



<b><u>Decision Ref:</u></b>	2019-0008
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Debit Card
<b><u>Conduct(s) complained of:</u></b>	Handling of fraudulent transactions
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

This complaint concerns fraudulent transactions carried out on the Complainant's debit card.

**The Complainant's Case**

The Complainant holds a debit card issued by the Provider. The Complainant states that the debit card was used without her knowledge and fraudulently in the early hours of the 6<sup>th</sup> of August 2017 to effect point of sale transactions to the value of nearly €1000 around London.

The Complainant states that she noticed the transactions on the morning of the 6<sup>th</sup> of August 2017, after receiving fraud alerts from the Provider. She reported the disputed transactions to the Provider and to the London Metropolitan Police.

She states that the Provider was unhelpful and sluggish in its response to her complaint. Ultimately, the Provider has refused to refund the disputed transactions to her account.

The complaint is that the Provider has wrongfully refused to refund the Complainant's account with the amount of funds fraudulently withdrawn.

### **The Provider's Case**

The Provider has refused to refund the disputed transactions. It states that the Complainant did not notify the Provider as soon as she noticed the card was missing, and that the Complainant was grossly negligent in the safe keeping of her card and PIN, and therefore in breach of the card terms and conditions.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 18 December 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, I set out below my final determination.

### **Background**

On the evening of the 5<sup>th</sup> of August 2017 the Complainant was in a bar in London. She surmises that while making a point of sale transaction in the bar (using a mobile merchant terminal), a fraudster was able to see her entering her PIN, and subsequently removed her bank card from her bag.

She noticed that her bank card was missing when she attempted to get a taxi later that evening, although she assumed at that stage that it could have been at the bottom of her bag and did not consider it missing at that point in time.

She received an alert from the Provider at 8.50am on the 6<sup>th</sup> of August 2017 on the basis of unusual activity on her account. She checked her account and confirmed that 8 transactions which had been effected on her account were not authorised by her.

The said transactions were carried out using the Complainant's debit card, and using her correct PIN.

### **Card Terms and Conditions**

The applicable terms and conditions for the Complainant's card are as follows:

*“You shall immediately notify us... if (i) Any Card, Device, PIN, VbV password or other Security Feature is mislaid, lost, stolen or copied or otherwise becomes liable to misuse”.*

*“You will be liable for the full amount of the unauthorised payments where:*

*[...]*

*(c) You have intentionally, or because of your lack of reasonable care, failed to notify us of the loss, theft or misappropriation of the Card or any other Security feature without undue delay”*

*“You must exercise all possible care to ensure the safety of the Card and prevent the PIN and VbV password or other Security Feature becoming known to any other person. We consider lack of reasonable care to be but not limited to circumstances where:*

*(i) the Card is lost or stolen and the PIN, VbV Password or other Security Feature becomes known or available to a third party who then has access to the Card (eg a finder or a thief).”*

There is, therefore, a heavy onus on the customer to keep safe both their card and their PIN. This stands to reason, as the convenience of debit card services and the access to one's account that they provide is such that a card and its PIN should be guarded as closely as cash itself.

### **European Communities (Payment Services) Regulations 2009**

The Provider has accepted that the transactions disputed herein were subject to the European Communities (Payment Services) Regulations 2009.

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Regarding its obligations to provide an agreed form of consent for a transaction as required under Regulation 68 of the above Regulations, the Provider has cited the applicable terms and conditions which provide a means in which it was agreed that the Complainant would provide consent for a transaction, namely by use of the card together with the correct PIN.

With regard to evidencing this consent for the transactions the subject matter of this dispute as required under Regulation 73 of the above Regulations, the Provider submits as follows:

*“The Bank can evidence via audit logs that the correct chipped card and PIN were used to process the transactions. As the PIN and the Card are a unique identifier for the customer, the Bank takes this as consent by the customer to process the transaction”.*

The Provider describes the procedure for consent, pursuant to Regulation 53 of the above Regulations by citing the following card terms and conditions:

*“There is a variety of means by which you can authorise such Transactions, these include:*

*(i) Authorisation by means of your Cards used in conjunction with your PIN for POS Terminal transactions....”*

The Bank explains its refusal to provide a refund of the transaction under the meaning of Regulations 74 or 75 of the above regulations as follows:

*“Regulation 75(2) of the above mentioned Regulations states ‘A payer bear all the losses relating to an unauthorised payment transaction if he or she incurred them by acting fraudulently or by failing, intentionally or by acting with gross negligence, to fulfil one or more of his or her obligations under Regulation 70.*

*The Complainant did not advise the bank when they were aware the card was lost/stolen. The customer realised that the card was missing when going to pay for a taxi fare home. Customer was unable to locate the card and failed to take preventative action to contact the bank and report card stolen/missing...*

*The Complainant was grossly negligent in the safe keeping of their card and PIN and in reporting their Card lost/stolen and therefore are in breach of the Bank’s terms and conditions.”*

In reference to Regulations 74(3) or 75(5) the Provider makes the following submissions:

*“... at the time the customers contacted the bank the transaction had already been approved on our systems with the correct PIN and card. They were all processed prior to the card being reported lost/stolen to the bank. The customer was aware of the fact their card was missing in the early hours of the morning of the 6<sup>th</sup> August 2017, the fraudulent activity began at 04:10am had they contacted initially when*

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*discovered card was missing the fraudulent activity would have been avoided/declined/prevented...”*

With regard to Regulation 70, the Provider makes the following submissions:

*“The Complainant did not fulfil her obligations under Regulation 70.2 and was grossly negligent in knowing that her card was missing but did not take precautionary action.”*

## Summary

In this complaint, the Complainant fell victim to a fraud whereby her PIN was seen and her card was stolen. Her card and PIN were then used over the course of a number of hours to effect point of sale transactions.

When a genuine card is used with a correct PIN, the Provider is contractually obliged to disburse the requested monies (subject to there being sufficient funds in the account).

The Complainant failed to comply with her obligations to keep her card and PIN safe. The Provider has complied with its obligations under the card terms and conditions and under the European Communities (Payment Services) Regulations 2009.

Crucially, the Complainant noticed that her card was missing but did not take immediate action.

In this regard, the information provided by the Complainant on the telephone call with the Provider on 1 September 2017 is of particular note when she stated:

*“We went home and I noticed then that my card was gone, but I kinda dismissed it ohh it was at the bottom of my bag, my phone was there, wallet was there,, the bag that I had is worthless. I kinda just dismissed it really and I thought to myself well if they got my card what’s the worst they can do a tap”.*

It is arguable that this course of action was *“grossly negligent”*, as emotive a phrase as that is, but there is no doubt that it constituted a breach of the card terms and conditions. If a cardholder makes the choice to ignore a missing card in the hope it will turn up, or that there is unlikely to be much detriment from it only being used to “tap” they are in breach of the card terms and conditions and they assume the risk that monies will not be recoverable if indeed they are defrauded in the manner in which the Complainant was defrauded.

There is a heavy onus on a customer to keep both their card and their PIN safe. This stands to reason, as the convenience of debit card services and the access to one's account that they provide is such that a card and its PIN should be guarded as closely as cash.

In the circumstances of this complaint, like a theft of cash itself, the Provider is not liable to reimburse the Complainant – it is a matter between the parties and the police to take all of the necessary steps to attempt to recover the monies.

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The Provider does have a certain level of safeguarding in place to identify unusual transactions, and indeed identified the disputed transactions as suspicious. However, that does not mean that it must refund every transaction that ultimately turns out to be fraudulent. The safeguards and fraud alerts are in place to assist, but not replace, a cardholder's own vigilance.

For the reasons set out above, I cannot accept that the Provider has wrongfully refused to refund the Complainant's account with the value of the disputed transaction.

On that basis, I do not uphold this aspect of the complaint.

### **Mislaid Documentation**

The Complainant has taken issue with the level of service she received when she was attempting to progress this dispute with the Provider's card fraud services.

In particular, the Fraud Declaration documents that the Complainant returned to the Provider and were received by it on the 10<sup>th</sup> of August 2017, were not acknowledged correctly on the Provider's systems, with the result that the Complainant was told that the Provider had not received the documentation from her. This led to roughly a month of the Complainant being frustrated and inconvenienced in her attempts to progress her claim. However, I do not accept that the Provider's delay caused the police investigation to collapse, as is contended for by the Complainant. The Provider cannot control the manner in which a police investigation is conducted.

The Provider has acknowledged shortcomings in this regard, and has offered the sum of €400 as a goodwill gesture in its response to the formal complaint from this Office. I believe this is reasonable compensation for those shortcomings and on the basis that this offer of €400 remains available to the Complainant, I do not uphold this complaint.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**

**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

22 January 2019

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Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

