



<b><u>Decision Ref:</u></b>	2021-0102
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Credit Cards
<b><u>Conduct(s) complained of:</u></b>	Disputed transactions Complaint handling (Consumer Protection Code)
<b><u>Outcome:</u></b>	Partially upheld

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

The Complainant holds a credit card with the Provider. The Complainant was due to travel from Ireland to the UK by return flight on **12 July 2018**. However, due to a pilot strike, the Complainant's departing flight was delayed and the Complainant did not board the flight. The Complainant sought a chargeback from the Provider in respect of the cost of his flight. However, the Provider declined the chargeback request.

**The Complainant's Case**

The Complainant explains that he applied for a transaction refund on his credit card in respect of return flight from the UK. The Complainant explains that he was due to travel to the UK for *meetings*, however, due to a pilot strike, the flight was substantially delayed which forced him to abandon his plans as the Complainant would not have "... *achieved my purpose.*"

The Complainant submits "[t]his was a foreseeable circumstance on behalf of [the Airline]", but the Airline failed to give any notice whatsoever about possible flight delays. The Complainant advises that the issue was raised with the Airline on the morning of the flight but the Airline did not acknowledge receipt of his complaint.

The Complainant states that he is seeking a transaction refund on his credit card in the amount of €458.96. The Complainant also states he is dissatisfied with the *dismissive management* of his complaint by the Provider "... *in favour of their large customer.*"

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

The Provider, against which this complaint is made, explains that the Complainant's credit card was issued by the Provider and is processed by a third party Service Provider. The Service Provider processes payments between the merchant banks and card-issuing banks. The Provider states that in order to ensure both cardholder and merchant rights are upheld, all parties must adhere to the chargeback rules imposed by the Service Provider.

The Provider states that chargeback schemes confer no legal rights on customers and a chargeback is not a guaranteed refund. The Provider advises that banks employ *best efforts* to process and apply chargebacks. The Provider further advises that the scheme is operated on a discretionary and goodwill basis.

When a customer disputes a charge to their credit card, the Provider says a refund should first be sought from the merchant with whom they transacted. If this fails, the next step is to contact the Provider to establish if the payment on their credit card can be reversed using the chargeback scheme. The Provider explains that once a chargeback request is lodged, its Chargebacks Department will investigate the disputed transaction and determine whether a chargeback would be permitted under the scheme. In this case, the Provider advises that a chargeback would not be permitted due to the terms and conditions applicable to the agreement between the Complainant and the Airline/Merchant.

By letter dated **15 August 2018**, the Provider states that it received a chargeback request from the Complainant. The Provider advises that the Merchant issued a full response to the chargeback request on or about **29 November 2018**, being 48 days subsequent to the Provider's request. Upon receipt of this response, the Provider says it was relayed to the Complainant for reply. The Complainant replied on **13 December 2018**. The Provider states that a Final Response letter was issued on **22 January 2019** declining the chargeback request. The Provider states that insofar as any *action* was taken, it was to ensure that fair procedures were followed and that the Complainant was given an opportunity to reply to the Merchant's response.

Subsequent to the Complainant's letter of **26 September 2018**, the Provider states that a chargeback request was lodged with the Merchant on **12 October 2018**. On receiving the Complainant's letter of **2 November 2018**, the Provider says it replied on **9 November 2018** informing the Complainant that the chargeback request had been lodged on **12 October 2018** and also informed him of the 45 days that would be afforded to the Merchant to respond.

The Provider outlines the review undertaken by its Chargebacks Department as follows:

- Receiving and considering the documentation submitted by the Complainant,
- Submitting this documentation to the Merchant for response,
- Relaying the Merchant's response to the Complainant for reply,

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- Receiving the Complainant's reply,
- Considering all documentation submitted by the parties,
- Issuing a Final Response letter.

The Provider states that the evidence submitted indicated that the Merchant, in refusing to refund the fee paid by the Complainant, was not in breach of the terms and conditions accepted by the Complainant nor was it a breach of any provision of EU or national legislation. In the circumstances, the Provider says it could progress the chargeback request no further and was obliged to refer the matter to the Merchant for resolution.

The Provider submits that in completing the disputed transaction, the Complainant accepted the terms and conditions that would be applicable to the agreement between him and the Merchant. The Provider says article 9.2.1.3 of the terms and conditions obliged the Merchant to offer the Complainant the option of a refund in certain circumstances, including where the Merchant *'[failed] to operate a flight reasonably according to schedule.'* The Provider states that the complaint is silent on the precise delay that occurred in the context of this complaint, but on the Complainant's own evidence, the delay was less than 3 hours.

As to what would constitute an unreasonable delay such as would give rise to a right to a refund, the Provider submits this is not set out in the terms and conditions. In this regard, the Provider refers to the provisions of the Aviation Regulations (EC) No. 261 of 2004 (the **Regulations**). The Provider states that article 6 deals with delays and does not provide redress for delays under 2 hours. For flights of 1,500 kilometres or less, the Provider says for delays of between 2 and 5 hours, the Regulations oblige airlines to provide meals, refreshments, accommodation or transport where appropriate. The Provider submits that the Regulations does not provide for reimbursement for any delay of less than 5 hours. The Provider submits that, objectively, a delay of under 3 hours, as occurred in the context of this complaint, was not unreasonable in the circumstances.

The Provider states it notes that the Complainant's reason for flying was to attend a meeting and the delay was of such a length that the meeting had to be cancelled. However, the Provider submits this factor is not sufficient to override the terms and conditions applicable to the agreement between the Complainant and the Merchant. The Provider submits this is more akin to a submission that the Complainant ought to be released from his contractual obligations by the application of the contractual doctrine of frustration. The Provider states that the high threshold for frustration is not met in this case. The Provider submits the delay would have been reasonably anticipated by the parties prior to entering the agreement and the terms and conditions reflected this; therefore, frustration cannot apply.

### **The Complaints for Adjudication**

The complaints are that the Provider:

Wrongfully declined the Complainant's chargeback request;

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Failed to properly handle the Complainant's complaint; and

Failed to act in accordance with its consumer protection obligations.

### **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 on 22 February 2021, outlining my preliminary determination 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.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. Letter from the Provider to this Office dated 4 March 2021.
2. E-mail from the Complainant's representative to this Office dated 9 March 2021.

Copies of these submissions were exchanged between the parties.

Having considered these additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

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## **Background**

The Complainant wrote to the Provider's Chargebacks Department on **15 August 2018** in respect of his flight to the UK as follows:

*"... My colleague and I were due to travel to [the UK] on a return day trip for business meetings however due to [Airline] pilot strikes the flight was substantially delayed which forced us to abandon our plans as we would not have made our meetings on time. This was a foreseeable circumstance on behalf of [the Airline] but they failed to give us any notice whatsoever about the possible flight delays. ..."*

The Complainant wrote to the Chargebacks Department again on **28 August 2018**, expressing his disappointment that he had not heard from the Provider and requested a response to his letter within 48 hours.

By letter dated **19 September 2018**, the Provider wrote to the Complainant explaining:

*"In order for us to dispute this on your behalf we require the following documentation. Please forward at your earliest convenience to the address above.*

- *Proof that you have attempted to resolve directly with the Merchant.*
- *A copy of the Merchants Terms and Conditions.*
- *Any other relevant document.*

*Please be advised that all disputes are subject to a 120 day time limit from the date of the transaction. ..."*

The requested information appears to have been provided under cover of letter dated **26 September 2018**. At the second paragraph of this letter, the Complainant states that:

*"Under the consumer protection code we do not permit [the Provider's] Chargeback Department to rely on [the Airline's] terms and conditions to resolve this dispute as their delayed flight was very much a foreseeable event. Strike action had been flagged and notified well in advance to [the Airline] and this was highly publicised on national television over several weeks. ..."*

By letter dated **2 November 2018**, the Complainant wrote to the Provider and referred to his letter of **26 September 2018** noting that *"[s]everal weeks have passed and I have not heard anything further regarding my dispute. ... Please revert within the CPC timeframe."* The Provider responded to this letter on **9 November 2018** advising that:

*"We have issued a chargeback for the transaction(s) on your account on 12 October 2018. The Merchant has 45 days to represent this chargeback, if they fail to respond, we will then be in a position to refund the transaction to your account. ..."*

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The Airline's response to the chargeback request appears to have been forwarded to the Complainant in or around **29 November 2018**. In its response, the Airline states:

*"The process of purchasing a flight involves the passenger accepting [the Airline's] terms and conditions via a tick box. In those terms and conditions it can be seen that [the Airline] are a non-refundable airline and you cannot cancel your flights once purchased. Since the passenger accepted the terms and conditions they can only hold themselves responsible. It is not [the Airline's] responsibility or duty to provide proof of purchase, however, the screenshots below clearly show the passenger purchased the services with their credit card and in their name. The passengers would have been fully aware that if they chose not to use the service provided by [the Airline] they are non-refundable anyway.*

*In this case, as can be seen in the Extract from Flight Manifest, the passenger(s) No-Showed for the flight(s). When this reservation was made, the service became available to the passenger(s) on the date(s) booked. The service and the flight(s) departed as described, but the passenger(s) failed to board at no fault of [the Airline]. [The Airline] assumes no responsibility for the passenger(s) No-Showing for the flight(s). The passenger name contact name and cardholder name all match in this reservation. No refund is applicable in this case. As per our terms and conditions, [the Airline] has a no refund policy. Furthermore, no credit was agreed between the cardholder and [the Airline].*

The Complainant wrote to the Provider on **13 December 2018** addressing the Merchant's response. In addition to this, the Complainant stated that he wished to escalate his chargeback request to a formal complaint. In this letter, the Complainant states:

*"The internal pilot challenges [the Airline] was experiencing at the time was being aired publicly on national TV and therefore the delay in their flight schedule was very much a foreseeable consequence. [The Airline] would have been aware that they were unable to adhere to their schedules and should have notified their customers of the envisaged delays and offered them a refund or opportunity to defer the flights. It is untrue to say that the parties were "no show". Airport CCTV will prove that both parties were airside and having gone through security awaiting flight call but several delays made the customers purpose for the flight obsolete. Once it was realised that the purpose of the flight had become obsolete it was necessary for [an Airline] staff member to accompany the customer back through security to the public side of the airport. There was no receipt given to the customer but [the Airline] should have a record of this and in any event airport CCTV and parking charges on the same card will support proof of attendance at [named] airport on the day."*

A Final Response letter was issued to the Complainant on **22 January 2019** which acknowledged receipt of the Complainant's complaint on **9 January 2019**.

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This letter states:

*“On receipt of your complaint I referred this matter to our Chargebacks Department who confirmed that upon review of the additional documentation you submitted on 28 September 2018, they are obliged to refer this to the merchant to resolve the matter for the customer.*

*Our records confirm that on 29 November 2018 the merchant provided documentation proving that the flight was valid and available for use. I note that the merchant states that you and your party did not board the flight on 12 July 2018. [The Airline] do not dispute the fact that you attended the airport and as you did not board the flight due to your decision to leave the airport, you would not be covered under the merchant’s refund policy. From the screenshots you provided I note that the flight was not delayed more than three hours. I respectfully suggest that you raise this matter with the merchant directly.*

*I must refer you to the European law EU Regulation 261/2004 which the following rules apply:*

#### ***Refund***

*If the flight is delayed at least 5 hours you must be afforded a refund of your ticket instead of flying. A refund is a full refund of the ticket for the part or parts of the journey you have not made and for the part or parts you already made if the flight is no longer serving any purpose to your original travel plan. When relevant, it also includes a return flight to your first point of departure, at the earliest opportunity.*

*It is important to note that in booking a flight with any airline, you are bound by their terms and conditions. In light of the foregoing, I regret to advise that we are unable to refund the above transaction on your account. ...”*

In response to this, the Complainant wrote to the Provider’s Complaints Department on **5 February 2019** as follows:

*“I am unhappy with your reply and request that you re-read my complaint.*

*You have not addressed the complaint in accordance with CPC. You are providing support of your merchant – a “giant” in their sector who has an excellent performance record in punctuality and something which they advertise to infinity. However in this instance they clearly were unable to provide the service and THIS WAS FORSEEABLE ON THEIR BEHALF.*

*Please address the complaint raised and revert with a full explanation.”*

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In a letter dated **28 March 2019**, the Complainant wrote to the Provider expressing his disappointment in not receiving a response to his previous letter.

It appears that in response to the Complainant's correspondence, the Provider issued a letter on **17 April 2019**, in almost identical terms to its letter of **19 September 2018**. By letter dated **10 June 2019**, the Provider informed the Complainant that:

*"Having reviewed the information you have provided, we regret to inform you, in this case, under [Service Provider] International Rules and Regulations, we have no dispute rights with this case.*

*As per your request we have reviewed your case again and regret to advise, per our original response, we cannot dispute this transaction as we have no chargeback rights in this case.*

*We would recommend that you contact the Merchant directly to try to resolve the dispute. ..."*

### **Analysis**

The Complainant attended the airport on **12 July 2018** to fly to the UK for certain meetings. Although the flight was delayed by a number of hours, the evidence is that it eventually departed. However, prior to departure the Complainant had already left the airport.

The Provider states that for a chargeback request to be accepted, the Complainant must first raise the issue with the Merchant, in this instance the Airline. A chargeback request was subsequently made by the Provider on the Complainant's behalf to the Airline.

The Airline declined the Complainant's request for a refund because, although delayed, the flight departed. In support of its decision, the Airline referred to its refund policy as set out in the terms and conditions of the contract between it and the Complainant. It describes itself as a "non-refundable" airline.

On receipt of the Airline's response to the chargeback request, the Provider declined the Complainant's request for a chargeback in reliance on the Airline's response and the provisions contained in the Regulations.

The documentation submitted by the parties shows that the Complainant's flight was not delayed by more than 3 hours and ultimately departed, it was not cancelled. While the Complainant booked the flight for a specific purpose and says this purpose was defeated by the flight delay, having considered the evidence, I do not believe this entitled the Complainant to a chargeback in respect of the cost of his flight tickets.



Further to this, clause 13 of the Provider's *Personal credit card agreement* deals with disputed and unauthorised transactions. As is evident from the wording of clause 13, it deals with transactions insofar as they are unauthorised or incorrectly executed but does not provide a mechanism for disputing transactions such as the one the subject of this complaint.

Therefore, the evidence does not support the contention that the Provider wrongfully or unreasonably declined the Complainant's chargeback request.

The Complainant made a chargeback request by letter dated **15 August 2018**. This request was not acknowledged by the Provider, and neither was the Complainant's follow-up letter of **28 August 2018**. It was not until **19 September 2018**, that the Provider wrote to the Complainant in respect of the chargeback request.

It is reasonable to expect that the Complainant's request be acknowledged by the Provider and it is disappointing that this did not occur in this case. However, even more disappointing is that the Complainant sent a follow-up letter which was also not acknowledged by the Provider.

The Complainant provided the information requested by the Provider by letter dated **26 September 2018**. The evidence is that a chargeback request was submitted to the Airline on **12 October 2018**. However, it does not appear that the Complainant was informed that this request had been made nor does the Provider appear to have updated the Complainant as to the status of his request or explained the chargeback process.

I consider it important for financial service providers to keep customers updated in respect of matters such as the progress and status of chargeback requests. It is quite clear that, in this instance, the Complainant was unaware as to when the request was made or the status of his request and was only provided with such information following his own requests.

I believe that the Provider's conduct in not keeping the Complainant informed as to the status of the chargeback request and in not providing information regarding the request process is contrary to the spirit of the *Consumer Protection Code, 2012* (the **Code**) and was not good customer service.

The Complainant requested an update on **2 November 2018** which the Provider responded to on **9 November 2018**. Having considered the manner in which this letter is worded, it was reasonable for the Complainant to assume that, if the Airline declined to refund the ticket price, the Provider would refund the money. This was not the case, however. I consider this correspondence to be misleading, and correspondence of this nature should not have been issued, particularly as the Provider states that the chargeback process is a discretionary and best efforts scheme and not a guarantee of a refund. The wording of its letter dated **9 November 2018** communicated the exact opposite position, and further highlights the Provider's failure to properly explain the chargeback process.

In my Preliminary Decision I had noted that *“the Complainant made a formal complaint on **13 December 2018**. However, there is no evidence to show this complaint was acknowledged within 5 business days as required by section 10.9(a) of the Code, nor is there any evidence to show that an update was provided after 20 business days as required by section 10.9(c). Although the Provider’s Final Response letter acknowledges receipt of the complaint on **9 January 2019**, there is no evidence to show that it was in fact received on this date and I am satisfied it is likely to have been received within days of **13 December 2018**”*.

The Provider, in its post Preliminary Decision submission, asserts that the Complainant’s letter was received on **8 January 2019**. The Provider submits that it *“...can confirm that the complaint was received on 8 January 2019. [The Provider] enclose a screenshot to evidence this. The Task ID on the left contains the date. This date is system generated when the received post is scanned centrally by the Provider on receipt of a document. The complaint was dealt with under the Payment Services Directive (EU 2015/2366 PSD2) which required a reply by the Provider within 15 business days of receipt of the complaint. The Final Response Letter issued on 22 January 2019, within the requisite 15 business day period”*.

From my review of the Provider’s post Preliminary Decision submission, I note that the date on the Provider’s internal system does show as *“08/Jan/2019”*. However, while the Provider has suggested that as the complaint was being *“dealt with under the Payment Services Directive”*, this does not render all provisions of the Consumer Protection Code as not applicable.

Where regulated entities are providing payment services, I acknowledge provisions 10.9(c) and 10.9(d) of the Code do not apply to them.

However, provision 10.9(a):

*“the regulated entity must acknowledge each complaint on paper or on another durable medium within five business days of the complaint being received”*

remains applicable, and in this instance where the Provider’s records show the complaint was received on **8 January 2019** but was not acknowledged until its Final Response Letter issued on **22 January 2019**, it appears that the Provider did not acknowledge the complaint within 5 business days as required by provision 10.9(a).

While I am satisfied with the response contained in the Final Response letter, the Complainant expressed his dissatisfaction with the adequacy of this letter by letter dated **5 February 2019** and wrote to the Provider again on **28 March 2019** expressing disappointment that his previous correspondence had not been responded to. Although the Provider’s Final Response letter was its final response to the complaint, it does not mean that the Provider was entitled to ignore or not acknowledge any further correspondence arising from its Final Response letter. I believe that it was reasonable to expect the Provider to have acknowledged these letters and confirmed its position as set out in its Final Response letter. It is disappointing that this did not occur in this instance.

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Consequently, having considered the evidence in this complaint, I am satisfied there were some serious customer service failings on the part of the Provider. Therefore, I partially uphold this complaint and direct the Provider to pay a sum of €500 to the Complainant for the inconvenience caused.

### **Conclusion**

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

21 April 2021

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.

