 16 of the Laws of Malta.
7. That, without prejudice to its pleas and with reference to the declarations submitted by the Complainant (fol. 7 of his Complaint), the Complainant should provide tangible and official evidence that it indeed qualifies as a micro-enterprise in terms of the definition set forth in Chapter 555 of the Laws of Malta.
8. That, without prejudice to its pleas and also on a preliminary note, the Service Provider contends that the nature of the Complaint is essentially frivolous and vexatious and henceforth in terms of Article 21(2) of Chapter 555 of the Laws of Malta ('the Act'), the Arbiter should choose to decline to exercise his powers in terms of the Act.

Facts as outlined in Truevo's reply

9. That the parties entered into a Merchant Agreement which was respectively signed on 2 July 2018 by Truevo and 4 July 2018 by the Complainant.
10. During onboarding, the Complainant had the following URL:[XX1.....](#). Subsequently, on 17 July 2018, the URL:[XX2.....](#) was also included.
11. That, on 18 February 2020, Truevo was notified that the Complainant was identified, through the *VISA Global Brand Protection Program*, to have processed illegal and/or brand damaging transactions. As a result of the non-compliance assessment a penalty was imposed on Truevo as a result of the Complainant's actions. The fine was for EUR 25,000.
12. That, on 15 June 2020, Truevo was also fined USD 50,000 for non-compliance with Mastercard Standards.

On 24 June 2020, Truevo notified the Complainant of the fine imposed by the Card Scheme as a result of its business activities and thus proceeded to debit its account by EUR 60,000 as explained in the email to the Complainant's advisers dated 24 July 2020.

13. That, on 19 June 2020, a termination notice was issued to the Complainant where it notified the Merchant that: (a) the termination was made effective 19 June 2020 (b) all outstanding settlement funds (excluding any amounts owed to Truevo, any Regulatory Authority and/or the Card Schemes) shall be transferred to the Merchant at the expiration of the chargeback period and release shall take place in accordance with the Merchant Agreement.
14. That following the issuance of the termination letter, Truevo received several correspondence from the Complainant via their lawyers where, in essence, the Complainant requested and/or stated:

'a) the release of funds in excess of two hundred thousand United States Dollars;

b) to provide the necessary certified true copies of correspondence with VISA and all ancillary and supporting documents as according

to the Complainant, the Respondent had failed to provide clear and unequivocal documentation evidencing the imposition of such fine from VISA;

c) to provide the necessary documentation with Mastercard which is clear and unequivocal regarding the alleged imposition by Mastercard of sixty-thousand Euro, additionally, that the alleged penalty was arbitrarily topped-up by the Respondent and thus these arbitrary fees are also being contested'.¹³

15. That, in response to such letters, Truevo reverted to each letter and, in essence, stated that:

'a) The amounts as quoted by the Complainant were disputed as they were not in line with the data available, which included the transactions which reflect the Merchant's processing. Additionally, the Respondent's calculations follow industry standard and practice;

b) The Card Scheme (Visa and Mastercard) fines were defended, and that it was not in Truevo's interest to have merchants in its portfolio that breach Card Scheme rules. The Card Schemes presented clear evidence that the Merchant was in breach of the rules and thus the penalty imposed. Moreover, Truevo has no reason or need to falsify fines that have been imposed by the relevant Card Schemes on the Merchant; and

c) The funds held by the Respondent were not released due to the chargeback window period as stipulated by the Card Scheme rules, and the Respondent does not retain Merchant funds arbitrarily or unlawfully'.¹⁴

16. That Truevo confirms that no balance is pending or withheld as at 10 January 2022 as shall be corroborated by documentary evidence.

¹³ P. 445

¹⁴ *Ibid.*

17. That, for the reasons mentioned, and whilst reserving any right and/or action according to law, the Service Provider requested that this Complaint be refuted and the requests and remedies indicated therein be thrown out, with costs against the Complainant.

Preliminary - Competence of the Arbiter

Plea that complaint is time-barred

In its reply,¹⁵ the Service Provider raised the preliminary plea that the Arbiter has no competence to hear this Complaint based on Article 21(1)(c) of Chapter 555 of the Laws of Malta (the 'Act'). The Service Provider claimed that the facts leading to the complaint have been known for over three years given that the Complainant was informed about the termination of the Merchant Agreement in 2020 and was also aware of the imposition of fines by the Card Schemes as far back as February 2020. It was further claimed that the Complainant's action is also time-barred in terms of Article 2153 of Chapter 16 of the Laws of Malta.

During the hearing of 28 November 2023, the Arbiter referred to *inter alia* the said preliminary pleas raised by the Service Provider and asked the parties to provide their submissions on the said pleas.

In its subsequent written submissions of 29 December 2023,¹⁶ the Service Provider further highlighted that the contractual relationship with the Complainant was terminated by Truevo in 2020 where the processing of all Mastercard transactions were first terminated effective 8 May 2020 and all transactions, including those of VISA, were secondly terminated effective 19 June 2020.

With reference to Article 2153 of Chapter 16 of the Laws of Malta ('the Civil Code'), the Service Provider submitted that:

'any complaint that needed to be raised by the Complainant was meant to be actioned upon before 19 June 2022. It is understood that prescription is

¹⁵ P. 443 - 444

¹⁶ P. 449 - 452

*applicable to establish a timeframe for when a complaint is actionable by the party alleging the complaint was suffered’.*¹⁷

The Service Provider further noted that the complaint before the OAFS was filed in August 2023, and claimed that *‘the prescriptive period as delineated both by the Civil Code and the Act was not adhered to, as it was not received within the two year prescriptive period and thus the Arbiter does not have the competence to hear or adjudicate’.*¹⁸

On its part, the Complainant subsequently presented, on 31 January 2024, a note of observations in reply to the preliminary pleas raised by Truevo.¹⁹

With reference to the plea that the Complaint is time-barred on the basis of Article 21(1)(c) of the Act, the Complainant submitted, *inter alia*, that a complaint was filed with the Service Provider through *‘a legal letter sent by the Complainant’s legal department dated the fourth (4th) June of the year two thousand and twenty (2020)’*²⁰ and that this was thus within two years from the date (that is, during 2020) when the Complainant first had knowledge of the matters complained of.

The Complainant furthermore made other submissions as to when it became fully aware of the matters complained of, noting that it was *inter alia* awaiting the requested reports and reconciliations (which were eventually provided in 2022) and the release of funds which resulted in a judicial letter on 20 December 2021 and a legal letter dated 23 February 2022.²¹ The Complainant accordingly submitted that it was not possible to make a complaint with the OAFS beforehand.

As to the plea relating to Article 2153 of the Civil Code, the Complainant submitted that it was clear that the applicable prescriptive period had not yet lapsed given that:

‘... the Complainant is seeking payments of debts arising from commercial transactions or other causes in terms of Article 2156(f) of the Civil Code –

¹⁷ P. 451

¹⁸ *Ibid.*

¹⁹ P. 453 - 460

²⁰ P. 456

²¹ P. 457

*which action is time barred by a prescriptive period of five (5) years: a period which has clearly not yet elapsed from the date of the first complaint filed with the Respondent Company and/or the date on which the Complainant became fully aware of the matters complained of’.*²²

The pleas raised by the Service Provider relating to Article 21(1)(c) of Chapter 555 of the Laws of Malta and Article 2153 of Chapter 16 of the Laws of Malta were rejected by the Arbiter in his decree dated 2 February 2024 for the reasons stated therein.²³

In essence, the Arbiter accepted the Complainant’s submissions given that Article 21(1)(c) of the Act refers to a complaint made with the service provider and not with the OAFS. The Complainant made its formal complaint with Truevo in 2020,²⁴ this being within the same year that the material matters in dispute actually occurred. The complaint with the Service Provider was thus clearly within two years from the day on which the Complainant first had knowledge of the matters complained of. The Complainant’s submissions with respect to the plea relating to Article 2153 of the Civil Code were also similarly accepted.

Qualification as a Micro-Enterprise

In its reply, the Service Provider also raised the plea that tangible and official evidence should be provided that the Complainant qualifies as a micro-enterprise in terms of the definition set in the Act.²⁵

In its submissions, the Service Provider referred to the definition of ‘*Eligible Customer*’ and the definition of ‘*customer*’ under the Act, where it noted that the latter refers to a ‘*micro-enterprise*’. It was further noted that a micro-enterprise is, in turn, defined under the Act as ‘*an enterprise which employs fewer than ten persons and whose annual turnover and, or annual balance sheet total does not exceed two million euros (€2,000,000)*’. On this point, Truevo submitted that:

²² *Ibid.*

²³ P. 519 - 522

²⁴ Communication in 2020 refers – whilst a copy of the 4 June 2020 complaint letter was not provided, other correspondence, such as the notification of damages and request for immediate action letter of 20 August 2020 (P. 9), refers.

²⁵ P. 444

*'No evidence was provided that the complainant fits the definition of a micro-enterprise. A search of the Cypriot Companies House shows that the complainant did not yield any information because the last financial statements submitted were in 2017. However, a review of the transactions of 2019 and 2020 (that were processed through the respondent company) for two different URLs (namely XX1 and XX2) show that in 2019 the transactions (purchases and completed) amounted to USD\$6,358,279.79 and for 2020 USD\$1,652,017 ...'.*²⁶

The Service Provider further submitted that the micro-enterprise position should be considered at the time the complaint first occurred, which was in 2020 for the current process. It further argued that the Complainant had failed to file the relevant financial documentation with the *Cypriot Companies House* and, accordingly, the Service Provider was unable to fully present its submission with the necessary documentation that the Complainant does not qualify as a micro-enterprise.

On its part, the Complainant claimed in its submissions that it had provided evidence to the OAFS that it fits the definition of a micro-enterprise, where it had presented the latest available annual balance sheet for 2021 and a declaration relating to the number of employees.²⁷

The Complainant further submitted that the Service Provider's claim that the latest financial statements filed with the *Cyprus Companies House* were only in 2017 was not correct given that the Complainant had submitted statements in 2018, 2019 and 2020. As part of its submissions, the Complainant presented a copy of its audited financial statements for the years 2019 and 2020 as well as a balance sheet for the year 2022.²⁸ It reiterated that the documents clearly demonstrate that the Complainant's annual turnover is well below the Euro 2 million threshold.

The plea raised by the Service Provider as to whether the Complainant fits within the definition of a micro-enterprise as defined under Article 2 of the Act

²⁶ P. 452

²⁷ P. 7 & 8

²⁸ P. 465 - 488; 489 - 516; 517

was subsequently also rejected by the Arbiter as per his decree dated 2 February 2024 for the reasons stated therein.²⁹

The Arbiter determined that, in addition to the criteria relating to the number of employees, it was sufficient for the Complainant to meet one of the two other criteria of either annual turnover or annual balance sheet total to qualify as a micro-enterprise for the purpose of the Act. Accordingly, the Arbiter accepted that, based on the evidence provided, the Complainant satisfies the definition of micro enterprise.³⁰

Other Consideration of 'Eligible Customer'

In a subsequent decree of 22 February 2024, the Arbiter requested certain information/documentation to assist further in the analysis of the case.

Following the additional documentation provided and also considering the submissions and evidence provided during the proceedings of the case, the Arbiter considers that there is a particular aspect relating to his competence on this Complaint, which is being raised by the Arbiter himself at this stage.

As provided for under Article 19 of the Act relating to the functions and powers of the Arbiter, *'It shall be the primary function of the Arbiter to deal with complaints filed by eligible customers ...'*. An *'eligible customer'* is in turn defined under Article 2 of the Act as follows:

"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 provision of a financial service from a financial services provider. It includes the lawful successor in title to the financial product which is the subject of the relevant complaint and also consumer associations'

The term *'customer'* is also defined under the Act to mean *'a natural person, including his successors in title, a micro-enterprise or consumer associations'*.

²⁹ P. 521 - 522

³⁰ Namely the declaration of 28 June 2023 (P.8); Balance Sheet as at end Dec 2021 (P.7); copies of the Financial Statements for the year ended 31 December 2019 (P. 465 – 488) and for the year ended 31 December 2020 (P. 489 – 516); and Balance Sheet as at end Dec 2022 (P. 517).

After determining that the Complainant satisfies the criteria of micro-enterprise as detailed in the Act, the Arbiter considers that upon further examination of the particular circumstances of this case, this Complaint, in substance, does not fall within the ambit of the Act.

This decision is based when taking into account certain aspects, namely, the nature of the dispute and the nature of activities and capacity of the Complainant as outlined in further detail below.

- a) General Background – It is noted that the parties to this Complaint entered into a Merchant Agreement (‘the Agreement’) in July 2018,³¹ where they agreed that the ‘Merchant’ (this being the Complainant), ‘shall participate through Truevo’ in ‘... card schemes in accordance with the terms and conditions of [the] Agreement’.³² Truevo was indicated as ‘being a principal member of Visa International and Mastercard International’.³³

The Agreement provided that:

*‘The Service is being provided by Truevo to the Merchant whereby Truevo shall act as an acquiring and authorising processor, shall provide the Merchant with technical services, and shall perform all necessary ancillary services in order for the Merchant to accept Card Not Present Transactions (i.e. where the Cardholder and the Card are not present at the time of the Transaction) by means of Visa and Mastercard Cards in its normal line of business ...’.*³⁴

The Agreement further included *inter alia* definitions of various terms including the following:³⁵

- ‘Merchant Account’ was defined as ‘the account on the Systems which details transactions and subsequent available balances as a result of the acceptance of Transactions by the Merchant’.

³¹ P. 69 - 102

³² P. 72

³³ *Ibid.*

³⁴ P. 76

³⁵ *Ibid.*

- 'Service' defined as 'the service made available by Truevo to the Merchant';
- 'Systems' defined as 'all components forming part of the Truevo technological server infrastructure';
- 'Transaction(s)' defined as 'the purchase of goods or services effected by the use of the Card';
- 'Card' defined as 'either Mastercard Card or Visa Card ...'.

With this background in mind, and the claims and submissions made by the parties as outlined above, the Arbiter would like to highlight certain observations next about the nature of the dispute in question and the activities/capacity of the Complainant relevant to the provisions and scope of the Act.

- b) Nature of dispute – It is considered that the nature of the dispute mainly, and in essence, involves the application of fines imposed by VISA and Mastercard on Truevo (in its capacity as Acquirer), in respect of the activities of the Merchant which were identified by VISA and Mastercard as 'Illegal Transactions'. The said fines were ultimately passed on and charged to the Complainant's account by Truevo.

It is noted that, as per the letter issued by VISA to Truevo dated 18 February 2020, VISA identified the Merchant as having processed 'prohibited transactions', where it *inter alia* outlined that:

*'Recently, your merchant,**XX2**....., was identified ... for processing illegal and/or brand damaging transactions'.³⁶*

It is further noted that, as per the letter issued by Mastercard dated 15 June 2020, Mastercard also identified the Merchant, with the names of '.....XX2.....' and '.....XX1.....' as having been 'noncompliant with Mastercard standards'.³⁷

³⁶ P. 588 – Emphasis added by the Arbiter

³⁷ P. 593 - 594

The Arbiter furthermore notes the internal email exchanged between Truevo's officials dated 24 July 2020, where it was *inter alia* stated that:

'Mastercard had raised a Non-Compliance Assessment alleging that the Merchants were operating from an incorrect Area of Use, i.e. operating outside of the European territory. Truevo defended this position by providing Mastercard with all supporting documentation required to prove that the Merchant was in the authorized Area of Use.

*However, Mastercard came back with serious allegations and concrete proof with screenshots from the Merchants' website showing that **the operations were conducted outside Europe (specifically XXX and XXX)**. In fact, MasterCard indicated that from the websites, it was clearly evident that the Cypriot entities were only acting as a 'payment agent' and not the actual Merchants providing the services, resulting in a breach of the Mastercard Rules. Hence, the Merchants were considered to be operating outside Europe. In addition, Mastercard pointed out that the Cypriot entities were not licensed to process such business, clearly evidencing that processing was done for the offshore entity via the agents in Cyprus ...'.³⁸*

Further to the Arbiter's decree of 22 February 2024, where the Arbiter *inter alia* requested a detailed definition of compensation of the USD 94,454 being sought in this Complaint, the Complainant provided a detailed overview and breakdown of such amount.³⁹

The Complainant explained that the amount of USD 94,454 comprised of:⁴⁰

- an 'Alleged Fine dated 18/02/2020 (XX2)' for 'USD 27,100.00';
- an 'Alleged Fine dated 26/06/2020 (XX2)' for 'USD 21,239.00';
- an 'Alleged Fine dated 26/06/2020 (XX1)' for 'USD 46,115.00'.

It is further noted that, in its explanations regarding the amounts withheld, the Complainant kept referring to the disputed fines as the 'Alleged Fines' where with respect to the fine of USD27,100 it again claimed *inter alia* that:

³⁸ P. 597 – Emphasis added by the Arbiter

³⁹ P. 541 - 544

⁴⁰ P. 541

- Truevo *'failed to provide a detailed explanation to the Complainant regarding the Alleged Fine and had deprived the Complainant the opportunity to dispute the Alleged Fine within the applicable timeframes as per the relevant Card Scheme rules and regulations'*;
- Truevo *'deprived the Complainant from receiving justified information relating the imposition of the Alleged Fine and from the opportunity to potentially allow it to dispute and possibly succeed in overturning the Alleged Fine and avoid the deduction of funds'*;
- Truevo *'unjustifiably neglected to provide the Complainant with supporting documents evidencing the receipt of the Alleged Fine, as well as supporting documents and evidence that indeed payment was made from their side with regards to the Alleged Fine'*.⁴¹

Similar allegations were also made in relation to the withholding of the amount of USD 21,239 and USD 46,115 in respect of the remaining 'Alleged Fines'.⁴²

Further to the above, it is clear that, ultimately, this Complaint principally relates to fines imposed by VISA and MasterCard with respect to the activities of the Complainant. The Arbiter feels that, for the purposes of Chapter 555 of the Laws of Malta, the application and handling of such fines is not strictly about the financial service offered by the Service Provider (notwithstanding being related thereto).

As to the matters raised relating to the legitimacy or otherwise of the supporting documents that the Service Provider has produced in respect of the fines and charges applied by VISA and MasterCard,⁴³ it is considered that this area does not really fall within the competence of the Arbiter either but is rather a matter for other authorities to consider particularly in the case where falsification is being implied.

⁴¹ P. 542

⁴² P. 542 - 544

⁴³ P. 38

Furthermore, the dispute is rather deemed to be purely of a commercial nature between two business parties predominantly involving the course of business of the Complainant. The observations below about the nature of activities and capacity of the Complainant further refer.

c) *Nature of activities/Capacity of the Complainant* –

It is noted that the nature of the activities of the Complainant intrinsically involves financial services – with three key areas specifically mentioned and emerging from the proceedings of the case: forex brokerage, CFD trading services, and/or payment services.⁴⁴

The Merchant Agreement entered into between the Complainant and the Services specified that the ‘*Nature of Business*’ of the Complainant indeed was ‘*Financial Services: Foreign Exchange trading*’.⁴⁵

In one of the communications exchanged between the Service Provider and the Complainant, dated 19 July 2021, the Service Provider noted that ‘... *Truevo always keeps in mind the industry that the Merchant is operating in ... which for this Merchant is Forex Brokerage*’.⁴⁶

In its submissions of 31 January 2024, the legal representatives of the Complainant *inter alia* explained that:

*‘... We hereby clarify that the Complainant’s sole activity is the provision of payment support services and/or processing funds only to its intra-group companies, a fact disclosed to the Respondent Company through the Merchant Agreement during the registration of the merchant account of the Complainant with the Respondent Company’.*⁴⁷

⁴⁴ Online forex trading and trading in Contract for Difference (CFDs) in respect of financial instruments are regulated activities falling under the EU Markets in Financial Instruments Directive (MiFID2) whilst payment services are regulated activities covered under the EU Payments Services Directive (PSD2). It has not been indicated, nor has it emerged, that the Complainant registered in Cyprus was a regulated entity.

⁴⁵ P. 106

⁴⁶ P. 526

⁴⁷ P. 459

It is noted that as per the notes to the Complainant's financial statements for the year ended 31 December 2019 and 2020 respectively, the Complainant's principal activity was furthermore defined as follows:

'The principal activity of the Company, which is unchanged from last year, is the provision of exclusive service to intragroup companies, of clearing and payment support, contracting 3rd party payment service providers and facilitates the related entity's payment needs'.⁴⁸

It is further noted that Truevo's Merchant Agreement specified that *'the Merchant's website approved for processing through Truevo'* was indicated with the *'Merchant name'* of *'.....XX2.....'* with the URL *'.....XX2.....'*.⁴⁹ Another URL *'.....XX1.....'* was also subsequently included as explained by Truevo in its reply.⁵⁰

The Arbiter notes that the voluminous *'Merchant Statements'* presented during the case referred to the following merchant identification numbers with respect to the merchant account:

- *'MID 1200XXXX - Currency USD'* for *'.....XX1.....'*⁵¹ and also indicated as in respect of *'OD'* with *'Reference: XX1'*;⁵²
- *'MID 1200XXXX - Currency EUR'* for *'.....XX1.....'*⁵³ and also indicated as in respect of *'OD'* with *'Reference: XX1'*;⁵⁴ and
- *'MID 1200XXXX - Currency USD'* for *'.....XX2.....'*⁵⁵ and also indicated as in respect of *'OD'* with *'Reference: XX2'*;⁵⁶
- *'MID 1200XXXX - Currency EUR'* for *'.....XX2.....'*⁵⁷ and also indicated as in respect of *'OD'* with *'Reference: XX2'*.⁵⁸

⁴⁸ P. 474 & 498

⁴⁹ P. 72

⁵⁰ P. 444

⁵¹ Example - P. 145-162; 164-180; 182-184 ; 186-197; 199-204

⁵² Example - P. 206, 209, 212, 215, 218, 221, 223, 226

⁵³ Example - P. 163, 181, 185, 198

⁵⁴ Example - P. 205, 208, 211, 214, 217, 647

⁵⁵ Example - P. 258, 260, 262, 264, 266, 268, 270, 295-300

⁵⁶ Example - P. 334, 337, 340

⁵⁷ Example - P. 259, 261, 263, 265, 267, 269

⁵⁸ Example - P. 333, 336, 650

In order to better understand the context of the dispute in question, the OAFS undertook some general research publicly available over the internet with respect toXX1..... andXX2..... The following information is particularly noted with respect to the said sites:

.....XX1.....

It is noted that the website ofXX1..... refers to an XX1 'trading platform' being 'a new approach to trading online' which 'will change the way you invest'.⁵⁹ XX1 was described as being 'different from other online brokers' where 'you don't need thousands of dollars to invest in company shares, currencies, gold and oil. For only \$200 you can access limitless opportunities to profit on the financial markets'.⁶⁰

The website includes a 'Client Trading Agreement' which is to be 'interpreted in accordance with the Laws of Seychelles'. This agreement stipulates *inter alia* that:

'... Limited (hereinafter the "Company"), a company formed, registered in and licensed in, operating under the brand name XX1 (hereinafter "XX1"...

...

WHEREAS XX1 provides investment services through a trading platform (the "Trading Platform") for Contracts for Difference (CFDs) and such other transactions as XX1 may from time to time make available (the "Services").

WHEREAS The Client wishes to open an account with XX1 in order to use the Trading Platform and to enter into investment services transactions with XX1 ...'.⁶¹

It is further noted that the Risk Disclosure section of XX1's website focuses on foreign currency trading, and stipulates *inter alia* that:

⁵⁹XX1.....

⁶⁰XX1.....

⁶¹XX1.....

'The following statement does not disclose all risk associated investments, and is meant to inform users that trading foreign exchange, also known as Forex or FX, may result in substantial loss of funds and/or complete loss of funds in excess of your initial margin funds, and therefore should only be undertaken with risk capital. Risk Capital is defined as funds that are not necessary to the survival or well-being of the user.

If you do not thoroughly understand the risks involved in foreign exchange trading - do not trade. XX1 strongly recommends that any user considering trading foreign exchange currency or commodities, should first thoroughly read this risk disclaimer and understand risks and losses inherent to Forex trading.

It is your responsibility to carefully consider your investments prior to committing funds for foreign exchange trading. Before you consider undertaking any transactions with XX1, you should carefully consider whether such trading is suitable in light of your own financial position and investment objectives. Foreign exchange trading is commonly known as a double-edge sword as the risks or losses involved are equivalent to the potential to gain.

...

The foreign currency trading that you are entering into is not conducted on an exchange, XX1 may act as counterparty in these transactions and, therefore may act as the buyer when you sell and the seller when you buy ... XX1 establishes the prices at which it offers to trade with you ...'.⁶²

The website ofXX1..... does not include any address under its contact details but just a telephone number for customer service/support.⁶³

It is further noted that in the section 'About the Company', the website ofXX1..... specifies the following '... the company is fully licensed and regulated! For more information please visit the 'Regulations' section on

⁶²XX1.....

⁶³XX1.....

our website'.⁶⁴ This section could, however, not be readily traced from the website.

It is noted that the website ofXX1..... further includes the following statement/disclaimer at the bottom of its site:

'CFDs trading carries a high degree of risk and may not be suitable for all investors. Please seek independent advice and ensure you fully understand the risks associated with leveraged financial trading before deciding to trade as you may lose some or all invested capital. Any information included in this website does not constitute an offer of services for clients residing in any jurisdictions where such offer is not authorized. This website is owned by The group consists of a European entity duly registered in Nicosia, Cyprus with registration number XXXXX operating the website in conjunction with having its operational address at with registration number XXXXX. This website was not created or intended for investors residing in XXX nor is XX1 authorised by the XXX. The content of this website is not deemed a public offer of securities in XXX or directed to investors residing in that country'.⁶⁵

.....XX2.....

Whilst access to this site was blocked, a general internet search onXX2..... indicates the activities of this site as a 'CFD broker' offering an online trading platform.⁶⁶

It is also noted that certain warnings have emerged from the general searches undertaken on such sites.⁶⁷

Concluding remarks

Having carefully considered the pertinent matters relating to this case and the applicable legal framework, the Arbiter has determined that the Complaint

⁶⁴XX2.....

⁶⁵ *Ibid.*

⁶⁶XX2.....

⁶⁷ Example: [.....XX2.....](#)

brought by the Complainant against the Service Provider cannot be entertained by his Office.

In addition to the observations already made, the Arbiter would like to conclude by highlighting that the scope of the Act and purpose of the Office of the Arbiter for Financial Services is *'... to mediate, investigate, and adjudicate complaints filed by a customer against a financial services provider'*.

It is important to note that Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, ('the ADR Directive'), which serves as a key reference point for the Office of the Arbiter for Financial Services, explicitly excludes consumers acting in the course of their business.

The ADR's Directive Preamble 18 clarifies that the *'The definition of 'consumer' should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.'*

Furthermore, Article 4 of the ADR Directive defines a *'consumer'* as *'any natural person who is acting for purposes which are outside his trade, business, craft or profession'*. The distinction between consumers and traders is important in determining the applicability of the dispute resolution mechanism.

Whilst Chapter 555 of the Laws of Malta captures, in its scope, not just natural persons but also a micro-enterprise as defined under the Act, the Arbiter, however, does not consider that the Act is aimed to cover situations such as those arising in the scenario of this Complaint.

The comments raised above about the nature of the dispute and the nature of the activities and capacity of the Complainant refer. From the facts presented, it is furthermore evident that both the Complainant and the Service Provider were acting in their respective commercial capacities as traders when entering into and undertaking the Merchant Agreement. The arrangement was one between a business-to-business with each company acting in pursuit of its own commercial activities.

As noted above, the Complainant was itself providing payment support services and processing funds for its intra-group companies (as per the explanations provided in its submissions),⁶⁸ whilst its activities were also seemingly intertwined with the websites ofXX2..... andXX1....., indicated as *'the Merchant's [i.e. the Complainant's] websites'*.⁶⁹ The activities ofXX2..... andXX1....., in turn, involved online trading services in relation to financial instruments, which services are in themselves licensable investment activities. The inherent commercial nature of the Complainant's activities, where the Complainant was utilising the services provided by the Service Provider in a professional capacity rather than as a consumer, emerges quite clearly in the circumstances.

As similarly applied in the case of natural persons, the Complainant cannot be deemed as a consumer acting for purposes outside his trade or business when the dispute is considered to predominantly relate to actions taken in the course of the Complainant's own business activities and where the events which have triggered the main disputed matters namely involve and relate to, the contested business activities of the Complainant - activities which by their nature are characteristically highly regulated financial services activities.

While the Arbiter has already decreed that the Complainant is considered as a micro-enterprise and consequently a *'customer'* as defined in Article 2 of Chapter 555 of the Laws of Malta, the Arbiter decides that the Complainant is not considered an *'eligible customer'* as defined in the same Article 2 which states:

"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 provision of a financial service from a financial services provider. It includes the lawful successor in title to the financial product which is the subject of the relevant complaint and also consumer associations'.

This article provides that for complainants to be considered as eligible customers, they have to be consumers who availed of (consumed), or

⁶⁸ P. 459

⁶⁹ P. 72 & point 11 of Truevo's reply to OAFS (P. 444)

consumers who have been offered, or consumers who have sought a financial service from a financial services provider. Accordingly, Chapter 555 of the Laws of Malta, in line with the provisions of the ADR Directive, is not meant to settle disputes between merchants in their normal business-to-business relationship. Such disputes should be resolved through the civil courts if not through arbitration in terms of Chapter 387 of the Laws of Malta, as is indeed provided for in clause 23 (a)/(d) of the Merchant Agreement signed between the parties.⁷⁰

Having considered the matters relating to this Complaint further and the particular context as explained above, the Arbiter feels that he cannot deem the Complainant to be an eligible customer for the purposes and scope of the Act. As such, the Arbiter's office is not the proper venue for consideration of this Complaint which is considered to fall outside the intended scope of the ADR Directive and Chapter 555 of the Laws of Malta, both of which aim to protect consumers acting outside their trade or business.

Decision

For the reasons explained, the Arbiter considers that the Complaint does not fall within his competence and, accordingly, decides that in terms of Article 19(1) of the Act, he does not have the power to consider the merits of the case. This is without prejudice to any right the Complainant may have for its complaint to be considered before another court or tribunal competent to hear its case.

As the case is being decided on a preliminary basis, each party is to bear its own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

⁷⁰ P. 119

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.