

## Before the Arbiter for Financial Services

**Case ASF 031/2021**

**DP**

**('the Complainant')**

**vs**

**Truevo Payments Limited**

**(C62721)**

**('Truevo' or 'the Service Provider')**

### **Sitting of the 14 December 2021**

#### **The Arbiter,**

Having seen **the Complaint** against Truevo Payments Limited ('Truevo' or 'the Service Provider') relating to the processing of payments by Truevo to an allegedly fraudulent third party.

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

Where, in summary, the Complainant claimed that: (i) the Service Provider processed payments to a party that was meant to offer him investment trading products, but which turned out to be a scam (ii) the Service Provider did not undertake adequate due diligence on the said party where proper due diligence might have prevented the transactions from occurring and the Complainant from losing his money.

#### *Background*

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<sup>1</sup> A fol. 1-35

The Complainant explained that he saw an ad on Facebook where Binary Tilt advertised investment opportunities with high return for which he had to open an account by depositing USD500. He paid the said amount and was contacted by Ben David the following day who told him not to invest himself but the investments had to be made according to his instructions through their website.

The Complainant further explained that he could see an account statement on the website which contained his transfers and subsequent returns. The investments were to be made in fluctuations in currencies, gold, silver, copper and other trading products. He invested on the instructions of Ben David and it gave a good return.

Thereafter, he was persuaded to transfer more money with the promise of better investment opportunities and higher profits. He was called up several times during the time he had contact with the company which always involved hectic investment processes.

He explained that his account gradually rose to about USD220,000 but suddenly one day he had lost so much that there was only about USD47,000 left in his account.

He was then contacted by Ryan Louis who promised him that he would restore his account balance in exchange for him depositing USD18,000. He further stated that he paid the money and shortly after he could no longer get in touch with Ryan Louis.

The Complainant explained that he was thereafter contacted by a new account manager who wanted to help him for an additional fee, but the Complainant noted that he referred the new account manager to the agreement he had made with Ryan Louis which was not acknowledged by the new account manager. The new account manager kept calling him several days in a row to persuade him to transfer more money, but he did not transfer more money.

Shortly afterwards the Complainant found that he could not log into his account and requested a new password which he was provided with, but did not work. Afterwards the website (of Binary Tilt) as closed, and he had lost all his money.

The Complainant stated that during the course of events, he wanted to transfer his returns to his Danish account, but Binary Tilt claimed that he could not get

the funds until he had generated a return of 40 times what he had invested as they had awarded him with a bonus in his account. He could not even go into his account and transfer amounts as it had to go through their book-keeping.

The Complainant submitted that this was a case of scam and not a case of lost funds noting that he has been robbed of his money.

Moreover, it was further submitted that Truevo claimed that Mastercard and VISA have a service of chargeback, but the Complainant stated that according to his Danish Bank this was not true. He also stated that the Danish Bank told him that Mastercard do not make such actions and told him that they will not help him since he had chosen himself to invest in binary options.

The Complainant further submitted that when he asked them to help him as a scam victim, he was just referred to correspondence regarding his investment and not to the fact that he was a victim of scam.

#### *Complainant's formal letter of complaint to Truevo*

The Complainant attached to his Complaint Form a copy of the formal letter of complaint dated 26.11.2019 that was sent to Truevo by his lawyers where the following main aspects were *inter alia* raised in the said letter:

- Truevo was asked for its support and understanding in the case concerning Binary Tilt acting through the internet-platform [www.binarytilt.com](http://www.binarytilt.com) which website is/was owned and operated by Chemmi Holdings Ltd and Depix Holdings Ltd which claimed to have a registered address at 78 York Street, London, England, W1H 1DP, UK and Suite 305, Griffith Corporate Centre, Beachmont, Kingstown, St. Vincent & The Grenadines, respectively referred to as *'the Merchant'*.
- There were concerns with the activity of the Merchant and Truevo was asked for its assistance and support as it was believed that the issues raised could under some circumstances affect its business operations as well.
- That the Complainant had accessed the internet-based platform of the Merchant available under *www.binarytilt.com* where *'... through the platform the Merchant did not provide a contract, however, the terms and conditions contained on the site are intended to govern the relationship and*

*responsibilities of the parties'* and that it was considered that *'Therefore, all information on the web-site is relevant for determination of the services and the rights and obligations of the parties.'*<sup>2</sup>

- That the web platform provided registration information about the company of the Merchant through which it was commercially active in different time periods.
- That the Merchant *'claimed to be a financial investment firm dealing with regulated financial tools, such as CFDs, indices, binary options, commodities etc. ...'*, where *'the officers and employees of the Merchant are also presented as experienced financial brokers'* but that a search on the Merchant eventually indicated that the Merchant was *'not licensed to offer regulated financial tools and to provide financial advice to third parties'* and also *'that there were warnings and citations for lack of license issued against the Merchant.'*<sup>3</sup>
- That the Merchant's claims as a finance broker were a clear example of misrepresentation.
- That on the reliance on the claims made by the Merchant, the Complainant ordered the *'...opening of an investment brokerage account to be used for subsequent trading with financial tools in real time'*, following which *'certain amounts of money were withdrawn from [the Complainant's] bank account'*, these being the disputed transactions.<sup>4</sup>
- That there was an alleged misrepresentation by the Merchant of its services in view of the lack of financial services license and given that the Merchant did not provide the investment brokerage account ordered by the Complainant and did not keep the Complainant's money on his account. It was claimed that the service was not *'as described'* and involved possible fraud as the Merchant never intended or was *'able to provide the claimed services in the described manner.'*<sup>5</sup>

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<sup>2</sup> A fol. 13

<sup>3</sup> Ibid.

<sup>4</sup> A fol. 13 & 33

<sup>5</sup> A fol. 13

- That after finding out that he was misled by the Merchant, the Complainant cancelled his account with the Merchant and *'requested return of his money by the Merchant'* which was however *'tacitly refused...'*<sup>6</sup>
- That the following breaches of applicable law could have taken place:
  - 'a) Trading regulated financial tools without required license; Facilitating persons to provide financial services without required license/ possible joint knowledge (accessory) in trading regulated financial tools without required license*
  - b) Possible neglect of the bank's duty to actively prevent fraud and abnormal payment patters*
  - c) Possible neglect of the legal provisions for measures against money laundering*
  - d) Possible theft/fraud committed'* <sup>7</sup>

In the said letter of complaint, it was further explained/submitted:

- That the Merchant claimed to be a *'financial broker and provide a self-directed brokerage/investment account with the ability to trade financial instruments (stocks, CFDs, Binary Options, commodities, indices etc) and with the ability to withdraw funds on request'* and was also *'advertising and promoting itself as provider of financial advice.'* <sup>8</sup>
- That *'the webpage of the Merchant contains clear statement that its team consists of professional brokers'* and that *'only licensed broker can contact persons intending to deal with regulated financial tools and influence their decision if, how much and where to invest their money.'* <sup>9</sup>
- That the business model of the Merchant, involving the provision of financial services should have been disclosed to Truevo when the Merchant applied for Truevo's services and that the due diligence required on Truevo's part prior to commencing processing payments for the Merchant

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<sup>6</sup> *Ibid.*

<sup>7</sup> *A fol. 14*

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

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

should have raised awareness as to whether the Merchant had the required license.

It was further submitted that the bank/payment services provider should have refused processing payments for such Merchant, who lacked a license, *'in order to meet the mandatory regulations.'*<sup>10</sup>

- That the Merchant had been cited and warned against by the supervisory authorities as it did not possess the required license to provide the services it was selling. Reference was made to the extracts from the websites of the UK FCA's, Australian Securities & Investments Commission and the British Columbia Security Commission (a copy of which were also attached to the formal complaint).<sup>11</sup>

It was submitted that such information was publicly freely available and Truevo should have known about it. It was further submitted that some of the warnings were issued before the disputed transactions. The said transactions were summarised in one of the attachments to the formal complaint.<sup>12</sup>

- That not just the Merchant but also the person(s) that allowed and/or contributed in some manner for such situation were deemed as an offender against the financial system stability.
- That Truevo *'could under certain circumstances be considered as a person(s) facilitating provision of financial services by the Merchant or others, as the case may be, unless they prove that they were compliant with the legal provisions applicable for the transactions in question, for example that they were presented with the required know-your-customer documents, including financial license, or if they prove successfully that their due diligence does not include the check-up of such public available information of substantial importance for the concerned transactions.'*<sup>13</sup>
- That the Complainant is questioning whether Truevo has performed a diligent check-up of the Merchant including an enquiry in public registries

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

<sup>11</sup> *A fol. 30-32*

<sup>12</sup> *A fol. 33*

<sup>13</sup> *A fol. 15*

such as regarding identity, license and activity and whether Truevo was ever in possession of a valid license of the Merchant in order to process payments for the provided services.

- That merchants that buy/sell securities and other financial instruments *'shall be identified with MCC 6211 in line with VISA / Mastercard rules'* and that *'both card schemes set out requirements, consisting of adequate due diligence for merchants engaged in above-described activities ...'*<sup>14</sup>
- That the Complainant required *'reversal of the disputed transactions because of lack of license of the Merchant, which makes such payments and transactions not grounded and fraudulent (i.e., null and void).'*<sup>15</sup>
- That *'all financial institutions are generally put under the obligation to meet appropriate measures for prevention of any fraudulent activity and abnormal payment patterns and schemes ...'* with the applicable standards foreseeing banks and financial institutions making *'efforts so that such measures shall come into effect as a prevention ...'*, requiring *'customer authentication'* to be performed *'in order to protect the initiation of internet payments, identify abnormal merchant payment patterns, prevent fraud and protect access to sensitive payment data.'*<sup>16</sup>
- That the funds transferred by the Complainant *'were paid for opening and maintaining a segregated investment account, which never happened'*<sup>17</sup> and that the holding of funds by the Merchant does not mean legally that such funds are owned by the Merchant.
- That the Complainant is questioning the scope and result of the customer authentication that Truevo should have performed concerning the Merchant prior to commencing receiving payments on its behalf and subsequently. It was also queried whether Truevo accessed the Merchant's web-platform, the sites of the regulatory authorities and other sources of relevant information.

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *A fol. 16*

<sup>17</sup> *Ibid.*

- That 'According to the European law all PSP's shall, before start processing payments related to Internet provided services, properly identify the merchants in also line with anti-money laundering legislation in the relevant jurisdiction', with such checks involving not just licenses 'but also possible beneficiary owner's identification and check-up, control of the validly existing payments' grounds, control of the transactions' direction (if to countries in suspicious list and with high risk), control of the Merchant's annual closings (filing, contents, correctness) etc', in order 'to prevent any activity in breach of the legal provisions and to hinder the persons to hide the income and the raised funds of any such activity.' <sup>18</sup>
- That if, for example, 'the Merchant is receiving continuously transactions for investment activity related services **without being in possession at any time of a valid license** for such activity a diligent PSP will have to cease receiving such payments immediately and to report this to the security authorities. If the bank/PSP knows or should have known about **possible nominee-UBO structure**, it shall clearly identify the involved parties and to determine the associated risk arising out of such scheme. If the Merchant is not **filing annual financial closings** or is **filing annual financial closings as a dormant company**, but the bank/PSP is receiving payments on behalf of such Merchant, then the bank/PSP has only one option: to reverse processed and refuse future payments on behalf of the Merchant and to inform the security and national revenue authorities, or other competent authorities, about the case. Failing to do so means that the bank/PSP failed to meet material requirements of the anti-money laundering rules and regulations and could possibly become accessory to these unlawful acts.' <sup>19</sup>
- That the Complainant is questioning whether Truevo took measures against money laundering with respect to the disputed transactions of the Merchant and the result of such measures, including whether the Merchant was assessed by Truevo as not being risky from a money-laundering perspective.

### Complainant's request

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

<sup>19</sup> A fol. 16-17

As to the remedy sought, the Complainant referred, in his Complaint Form, to the attachments he included to the said form.<sup>20</sup> One of the attachments presented with the Complaint Form was a copy of the formal complaint letter dated 26.11.2019 that was sent to the Service Provider which letter included an explanation of the remedy sought from Truevo.<sup>21</sup>

In the said letter of 26.11.2019, the Complainant asked for

*'the reversal of all the transactions ... since the Merchant and its officers, employees and other persons that contacted [the Complainant] and/or were gained access and used the web-platform [www.binarytilt.com](http://www.binarytilt.com) are not duly licensed and thus not authorized to collect and hold investment funds in segregated accounts or provide investment services and advice to third parties due to the lack of license' given that 'All such transactions are therefore null and void, in breach of the financial laws and resulting out of a fraudulent activity, which probably might have been prevented upon proper application of the due diligence standards by all involved parties'.*<sup>22</sup>

**Having considered Truevo's reply which included the following submissions:**<sup>23</sup>

1. That Truevo is a Maltese MFSA-licensed Financial Institution which is also licensed by Visa and Mastercard ('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;
2. That preliminarily, and without prejudice to the other pleas hereunder, the action proposed by the Complainant was clearly time-barred in terms of Article 21(1)(c) of Chapter 555 of the Laws of Malta. In fact, Truevo notes that in the Complaint itself, i.e. in Section 4, Complaint Details, in response to the question of *'When did you first have knowledge of the matters you are complaining about'*, he clearly and unequivocally answered *'05/07/2017'*.<sup>24</sup>

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<sup>20</sup> A fol. 4

<sup>21</sup> A fol. 12

<sup>22</sup> A fol. 17

<sup>23</sup> A fol. 41-43

<sup>24</sup> A fol. 41

The Service Provider noted that, moreover, and without prejudice to the Complainant's response in Section 4, it submitted that it was also clear from documentation presented by the Complainant that he had information about the alleged losses on the 23 November 2017.

It further submitted that, at this stage, Truevo makes reference to the applicable framework legislation regulating these procedures, specifically Article 21(1)(c) of Chapter 555 of the Laws of Malta which established as follows:

*'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'*

Truevo submitted that the complaint was filed on the 1 March 2021, that is more than three years after the Complainant first complained about the alleged losses.

3. That, in addition and without prejudice to the pleas indicated above, the Action is also time-barred in terms of Article 2153 of Chapter 16 of the Laws of Malta.
4. That, also, in addition and without prejudice to the pleas indicated above, Truevo is not the rightful defendant in these proceedings as it never held any contractual relationship with the Complainant, nor can it be held responsible for any alleged losses claimed by the Complainant.
5. That without prejudice to the above, during the course of the proceedings, Truevo will provide evidence that the Complainant is not an Eligible Customer in terms of Chapter 555 of the Laws of Malta, and that there was no direct relationship between Truevo and the Complainant. It was further submitted that, henceforth, Truevo is surely not the rightful defendant in relation to the claims brought forward by the Complainant. Truevo referred to Article 11 of Chapter 555 which establishes that the function of the office of the Arbiter for Financial Services is to (*inter alia*) deal with complaints

filed by eligible customers. From the very definition of eligible customer established in Article 2 of Chapter 555 of the laws of Malta, it is clear that:

*'5.1. The complainant was never a customer of the Respondent Company; &*

*5.2. The respondent company never offered to provide a financial service to the complainant; &*

*5.3. The complainant never sought the provision of a financial service from the Respondent Company.'*<sup>25</sup>

That in the course of the proceedings, Truevo will produce evidence to prove that the Complainant was never a customer of Truevo.

6. That in relation to the facts of the action - the Service Provider rebutted ALL the claims made by the Complainant in the Complaint as being unfounded both in fact and in law.
7. That the Complaint and the requests therein are not contemplated in the law, in that the Complainant is seeking redress from alleged regulatory breach which did not necessarily lead to the losses alleged.
8. That for the stated reasons, and while reserving any right and/or action according to law, Truevo humbly requests that this Complaint be refuted and the requests and remedies indicated therein be thrown out, with costs against the Complainant.

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

**Further considers:**

***Preliminary Pleas***

The Service Provider raised a number of preliminary pleas in its reply, where it was submitted that *'the action proposed by the Claimant is clearly time-barred in terms of Article 21(1)(c) of Chapter 555 of the Laws of Malta'*; that *'the Action is also time-barred in terms of Article 2153 of Chapter 16 of the Laws of Malta'*;

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<sup>25</sup> A fol. 42

and that *'the Complainant is not an Eligible Customer in terms of Chapter 555 of the Laws of Malta ...'*.<sup>26</sup>

***Plea raised in respect of Article 21(1)(c) of Chapter 555 of the Laws of Malta***

The Arbiter shall first consider the plea raised regarding his competence and the submissions made with respect to Article 21(1)(c) of Chapter 555 of the Laws of Malta ('the Act').

The Arbiter notes that the Service Provider submitted that the Complainant has himself indicated, in Section 4 of his Complaint Form to the OAFS, '05/07/2017' as being the date when he first had knowledge of the matters complained of.<sup>27</sup>

The Service Provider further submitted that, without prejudice to the information contained in his Complaint Form, it was also clear, from the documentation presented by the Complainant, that *'he had information about the alleged losses on the 23<sup>rd</sup> November, 2017'*.<sup>28</sup>

In his final submissions, the Complainant's representative submitted the following with respect to Truevo's claim that the complaint is time-barred:

*'... it shall be considered that the complainant prepared and filed the complaint to OAFS on his own and provided that part of the information that an average consumer (non-lawyer) considers relevant.*

*First, it is apparent that there are transactions made after 05.07.2017. It would not make any sense to proceed making transactions if one is confident to have been defrauded.*

*Second, the date 05.07.2017 was indicated as the moment when the client first had doubts about the legitimacy of [www.binarytilt.com](http://www.binarytilt.com) platform. Unlike the consumer, a lawyer should made distinction between 'having doubt', 'having reasonable doubt' and 'being confident'.*

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<sup>26</sup> A fol. 41-42

<sup>27</sup> A fol. 2 & 41

<sup>28</sup> A fol. 41

*Third, considering the numerous breaches of the regulatory framework and the obvious gaps in the KYC/KYB performed on the merchant by Truevo Payments Limited it will contradict the common sense and the sense for justice of the public if the acquirer, being a licensed and professional body, is allowed to shift responsibility based upon inexperience of a consumer having prepared its complaint on his own.*

*Last, but not least, it is apparent that the moment when a person realizes to have been defrauded online differs from the moment when the defrauded person gets knowledge against which parties it can file complaints. Due to the specifics of the card-transactions, the complainant did not have knowledge in 2017 that it has paid to the fraudulent merchant Chemmi Holdings Limited that had a merchants account with Truevo Payments Limited that was likely run in breach of the applicable law. From the moment, the client first realized that it might have been defrauded, to the moment the client knew which parties are involved in the transactions, it took over two years (searching for legal assistance, inquiry with the issuing bank, providing information from the issuing bank, legal research and identifying the possible addresses of a claim, addressing the issue to the acquirer and then – contemplating the OAFS complaint).*

***Considering the afore-mentioned, we are of the opinion that the first moment the complainant got knowledge of the matters, he is complaining about, obviously is different from the moment the client felt defrauded. The relevant point in the timeline, to which Truevo Payments Limited should refer, is the moment when the complainant got knowledge about Truevo's likely involvement in the chain of events led to damages and losses. This moment lays not in July 2017, but in 2020, when Truevo Payments Limited rejected any responsibly and/or back in end of 2019 when Danske Bank revealed Truevo Payments Limited as the merchant's acquirer.***<sup>29</sup>

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<sup>29</sup> A fol. 88

Having considered the said submissions and the pertinent facts of the Case, the Arbiter makes the following observations and conclusions:

First, the Arbiter wants to underline the fact that the timeframe established under Article 21(1)(c) of Chapter 555 is not a 'prescriptive' period but a period of decadence and therefore different rules apply.

However, it is not necessary to enter into these legal distinctions in this particular case.

Article 21(1)(c) of the Act provides that:

*'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'*

On the first point raised by the Service Provider, the Arbiter considers that whilst the Complainant has indeed indicated the date '05/07/2017' in reply to the question in Section 4 of the Complainant Form asking, '*When did you first have knowledge of the matter you are complaining about?*', it is clear that the indicated date cannot be taken as the correct date as to when the Complainant first had knowledge of the matters complained of.

This is in view that it has clearly emerged that the 5 July 2017 was the date of the first transaction which transaction was then followed by various other subsequent transactions made by the Complainant throughout the whole month of July 2017, which fact was undisputed by the Service Provider.<sup>30</sup>

Hence, the Arbiter cannot reasonably take the indicated date of 5 July 2017 as '*the day on which the complainant first had knowledge of the matters complained of*', for the purposes of Article 21(1)(c).

With respect to the second point raised by the Service Provider that it was clear from the documentation presented by the Complainant that the Complainant knew about the alleged losses on 23.11.2017, the Arbiter notes that this date

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<sup>30</sup> A fol. 52

emerges from the Complainant's letter of 07.04.2019 addressed to Danske Bank.

The said letter, which was attached as part of the Complainant's Complaint Form to the OAFS, includes a statement made by the Complainant that '*On 23.11.2017, we had a meeting with our bank adviser, where we talk about the failed investment and what could be done about it*'.<sup>31</sup>

Whilst the said letter confirms that by 23.11.2017, the Complainant did indeed have knowledge about some issues with his transactions, the Arbiter considers that however this does not confirm that by the said date the Complainant had knowledge **of the matters which are the subject of the Complaint submitted before the Arbiter.**

The Complaint being considered by the Arbiter, in essence, relates as to whether Truevo, (which processed payments made by the Complainant that were targeted to BinaryTilt and/or Chemmi Holdings Limited and/or Depix Holdings Ltd, referred to by the Complainant as the '*Merchant*'),<sup>32</sup> carried out adequate due diligence checks on the Merchant and whether Truevo could have prevented and not facilitated the alleged fraud perpetuated by the Merchant had it undertaken proper checks.

The Arbiter notes that the Complainant clearly first became aware of Truevo's involvement in the payment process through the email sent by his bank, Danske Bank, dated 08.10.2019 wherein his bank notified him about the name of the acquirer involved in the payments to Binary Tilt.<sup>33</sup>

Hence, for the purposes of this Complaint, the date from when it can be reasonably considered that the Complainant first had knowledge of the matters being complained of before the Arbiter, is one which falls after the beginning of October 2019.

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<sup>31</sup> A fol. 35

<sup>32</sup> A fol. 12

<sup>33</sup> A fol. 8

The Arbiter notes that the Complainant made a formal complaint with the Service Provider by way of his letter dated 26.11.2019.<sup>34</sup> This is clearly within the two-year time period referred to in Article 21(1)(c).

**Hence, for the reasons amply explained above, the Arbiter is dismissing the plea raised by the Service Provider with respect to Article 21(1)(c) of the Act and shall proceed to consider the next plea submitted by the Service Provider.**

***Plea that the Complainant is not an Eligible Customer in terms of Chapter 555 of the Laws of Malta***

The Arbiter notes that in its reply, Truevo noted that it was *'not the rightful defendant in these proceedings as it never held any contractual relationship with the Complainant ...'*<sup>35</sup>

The Service Provider further submitted that *'the Complainant is not an Eligible Customer in terms of Chapter 555 of the Laws of Malta, and there was no direct relationship between the Respondent and the Complainant.'*<sup>36</sup>

Since the Service Provider is claiming that the Complainant is not their client, the Arbiter has to examine whether the Complainant is, in fact, an *'Eligible Customer'* according to law.

The Arbiter can only determine complaints filed by *eligible customers*.

In fact, Article 19(1) of the Act stipulates that:

*'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 also states that the Office of the Arbiter can only receive complaints filed by eligible customers:

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<sup>34</sup> A fol. 12

<sup>35</sup> A fol. 42

<sup>36</sup> *Ibid.*

*'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**.*<sup>37</sup>

In the definition of a *financial services provider*, the legislator also provided that a complaint against a financial services provider has to be made by an *eligible customer*.<sup>38</sup>

Reading through the Act, it follows that the Arbiter may only deal with complaints filed by an **Eligible Customer**.

Therefore, the Arbiter needs to consider whether the Complainant is an eligible customer because such consideration determines whether the Arbiter has the competence to consider the complaint.

Article 22(2) of the Act enables the Arbiter to consider whether the complaint falls within his competence.<sup>39</sup>

As also provided for in Article 2 of the Act, an **'eligible customer'** is defined as:

*'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.'*

### *Facts of the Case and other relevant Aspects*

In order to decide whether the Complainant is an Eligible Customer, the Arbiter has to consider the facts and other relevant aspects raised and emerging in this case.

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<sup>37</sup> Article 11(1)(a)

<sup>38</sup> Article 2: *"financial services provider" means a provider of financial services which is or has been licensed or otherwise authorised by the Malta Financial Services Authority ... during the period in relation to which a complaint by an **eligible customer** is made to the Arbiter ...*

<sup>39</sup> Article 22(2) *'Upon receipt of a complaint, the Arbiter shall determine whether the complaint falls within his competence.'*

The following is a summary of the pertinent points arising with respect to the disputed transactions as evident from the documents provided, hearings and submissions made:

- (i) The Complainant, (whose address was indicated in the Complaint Form as being in Denmark),<sup>40</sup> used his bank, Danske Bank in Denmark<sup>41</sup> to initiate the payments to his Merchant.
- (ii) As per the formal letter of complaint sent to the Service Provider dated 26.11.2019, and the extracts provided from the website of the merchant's internet platform, the Merchant was identified by the Complainant as *'BinaryTilt acting through the internet-platform [www.binarytilt.com](http://www.binarytilt.com), which website is/was owned and operated by Chemmi Holdings Ltd and Depix Holdings Ltd'*,<sup>42</sup> having an address in the UK and St Vincent and the Grenadines respectively.<sup>43</sup>
- (iii) The Complainant presented a table listing the disputed transactions. The said table listed fifteen transactions made over the period 5 July 2017 to 7 August 2017 for a total of USD83,510. The transactions were initiated by the Complainant from his MasterCard issued by Danske Bank.<sup>44</sup>

The said transactions were indicated in the said table to have been undertaken with the 'Broker' named as *'BinaryTilt'*.<sup>45</sup>

The Service Provider contested the disputed transactions where it noted *inter alia* that *'the table provided by the Complainant is misleading, as it does not provide a clear picture of the transactions processed'*,<sup>46</sup> pointing out that *'The table of transactions provided by the Complainant does not reflect the transactions which took place according to Truevo's internal records'*,<sup>47</sup> and that actually *'Truevo's records show 12 transactions amounting to \$74,000 ...'*.<sup>48</sup>

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<sup>40</sup> A fol. 1

<sup>41</sup> A fol. 7, 8 & 9

<sup>42</sup> A fol. 12

<sup>43</sup> A fol. 12, 20 & 23

<sup>44</sup> A fol. 33

<sup>45</sup> *Ibid.*

<sup>46</sup> A fol. 50

<sup>47</sup> A fol. 52

<sup>48</sup> A fol. 53

- (iv) During the hearing of 1 June 2021, the representative of the Service Provider noted that *'the legal entity which received the payments made by [the Complainant] ... was our merchant of record which was Chemmi Holdings'*.<sup>49</sup> It was further testified that *'Being asked if the merchant was acting through Binarytilt.com, I say, yes, Binarytilt.com was the URL owned by the merchant'*.<sup>50</sup>
- (v) The Service Provider presented a copy of its Merchant Agreement (signed in February 2017) entered into with its client *'Chemmi Holdings Limited'*,<sup>51</sup> the latter being indicated as having a registered address in the United Kingdom and its *'Nature of Business'* being *'Sale of Binary options'*.<sup>52</sup>
- (vii) As testified during the hearing of 12 April 2021, the Complainant had contacted his bank to make a chargeback. During the said hearing the Complainant testified that:

*'Asked if I tried to make a chargeback, I say, yes, I did try to make a chargeback. I contacted the bank when I saw that this was getting out of hand. Apparently, it was impossible for me to get a chargeback for two reasons.*

*One reason was that Binary Tilt strictly said to me that I should transfer the money by quick transfer. It would mean that it would only take a few hours and the money would be where they should be transferred to.*

*Secondly, when I discovered that the matter was getting out of hand, it was too late to make a chargeback'.<sup>53</sup>*

It is noted that, in the affidavit dated 6 May 2020, presented by Truevo's employee, the following was pointed out with respect to the responsibilities of the issuing bank (in this case being Danske Bank):

*'Under Scheme rules, a cardholder who feels that the service or product rendered by the merchant is defective, not compliant to regulations or any other reason considered valid by the cardholder, may contact the Issuing*

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<sup>49</sup> A fol. 55

<sup>50</sup> *Ibid.*

<sup>51</sup> A fol. 61-75

<sup>52</sup> A fol. 61

<sup>53</sup> A fol. 46

*Bank in order to dispute the transaction. Subsequently, if the case is considered valid by the Issuing Bank, a chargeback will be raised which will effectively debit the Acquiring bank. It is then up to the Acquiring bank to recover such funds from the merchant or represent the case with appropriate documentation. The chargeback process ensures that the cardholder is given a fair treatment where Scheme Arbitration committee intervene in the absence of agreement between the Issuing bank representing the cardholder and the Acquiring bank representing the merchant. This is the standard route for every cardholder who believes that the service provided by the merchant was not legitimate and by far the most cost effective route.'*<sup>54</sup>

#### *Determination of eligibility - Considerations*

**The Complainant did not file any evidence showing that there was any form of contractual obligation or contractual relationship existing between the Complainant and Truevo.**

**The Arbiter has no proof that there was any contract and/or contact between the Complainant and Truevo and/or its agents prior to, or during, the disputed transactions.**

**The Complainant has, in fact, never claimed that it had a contractual relationship or any direct dealing or contact with Truevo.**

**The Complainant had only contacted Truevo, after contacting his bank and after discovering Truevo's involvement in the payment process during his communications with his bank, Danske Bank, as emerging during the proceedings of this case.**<sup>55</sup>

**During the hearing of 12 April 2021, the Complainant stated *inter alia* that:**

***'Asked if I knew to which legal entity I have paid exactly, I say that in the beginning, I thought it was Binary Tilt, but after a few times, I had to go to the bank to ask them directly who was exactly the receiver of these monies; and***

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<sup>54</sup> A fol. 53

<sup>55</sup> A fol. 8

*after some time they found out that it was Truevo Payments who were receiving the money.'*<sup>56</sup>

By virtue of its licence as a financial institution under the Financial Institutions Act ('the FIA'), Truevo's activities were only limited in terms of the said licence, to: *'payment services as defined in the Second Schedule' to the FIA; 'issuing and/or acquiring of payment instruments' and 'money remittance'*.<sup>57</sup>

With respect to the case in question, Truevo's role was limited to processing payments but not as the Payment Services Provider of the Complainant. The Complainant, as payer, had his own payment service provider, this being his bank, Danske Bank. Such payments were initiated by the Complainant from his Mastercard account held with Danske Bank and aimed to his merchant, BinaryTilt/Chemmi Holdings Ltd.

The transactions were ultimately clearly consented to by the Complainant and the disputed transactions did not involve incorrectly executed payment transactions nor has the Complainant ever raised the issue that the funds had not adequately arrived at his merchant.

The Arbiter considers that, taking into consideration the particular circumstances of this case, it does not emerge that the Complainant has a valid complaint against the Service Provider which can be considered by him in terms of Chapter 555 of the Laws of Malta.

The Arbiter notes *inter alia* the arguments put forward by the Complainant (through his legal advisors), on the point of the relationship between the Complainant and the Service Provider.

In the Complainant's final submissions, it was stated, for example, that:

*'... Insofar as the acquirers are publicly regulated and licensed, the regulatory framework applicable to them defines the legal expectations of payors towards said payment institutions. It contradicts the common sense and the essence of the EU Law to deny a claim of a cardholder against an acquirer just because there is no contractual relationship between them. The absence of a formal direct agreement does not mean by far that there are no justified and protected legal*

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<sup>56</sup> A fol. 46

<sup>57</sup> <https://www.mfsa.mt/financial-services-register/result/?id=5400>

*expectations and reliance that is subject to legal protection and that each violation against those expectations and reliance shall remain unsanctioned*<sup>58</sup>

...

*In our opinion, even though Mr. DP has no direct written agreement with Truevo Payments Limited, as one of its immediate clients, still does not mean that Mr. DP does not have a legal relationship to the acquirer and justified and legally protected expectations towards Truevo Payments as a licensed financial institution and payment services provider to observe all applicable rules and regulations and especially those related to KYC, AML and fraud prevention and combating ...*<sup>59</sup>

**Notwithstanding the above and other extensive submissions made by the Complainant on this point, it is considered that no specific or adequate provision from any applicable legislation, regulation or terms and conditions, has however ultimately been quoted or been produced by the Complainant to demonstrate the Service Provider's obligations and duties applicable specifically towards him and/or dealing with or catering for the Service Provider's potential liability towards him in the context of the particular circumstances of his case.**

**The Arbiter notes that in his final submissions, the Complainant further referred and highlighted the definition of 'payment service user' as per 'Art. 4(10) Directive 2015/2336' to justify his 'direct claim' against Truevo.**<sup>60</sup>

**The Arbiter however considers that this case does not relate to issues involving the liability of payment service providers in circumstances as provided for under the provisions of the Payment Services Directive 2015/2366/EU ('PSD2') which regulates payment services throughout the EU.<sup>61</sup> It does not involve losses related to, for example, unauthorised payment transactions, non-execution, defective or late execution payment transactions.**

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<sup>58</sup> A fol. 83

<sup>59</sup> A fol. 87

<sup>60</sup> *Ibid.*

<sup>61</sup> Furthermore, as indicated in Preamble 87 of Directive 2015/2366, 'This Directive should concern only contractual obligations and responsibilities between the payment service user and the payment service provider.'

Moreover, it is noted that the said contact with Truevo occurred various months after the date of the disputed transactions. Over 24 months had indeed lapsed since the letter of complaint dated 26.11.2019 was sent to the Service Provider in relation to the disputed transactions undertaken between 05 July 2017 to 07 August 2017.<sup>62</sup>

The said period even exceeds the permitted period for notifications giving rise to a claim by a payment service user under the PSD2.<sup>63</sup>

**For the reasons mentioned, the Arbiter accordingly considers that there is no basis on which the Complaint could be considered even from the perspective of the liability provisions specifically catered for under the Payment Services Directive.**

It is further noted that in its final submissions, the Complainant claimed several '*possible breaches*'<sup>64</sup> on the part of the Service Provider of various directives and regulations where reference was made to Article 9 and Article 66(1)(a) of the Capital Requirements Directive (Directive 2013/36/EU); Article 18(5) of the Payment Services (PSD2) Directive, (Directive 2015/2366/EU); Article 5(1) and Article 42 of the MiFID II Directive (Directive 2014/65/EU); Article 11 and Article 13 of the Fourth Money Laundering Directive (Directive 2015/849/EU); as well as sections R5, R10 and R13 of the FATF Recommendations; the VISA VCR and/or MasterCard Rules and Regulations; and the Payment Services Provider '*own Directives for Fraud Control and Prevention of Suspicious Payments*'.<sup>65</sup>

The Arbiter however does not consider the quoted provisions as supporting in any way the Complainant's eligibility for the submission of a complaint under Chapter 555 of the Laws of Malta.

### ***Conclusion***

The context of the Complaint involves no payment service contract between the parties to this case as indicated above. A complaint with the Arbiter can only be filed against the service provider of a complainant in line with the

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<sup>62</sup> A fol. 12 & 33

<sup>63</sup> For example, the 13-month period after the debit date referred to in Article 71(1) of the PSD 2.

<sup>64</sup> A fol. 85

<sup>65</sup> A fol. 85-86

provisions of Chapter 555 of the Laws of Malta. The Arbiter cannot extend his jurisdiction or competence.

In the particular circumstances of this case, the Arbiter considers that the Complainant was not *'a customer who is a consumer of'* Truevo, neither that Truevo *'has offered to provide a financial service'* to the Complainant nor that the Complainant *'has sought the provision of a financial service from'* Truevo for the purposes of the Act. The Complainant is accordingly not deemed to qualify as an *'eligible customer'* in terms of Article 2 of the Act.

Given that the Complainant cannot be considered an *'eligible customer'* under the Act, the Arbiter has no competence to deal with this complaint in terms of the Act.

Therefore, the Arbiter decides that he cannot consider this complaint any further and is dismissing this case.

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

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