



<b><u>Decision Ref:</u></b>	2019-0279
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Credit Cards
<b><u>Conduct(s) complained of:</u></b>	Disputed transactions
<b><u>Outcome:</u></b>	Substantially upheld

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

**Background**

This complaint concerns an unauthorised pre-authorisation made against the credit card account which the Complainant holds with the Provider.

**The Complainant's Case**

The Complainant submits that on 8 April 2018, a pre-authorisation of €87.80 was placed against his credit card by a merchant for a rental car. The Complainant had authorised this through the use of his PIN. A copy of this receipt has been provided. The Complainant asserts that this pre-authorisation of €87.80 was a refundable deposit. The Complainant asserts that on 11 April 2018, the car was returned to the car rental company, undamaged. The Complainant submits that on this date, he was advised by the car rental company representative that the pre-authorisation of €87.80 would be removed from his credit card within a couple of days.

The Complainant submits that on 16 April 2018, he contacted the Provider to check that the pre-authorisation of €87.80 had been removed from his credit card. The Complainant contends that the Provider advised him that this pre-authorisation had not been removed from his credit card and that, in addition, he was advised that a second pre-authorisation of a €87.80 had been made against the credit card on 11 April 2018. The Complainant asserts

that he did not authorise, nor did he request, the second pre-authorisation of €87.80 to be made against his credit card.

He states that he never authorised the second pre-authorisation, nor was he requested to, on 11 April 2018. He states that he advised the Provider that he wished to make a formal complaint to VISA about the actions of the merchant. He states that he was advised that he should notify the merchant accordingly and include a copy of the complaint with his written complaint to the Provider's payment services department. He requested that the pre-authorisation be removed from his credit card account as a matter of urgency and requested an explanation as to how the merchant was allowed to place a pre-authorisation against his card without his consent.

The Complainant accepts that the two pre-authorisations have subsequently been removed from his card. He argues, however, that the Provider should not have allowed the merchant to take a second pre-authorisation against his card without his permission. He wonders what the point in having a PIN is if the merchant can call for payment from his account without his authority. He is also concerned that the Provider has indicated that if the merchant had called for this unauthorised pre-authorisation, it would have honoured it.

The Complainant disputes the Provider's characterisation of the second pre-authorisation having been approved by him by giving the card details to the merchant. He argues that the Provider's response to the complaint indicates that a merchant can put further pre-authorisations against a card without a customer's permission once one pre-authorisation has been authorised. He is further concerned that if such a merchant calls for payment of unauthorised pre-authorisations, the Provider would honour them and the Complainant would be left to dispute the unauthorised payment through the VISA dispute resolution process.

He states that he complained to the merchant and submitted evidence of this to the Provider but he never received a response from the merchant. The Complainant feels that the Provider has not answered the kernel of his complaint which is how a merchant can place a pre-authorisation against an account without the customer's explicit permission. He disputes the Provider's characterisation of the second pre-approval as being an approved authorisation. He points out that there is no term or condition that indicates that a merchant can place a further pre-authorisation against a credit card account without a customer's consent once a single pre-authorisation has been authorised with a PIN.

The Complainant seeks a customer protection against a merchant placing unauthorised pre-authorisations against his credit card.

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

The Provider denies wrongdoing and asserts that there are a number of ways that a customer can authorise a transaction, including by means of his card number. It states that as the Complainant willingly gave his card details to the merchant, and therefore accepted

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its terms and conditions, under VISA rules, the merchant can call for payment from his account and the Provider must honour this.

The Provider also draws attention to its own terms and conditions which state that transactions are irrevocable once received by it for execution. It further states that if a transaction is later debited from a customer's account and the customer wishes to dispute this, this can be raised by the Provider through the VISA Dispute Resolution process.

The Provider argues that it sought to resolve the Complainant's complaint in its response dated 17 May 2018 which advised the Complainant of the relevant terms and conditions pertaining to transaction authorisations. The letter also advised the Complainant that should the transaction be debited from his account and the Complainant wished to dispute it, the Provider could raise this on his behalf through the VISA dispute resolution process and advised him of the timescale of such disputes. The Provider states that as the transaction in question had not been debited from the Complainant's credit card account, there was no opportunity or reason to dispute the charge i.e. to instigate a chargeback.

The Provider states that disputed card transactions are generally raised by customers where a transaction is not authorised by him or was deducted from an account more than once. It refers to information from the Competition and Consumer Protection Commissioner (CCPC) website where the CCPC advises customers to firstly contact the supplier to request a refund. If the supplier will not provide a refund of the funds that the customer paid using his credit card, the Provider may then agree to reverse the transaction, which is called a chargeback. The Provider highlights that the Complainant submitted evidence of his attempt to contact the merchant/supplier but does not seem to have received a response to this.

The Provider highlights section 14(e) of its terms and condition which state that the Provider is not liable for any error or omission made by retailers with access to the authorisation service. It states that as the funds in question were not debited from the account, the Provider had no opportunity to raise a chargeback of the funds through the VISA dispute resolution process. The Provider further points to section 4(b) of the conditions of use which list a variety of means by which a customer can authorise a transaction, and which includes "*authorisation by means of your Card number and in some circumstances a security code or codes for Transactions by mail, telephone, intranet or using a Secure System*". It further highlights section 14(b) which indicates that a transaction is irrevocable once received for execution but that the Provider would use reasonable endeavours to make amendments or cancellations on request if it was possible to do so. The Provider states that the Complainant agreed to be bound by the conditions of use for credit cards in his application form dated 25 July 1995.

The Provider states that the merchant did not request receipt of the disputed funds and therefore the transaction amount was made available to the cardholder on expiry of the relevant time period. The Provider explains that once transactions are approved by a provider, the transaction amount will be made unavailable to the cardholder for a period of five business days. The merchant subsequently requests receipt of funds electronically via their bank for payment and on receipt, the Provider will debit the cardholder's account and post the transaction to the customer's account. In this instance as the merchant did not

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request receipt of funds, the transaction amount was made available after the expiry of five business days.

The Provider explains that given the timeframe since the transactions in question were authorised and that the merchant did not request receipt of funds allowing the authorisations to expire, the Provider no longer holds any data pertaining to the transactions.

The Provider argues that pre-authorisations is the practice within the banking industry of verifying electronic transactions initiated with a credit or debit card rendering this balance unavailable until either the merchant clears the transaction (settlement) or the hold expires. The Provider explains that this is common practice for companies who wish to confirm a valid method of payment has been received prior to providing goods or services.

The Provider states that if the merchant had requested receipt of funds, it would have instigated a chargeback at the Complainant's request. It further states that the Complainant is aware of this process as he has previously availed of it. The Provider argues that once transactions are authorised in accordance with the Provider's conditions for use of credit cards and the merchant's terms and conditions, the Provider will honour the transactions, but that the Complainant then has 120 days after the transaction takes place to request the Provider to raise a chargeback. The Provider states that the chargeback process offered to customers is set out under the VISA rules. The Provider argues that it acted in accordance with the VISA international regulations and the terms and conditions of the account. It states that the pre-authorised funds were never deducted from the Complainant's account as the merchant did not request receipt of funds and the authorisation expired.

The Provider disputes the Complainant's characterisation of its response in which he claims that the merchant can put through further pre-authorisation against a card without permission once one pre-authorisation has been authorised. Instead, the Provider states that it has merely outlined the relevant terms and conditions of the account which the Complainant has agreed to be bound by, in particular that the Provider is not liable for any errors or omissions made by retailers through access to the authorisation service.

### **The Complaint for Adjudication**

The complaint is that the Provider incorrectly allowed a merchant to place a pre-authorisation against the Complainant's credit card without the Complainant's authorisation.

### **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.

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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 14 August 2019, 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, within the period permitted, I set out below my final determination.

The Complainant accepts that he authorised a pre-authorisation amount of €87.80 against his credit card by a named merchant on 8 April 2018 and has provided a receipt in respect of this. He claims, however, that the second preauthorisation amount of €87.80 that was held against his credit card on the request of the same merchant from 11 April 2018 was not authorised by him. It is common case that neither pre-authorisation amount was in fact debited from the Complainant's credit card account and so the dispute centres on the failure of the Provider to remove the pre-authorisation hold having been notified by the Complainant that he had not authorised it.

In its response to the complaint, the Provider relies heavily on the terms and conditions pertaining to the use of the credit card. The Complainant applied for credit card in question on 25 July 1995 and in his application and by his signature agreed that he had read and agreed to be bound by the conditions of use of the credit card.

The conditions of use that the Provider has submitted to this office are effective from 3 December 2018. This is unsatisfactory as the incident in question occurred on 11 April 2018. I have compared the December 2018 terms and conditions against terms and conditions applicable from September 2015, however, and it appears that the relevant terms and conditions that the Provider relies on for this complaint remain the same.

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Condition 4(b) deals with the authorisation of transactions and provides as follows:

*“There is a variety of means by which you can authorise such Transactions and draw down funds, including:*

- (i) authorisation by means of your Card used in conjunction with your PIN for point of sale Transactions or Transactions using a Cash Machine;*
- (ii) authorisation by means of your Card number and in some circumstances a security code or codes for Transactions by mail, telephone, internet or using a Secure System; and;*
- (iii) authorisation by means of your Card and signature where the other authorisation options in this Condition are not available.”*

A ‘Secure System’ is defined as *“a system approved by [the Provider] to enable the secure use of your Card over the Internet”* and does not appear to be applicable here.

The Provider relies on Condition 4(b)(ii) and argues that by providing his credit card number to the merchant in question, the Complainant authorised the second pre-authorisation transaction of 11 April 2018 from the perspective of the terms and conditions. This argument, however, ignores the clause in its entirety which refers to the authorisation by means of card number (and possibly security code) *“for Transactions by mail, telephone, internet or using a Secure System”*. The evidence provided by the Complainant is in the form of a credit card receipt containing the words *“vérifié par PIN”* which shows that the initial pre-authorisation of 8 April 2018 was approved by him by the use of his PIN as a point of sale transaction, as contemplated under condition 4(b)(i). A receipt from 11 April 2018 indicates that the entire payment due from the Complainant of €84.40 had been met by way of pre-payment and that there was no balance outstanding to the merchant. There is nothing before me to suggest that the second, unauthorised pre-approval of 11 April 2018 was in the form of a transaction *“by mail, telephone, internet or using a Secure System”*. There is further no evidence before me that the second point of sale transaction was verified by the Complainant’s use of his PIN.

On this analysis, I cannot accept the argument of the Provider that the transaction of 11 April 2018 was in fact approved by the Complainant in accordance with the terms and conditions of his credit card.

Further, under Regulation 88 of the European Union (Payment Services) Regulations 2018 (PSD2 Regs):

*“(1) A payment transaction is authorised by a payer only where the payer has given consent to execute the payment transaction.*

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*(3) Consent to execute a payment transaction or a series of payment transactions shall be given in the form agreed between the payer and the payment service Provider concerned.*

...

*(7) The procedure for giving consent shall be agreed between the payer and the payment service Provider concerned."*

The form and/or procedure agreed between the Complainant and the Provider in the present case is set out in Condition 4(b) of the terms and conditions. The Provider has not provided any other evidence to this Office that would tend to demonstrate that the transaction of 11 April 2018 was approved in the manner agreed under the terms and conditions of the credit card. Therefore, I am not satisfied that Regulation 88 has been met in this case in respect of the transaction of 11 April 2018.

The Provider has also sought to rely on section 14 (entitled 'authorisations') of its terms and conditions as follows:

*"(b) Once received by us for execution, Transactions are irrevocable. However, if you wish to amend or cancel a Transaction that you have given us we will use our reasonable endeavours to make such amendment or cancellation if it is possible for us to do so.*

...

*(e) Approved authorisation reduces the available balance of the Credit Limit, even though the Transaction might not yet appear on your Statement. We are not liable for any error or omission made by a Merchant through access to the authorisation service."*

I accept that pursuant to section 14(e), the Provider is not liable for any error or omission made by a merchant which has access to the authorisation service. Though it appears that the merchant in question has not responded to the Complainant's complaint, the fact that the pre-authorisation hold in question was allowed to expire by the merchant, in conjunction with the evidence submitted by the Complainant from 8 and 11 April 2018, suggests that a mistake may have been made by the merchant in question. I cannot, however, form a definitive view on this in the absence of further information. In any event, no actual loss appears to have accrued to the Complainant as a result of the unauthorised pre-approval hold so it would not appear that section 14(e) is particularly relevant here as no question of liability in fact arises.

In respect of condition 14(b), I note that the terms and conditions provide that 'transactions' are irrevocable once received for execution. The definition of 'transaction' is:

*"Transaction means a balance transfer and the purchase of goods, services or other benefits obtained by use of the Card, the Card number and where appropriate, in conjunction with the PIN and VbV Password, for debit or credit to the Account pursuant to the Agreement."*

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At the definition of transaction is expressly subject to the use of the card pursuant to the agreement, I am of the view that transactions are only irrevocable where they have been authorised in accordance with the terms and conditions of the use of the credit card. As set out above, I am not satisfied that the disputed pre-approval hold of 11 April 2018 was in fact authorised by the Complainant in the present case. I am further conscious of the Provider's commitment to use its "reasonable endeavours" to make an amendment to or cancellation of a transaction if it is possible to do so. There is no evidence before me of any assistance given to the Complainant in respect of the disputed pre-authorisation hold, other than to encourage him to contact the merchant in question, which he duly did.

The Provider has indicated that it complied with the VISA terms and conditions in relation to the transaction in question but has not submitted a copy of the terms and conditions or listed any relevant terms and conditions to support this contention.

There is no indication under the PSD2 Regs as to what, if anything, a payment service Provider (such as the Provider) should do in the event that a pre-approval hold has been requested by a merchant but where this was not authorised by the customer. If payment was not authorised, the customer must be refunded under Regulation 97(1) of the PSD2 "not later than the end of the business day immediately following the date that the payer's payment service Provider notes or is notified of the transaction". In the present case, the disputed amount was never in fact debited from the Complainant's credit card account. In those circumstances, I do not consider that the Provider was in breach of Regulation 97 as, after the expiry of the hold, the Complainant's account balance remained as it had been prior to the pre-authorisation hold of 11 April 2018.

Under Regulation 99(1) PDS2 Regs, a pre-approval hold may only be utilised where a customer has given his or her consent to the exact amount of the funds to be blocked. The relevant section provides as follows:

*"Payment transactions where the transaction amount is not known in advance*

*99. (1) Where a payment transaction is initiated by or through a payee in the context of a card-based payment transaction and the exact amount is not known at the moment when the payer gives consent to execute the payment transaction, the payer's payment service Provider may block funds on the payer's payment account only if the payer has given consent to the exact amount of the funds to be blocked.*

*(2) The payer's payment service Provider shall release the funds blocked on the payer's payment account under paragraph (1) without undue delay after receipt of information about the exact amount of the payment transaction and at the latest immediately after receipt of the payment order."*

In the present case, and as set out above, I do not accept that the Complainant consented to the second pre-approval transaction of 11 April 2018 and as such I am not satisfied that the Provider was entitled to place the additional hold on his credit card account in the amount of €87.80.

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There is no evidence before me of any loss or damage having been suffered by the Complainant owing to the unauthorised preapproval hold April 2018. The Complainant notified the Provider that he had not authorised the disputed pre-authorisation of 11 April by telephone call and by letter dated 16 April 2018. On the basis of the information submitted by the Provider, a pre-authorisation hold on a customer credit card expires after five working days, unless the merchant calls for payment in the meantime. This means that the hold in the present case should have expired on 18 April 2018, a mere two days after the Complainant was made aware of the second pre-authorisation hold.

Further, the Provider has stated that if the amount had in fact been debited from the account, it would immediately have acted on any instruction from the Complainant to dispute the relevant transaction by way of instigation of a chargeback through VISA. It is not entirely clear what the Complainant believes ought to have happened on the discovery of the second pre-authorisation hold in the very short time frame before the hold expired.

In relation to the Provider's response to the Complainant's letter of 16 April 2018, however, I can readily appreciate the Complainant's frustration that the Provider insisted that the second preauthorisation was authorised by the Complainant by means of his card number. As I detailed above, I do not believe that the Provider is entitled to rely on condition 4(b)(ii) in this regard as this applies only to transactions by "mail, telephone, internet or using a Secure System". The Provider was aware, or ought to have been aware, that the transaction in question was not in this category. Under provision 10.7 of the Consumer Protection Code 2012 (CPC), the Provider "*must seek to resolve any complaints with consumers*". Although I accept that the Provider acknowledged the complaint and responded within the applicable timeframes, I am not satisfied that the Provider's final response letter or subsequent submissions to this complaint had met its obligations under provision 10.7 and that at no point appears to have really listened to the kernel of the complaint in question.

As is often the case with such complaints, I believe that greater communication and, in particular, better attention to what the Complainant was explained, could have resolved this complaint.

In all the circumstances of the present complaint, I am of the view that the Provider was in breach of its own terms and conditions and in breach of certain obligations of the PSD2 Regs in placing a pre-authorisation hold on the Complainant's credit card account that he had not authorised. I am satisfied, however, that it did so only as a result of an instruction received from the merchant in question, at whose door the fault in relation to the present complaint most likely lies. Due to the short timeframe for which the hold was in place, the fact that the Provider had little time to investigate the matter before the hold expired, and the fact that the disputed sum was never in fact debited from the Complainant's account, I do not feel that it would be appropriate to direct the payment of any compensation to the Complainant on the basis of the unauthorised transaction. I am also of the view, however, that the Provider has breached Provision 10.7 CPC in respect of its response to the present complaint as I am not satisfied that the Provider sought to resolve the Complainant's complaint, other than by attempting to insist that he had authorised the transaction which the evidence before me indicates that he did not do.

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In light of this breach, and the resulting frustration and inconvenience that this undoubtedly caused to the Complainant, I am of the view that it would be appropriate to direct the Provider to pay a sum of €500 in compensation to the Complainant in respect of its failings.

For the reasons set out above, I substantially uphold this complaint and direct the Provider to pay a sum of €500 in compensation to the Complainant.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2) (b) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €500, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

**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**

12 September 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.

