

Before the Arbiter for Financial Services

Case No. 070/2020

LA ('the Complainant')

vs

Truevo Payments Limited

(C62721)

('Truevo' or 'the Service Provider')

Sitting of the 13 September 2021

The Arbiter,

Having seen **the Complaint** against Truevo Payments Limited ('Truevo' or 'the Service Provider') relating to the processing of various transfers that the Complainant made to the payee with her VISA card issued by a third party,¹ which payee was allegedly a fraudulent merchant.

Having considered, in its entirety, the Complaint including attachments, filed by the Complainant,²

Where, in summary and in essence, the Complainant claimed that: (i) the Service Provider did not adequately undertake its due diligence, know your customer ('KYC') and anti-money laundering ('AML') checks in respect of the merchant to whom the payments were made and who, it was claimed, was a client of the Service Provider, and (ii) that through its payment services and inadequate checks on its client, the Service Provider had facilitated the alleged fraud perpetuated by the merchant.

¹ RMB Private Bank - A fol. 38

² A fol. 1-23

In her Complaint Form, the Complainant explained *inter alia* that:

- (i) She made a recall request to her bank³ to recall transfers she inadvertently made to a fraudulent merchant who had contacted her under the name of EU Capital and had portrayed itself as a broker offering a self-directed brokerage/investment account service to trade financial instruments like stocks, Contracts for Differences (CFDs), commodities and others;
- (ii) She did not receive the service from the merchant who, she claimed, did not have a licence to offer brokerage/investment services.

The Complainant referred to her letter of complaint to the Service Provider⁴ which letter, *inter alia*, asked for the assistance and support of Truevo 'in the case concerning EU-Capital acting through the Internet-platform *www.eu-capital.co*, which website is/was owned and operated by namely: Gelko Partners Ltd having registered address at Trust Company Complex, Ajeltake road, Ajeltake Island, Majuro, Marshal Island MH 96960 // hereby referred to as the Merchant'.⁵

The said letter of complaint explained the issues that the Complainant had with the merchant, Gelko Partners Ltd, where it was *inter alia* submitted:

- that the merchant 'claimed to be a financial investment firm dealing with regulated financial tools ...', but that a search on the merchant eventually indicated that the merchant was not licensed to offer financial services;
- that there was an alleged misrepresentation by the merchant of its services in view of the lack of financial services licence and given that the merchant did not provide the investment brokerage account ordered by the Complainant;⁶
- that the merchant should have been licensed to provide the portrayed financial services and that there were warnings regarding the merchant's lack of licence;

³ Issuer of her VISA card – A fol. 37 & 42

⁴ Copy of which was attached to the Complaint Form - A fol. 8-16

⁵ A fol. 8

⁶ A fol. 9

- that the Complainant questioned whether, as part of its due diligence checks, Truevo was in possession of a valid licence of the merchant;
- that Truevo could have possibly neglected its duty, as a payment service provider, to actively prevent fraud and abnormal payment patterns as well as neglected the legal provisions regarding measures against money laundering in view of the inadequate checks on the merchant as its client.⁷

The Complainant requested the following remedy from the Arbiter:

- (a) Assistance in order for Truevo to review her case and respond in full to her letter of complaint;
- (b) To *'Check the observance of the KYC and AML obligations of Truevo Payments Ltd in the case of the disputed transactions in light of the restriction to process payments possibly related to fraud'*;⁸ and
- (c) *'To instruct Truevo Payments Ltd to reverse all disputed transactions with regard to the payments specified in the letter provided to the bank on [her] behalf'*.⁹

In its final submissions, the Complainant submitted that she sought compensation from the Service Provider of 'ZAR 644.031,75' which was described as:

'the difference between what I have invested and Truevo has processed and what I already received back as a result of my successful chargeback requests'.¹⁰

Having considered Truevo's reply which states that:

'With the present letter, we hereby bring to your attention that Truevo does not have any contractual relationship with the Claimant or Gelko Partners Ltd of Marshall Islands. To this effect, neither the Claimant nor Gelko Partners Ltd is a client of Truevo.'

⁷ A fol. 9-13

⁸ A fol. 4

⁹ *Ibid.*

¹⁰ A fol. 69

The Arbiter notes that the Service Provider raised various other pleas in its note of final submissions. These pleas should have been raised in the reply and not in the final note of submissions when the Complainant cannot reply to them.

Therefore, the Arbiter cannot consider these pleas and will deal with the reply as submitted to the OAFS on the 4 August 2020,¹¹ as quoted above.

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

Considers:

The Arbiter notes that the issue that was, in essence, raised by the Complainant relates as to whether Truevo, the Payment Services Provider of the merchant, carried out adequate due diligence on the merchant when it onboarded and kept the merchant as its client. The Complainant claimed that such due diligence was inadequate and in breach of applicable requirements relating to know your customer and AML requirements.

In essence, the Complainant claimed that had Truevo carried out adequate due diligence, Truevo would not have onboarded or kept the merchant as its client and would have thus prevented and not facilitated the fraud perpetuated by the merchant. Such claim is being used as the basis for the requests made by the Complainant in this Complaint.

The Jurisdiction of the Arbiter

In its reply,¹² the Service Provider submitted that it did not have any contractual relationship with the Claimant or Gelko Partners Ltd (Gelko) and, therefore, the Complainant and Gelko were not their Clients.

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:

¹¹ A fol. 27

¹² *Ibid.*

*'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:

'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.'*¹³

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*.¹⁴

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.¹⁵

'Eligible Customer'

Article 2 of the Act defines an *'eligible customer'* 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.'

¹³ Article 11(1)(a)

¹⁴ 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 ...*

¹⁵ Article 22(2) *'Upon receipt of a complaint, the Arbiter shall determine whether the complaint falls within his competence.'*

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 particular case.

The following is a summary of the pertinent points arising with respect to the transfers in question as evident from the documents provided, hearings and submissions made during the case:

- (i) The Complainant is/was resident in South Africa.¹⁶ The merchant identified by the Complainant, Gelko Partners Ltd,¹⁷ was indicated as being based in the Marshall Islands according to the extracts provided from the website of the internet platform and commercial register.¹⁸

Gelko Partners Ltd was indicated by the Complainant as the owner and operator of 'EU-Capital' which acted '*through the Internet-platform www.eu-capital.co*'.¹⁹

With respect to the location of 'EU-Capital', it is noted that during the hearing of 21 October 2020, the Complainant testified that:

*'Being asked where EU-Capital is based, I say that I thought EU-Capital was based in Europe, but after 7 or 8 days after I did business with this firm, I read that EU-Capital actually run in Bulgaria, Sofia or somewhere like that.'*²⁰

No evidence was produced of EU-Capital being based or operated in Bulgaria.

- (ii) Various transfers were made from the Complainant's credit card, which card is issued by her bank RMB Private Bank based in South Africa.²¹ The transfers were made for the scope of the trading account with EU-Capital.²²

¹⁶ A fol. 1 & 20

¹⁷ A fol. 8

¹⁸ A fol. 17-18

¹⁹ A fol. 8

²⁰ A fol. 32

²¹ A fol. 37-38

²² A fol. 29-30

The transfers were made in February 2018, during the period from 13 to 22 February 2018;²³

- (iii) The list of disputed transactions attached to the Complaint Form and the formal letter of complaint to the Service Provider indicates 16 transactions amounting in total to ZAR 917,728.80.²⁴

The credit card statement of RMB Private Bank presented by the Complainant during the proceedings of the case refers to 14 transactions amounting in total to ZAR 780,728.80.²⁵

The Service Provider indicated that it had only processed, from its end, 8 of the listed transactions.²⁶

- (iv) The credit card statement of RMB Private Bank indicates that the transfers were made to the following: '*Capmbeu.com*', '*Investingpro.Com*', '*Ew*trading Finance*' and '*O.Sol*'.
- (iv) During the proceedings of this case, the Service Provider submitted that it had no relationship with '*Gelko Partners Ltd*' and/or '*the trade name EU-Capital-Co*' and that it never processed any transactions for such.²⁷

The Service Provider clarified that the payments were:

'rather related to 2 different merchants:

1. *Joshua Partners EOOD trading as Capmbeu.com*
2. *Kyoto Limited trading as Investingpro.com*'.²⁸

In its subsequent submissions, the Complainant clarified that Joshua Partners EOOD and/or Kyoto Limited *'should be the legal entities receiving*

²³ A fol. 7, 23 and 38

²⁴ Total of Transactions as per the table attached to Complaint Form:

ZAR 3,084.86 + 123,394.52 + 123,394.52 + 12,016.34 + 60,081.68 + 36,100.17 + 60,166.96 + 58,470.25 + 37,411.81 + 46,821.92 + 48,267.93 + 24,061.66 + 24,061.66 + 20,000 + 117,000 + 123,394.52 = ZAR 917,728.80

²⁵ A fol. 38 - Total of Transactions as per the statement of RMB Private Bank: ZAR 3,084.86 + 123,394.52 + 123,394.52 + 123,394.52 + 12,016.34 + 60,081.68 + 36,100.17 + 60,166.96 + 58,470.25 + 37,411.81 + 46,821.92 + 48,267.93 + 24,061.66 + 24,061.66 = ZAR 780,728.80.

²⁶ A fol. 49

²⁷ A fol. 47

²⁸ A fol. 48

payments on behalf of the persons acting through the non-licensed web-platform www.eu-capital.com ...'.²⁹

- (v) It was indicated by the Service Provider that the eight transactions processed by Truevo were subject to chargebacks which were made on the issuing bank. The Service Provider further indicated that four of these chargebacks were won by the merchant and four were lost.

The Complainant indeed herself stated that it had made a chargeback with her bank in South Africa in 2018.³⁰ A complaint was also lodged with her bank in South Africa in August 2018.³¹

According to a letter dated 3 February 2020 issued by her bank, which made reference to her complaint of August 2018, her bank *inter alia* stated:

'... the Bank received and investigated the complaint logged. The Bank ruled on the matter in accordance with Visa Rules. The complainant was in a contractual relationship with the merchant and used the merchant as an online trading service. The bank assisted complainant with chargebacks, however only 10 of 14 transactions were returned, as Visa ruled in favour of the merchant for the other 4 transactions. This was made an arbitration award, which the Ombudsman cannot overrule ...'.³²

The said letter further indicates that *'The matter was escalated to the Ombudsman of Banking Services ...'*. The bank's letter also identified Truevo as the acquiring entity in respect of the four transactions which were re-debited to her account.³³

- (vi) The Complainant sent a formal letter of complaint to the Service Provider almost two years after the disputed transactions, by way of its letter dated 11.02.2020.³⁴ The Service Provider confirmed that it was *'received electronically by Truevo on the 19th February 2020'*.³⁵

²⁹ A fol. 62

³⁰ A fol. 30 & 35

³¹ A fol. 42

³² *Ibid.*

³³ *Ibid.*

³⁴ A fol. 8

³⁵ A fol. 47

(vii) **No evidence of any contractual relationship existing between the Complainant and Truevo has been submitted or emerged during the case. The Arbiter has no proof that there was any contact between the Complainant and Truevo and/or its agents prior to or during the disputed transfers.**

The Complainant has indeed never claimed that it had a contractual relationship or any direct dealing or contact with Truevo.

During the hearing of 21 October 2020, the Complainant *inter alia* confirmed as follows:

'It is being suggested that I was never in contact with Truevo Payments at the time of sending the money, I say that is correct. I only got to know about Truevo when I received the statements from my bank'.³⁶

Determination of eligibility

Having considered the circumstances of the case in question, there is sufficient basis on which to conclude that Truevo was only the payment service provider of the payee (that is, the merchant), and was not the payment service provider of the payer.

The Complainant, as payer, had her own payment service provider, with this being the bank, RMB Private Bank. Indeed, the Complainant initiated the chargebacks with her own bank and was successful in a number of the chargebacks made with her bank.

The Complainant had only contacted Truevo, after certain chargebacks were unsuccessful and after discovering Truevo's involvement in the payment process in the communications issued by her bank as she herself confirmed during the proceedings as outlined above.

In the particular circumstances of the case, and in the absence of any contractual arrangement between the parties to this Complaint, as well as the lack of any direct and/or even indirect contact between the Complainant and the Service Provider or any of its agents prior to, and/or, during the disputed transactions in question, the Arbiter considers that there is no adequate and

³⁶ A fol. 32

sufficient basis on which he can consider the Complainant as being *'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 and, accordingly, the Complainant cannot be deemed 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, he cannot consider this complaint any further and is rejecting it.

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