An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0146
Sector:	Banking
Product / Service:	Debit Card
Conduct(s) complained of:	Handling of fraudulent transactions Failure to provide correct information
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns transactions that occurred on the Complainant's personal current account which he holds with the Provider.

The Complainant's Case

On **28 August 2018**, while abroad in another EU Country, the Complainant visited a pole dancing club where he states that he bought/was given a number of drinks. He claims that one or some of these drinks were spiked by the staff. The Complainant explains that he had gone into *"a private clubroom"* with a female employee of the club and states that everything then became *"hazy/blurred"*. The Complainant submits *"*[the staff then] *manipulated me into using my Visa Debit Card to pay them several thousand of euro, which I was completely unaware of"*.

The Complainant states in further submissions to this Office dated **6 May 2020**:

> *"At the time, I did not realise or suspect that my drink had been spiked. It took several days to piece things together afterwards, and my memories of using my card with PIN were foggy at best. I vaguely remember the staff pulling tricks, like telling me that I had entered the wrong PIN and making me repeat the process."*

The Complainant states that *"at some point in time in the room, I had a very strange feeling as if I had woken up from anaesthetic after medical surgery. At some other time in the private room, the club manager reappeared – claiming that I had to pay again.*

I didn't know what I was paying for or how much, but I automatically took my wallet out of my pocket, took the card out and made a payment.

The manager told me that the payment failed and that I incorrectly entered my PIN – it happened twice in a row. I didn't know what time it was, but I felt I had to be at the club for an hour. I felt confused. After a while, I realised that I wasn't wearing a shirt, and my wallet and card went missing somewhere".

The Complainant states that he then exited the premises with difficulty due to the influence of the narcotics and the attitude of the staff members and returned to his accommodation. He states that:

> *"I checked my banking online and saw that more than €11,000 had been taken – the majority of my savings. I immediately called the* [Provider]*, they cancelled my card and advised me that I must visit a Police Station in order to open a case to have these transactions cancelled or reversed"*.

The Complainant states in his complaint form that he visited a police station near his hotel but was told that he needed to attend another police station to make his complaint. The Complainant then states that he rang the Provider to update it as to the situation and was advised that he did not need to make a statement to police.

The Complainant states that regardless of the Provider's advice he subsequently visited a police station the next day and furnished the Provider with a crime reference number and contact details for that police station. The Provider issued a letter to the Complainant dated **02 September 2019**, setting out that the Provider considered the transactions in question to be authorised, and:

> *"As per section 6.5 of the Terms and Conditions of the ATM Card and Visa Debit Card found on our website, you are fully liable for these transactions".*

The Complainant made a formal complaint to the Provider on **11 September 2019**. The Complainant subsequently lodged a complaint with this Office, and states in his complaint form:

> *"The* [Provider's] *letter stated that I was liable, because I entered the PIN number into the terminal myself. - In my initial phone calls with the* [Provider]*, I stated this fact, that I had used my card and entered my PIN"*.

In the Complainant's submission dated **06 May 2020**, the Complainant submits that the Provider has *"utterly failed"* to safeguard the Complainant's savings, and *"rather than offer good advice to customers in distress, they offer bad advice.*

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Rather than make an effort to help, they default to pointing the blame". The Complainant states *"years of effort saving my money was undone in hours without my knowledge"*.

The Complainant made further submissions to this Office dated **29 July 2020**. The Complainant states that he has *"no memory"* of sending the text message validating the transactions.

The Complainant states that the Provider's security measures *"are wide open to this particular scam"* and if the scammers were capable of getting his card and PIN then they were just as capable of sending a text message from his phone without his knowledge.

The Complainant maintains that the Provider let him down *"on every count"*. He states that the Provider's employee convinced him not to pursue his claim in the other EU Country's legal courts which was the *"only realistic way"* he could have gotten his money back.

To resolve the complaint, the Complainant *"would like the transactions that I do not recognise reversed/cancelled. They total €11,265.09"*.

The Provider's Case

The Provider, in its Final Response Letter dated **27 September 2019**, states that it finished an investigation into its decision to hold the Complainant liable for the transactions on his debit card.

The Final Response Letter further states that the *"onus is on* [the Complainant] *to protect* [his] *card and pin at all times"*. The Provider states that as the PIN is only known to the Complainant and given that his card should have been in his own possession at all times, the person responsible for the disputed transactions needed both the PIN and the physical card to complete the transactions. The Provider states that as all the disputed transactions which debited the account were completed successfully on the first attempt, this indicates that *"the third party knew your PIN first hand"*.

The Provider draws attention to the terms and conditions of the debit card, namely:

> *"3.0 Protecting your Card, PIN, and other Security Credentials;*
>
> *3.1 You should sign your card as soon as you receive it.*
>
> *3.2 You must keep the PIN secret, memorise it and take the greatest possible care to prevent anyone knowing it or using it fraudulently or without your permission. You should never write down your PIN in a place where you also keep the Card or where it can be easily linked to your Card.*
>
> *6.5 You will be liable for the full amount of the unauthorised transactions if they were made:*

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(a) because of any fraud or gross negligence by you.

(b) the Card was lost or stolen and the PIN, 3D Secure Passcode or other Security Credentials became available to the finder or thief or someone else had access to the Card

(c) someone possesses the Card with your consent and uses it or gives it to someone else; or

(d) you do not co-operate fully with us or others in any investigation concerning the theft or loss of the Card or any attempt to retrieve it.

The Provider states that the Complainant was in breach of the above Terms and Conditions and therefore will remain liable for the transactions in question.

The Provider acknowledges that during the Complainant's second call with the Provider, an employee of the Provider incorrectly advised the Complainant that it would not be necessary for him to obtain a police report. In light of this, the Provider has offered the Complainant €500 as a gesture of goodwill.

On **9 July 2020**, the Provider made further submissions to this Office. In these submissions, the Provider explains that further to a number of transactions of varying amounts being placed on the Complainant's card at 22.39 on **28 August 2019**, a temporary block was placed on the Complainant's account and an SMS message was sent to the Complainant's registered mobile phone number, advising the Complainant of the transactions being made. The Provider states that it received a response from the Complainant's registered mobile phone number at 22.39 confirming that the transactions were genuine and therefore the security flag was removed.

The Provider states that condition 4.2 of the Terms and Conditions of the Complainant's visa debit card advises:

> *"You must make sure that a card transaction including the amount is correct before you enter your PIN, 3D Secured Passcode or any other Secured Credential".*

The Provider notes that by the Complainant's own submissions, on a number of occasions he made payments while in the pole dancing club without knowing how much those payments were for or even what they were for. The Provider states that there is *"a clear onus on the Complainant to confirm the amount being debited on a terminal prior to entering in his PIN code"*.

The Provider points to terms and conditions in addition to those mentioned above, namely:

> *"3.4 you should always protect your card and take the greatest possible care to ensure it is not lost, stolen or used in an unauthorised way.*

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3.6 you are responsible for you card and you must ensure that you protect it…if you do not do so, you will be liable for any loss suffered as a result.

5.11 We have no obligation to you or the retailer concerning goods or services provided. You should contact the retailer if you have any query or dispute about the goods or service they provide.

14.1 If a transaction is made using your card with the PIN…you agree that we can conclude that the transaction was made by you".

In respect of the second phone call between the Complainant and the employee of the Provider, the Provider, in its submissions dated **9 July 2020**, stated that as the Complainant was having difficulty securing a crime reference number, its employee reassured the Complainant that the investigation into the transaction could still proceed in the absence of this reference number. The Provider stated that this is accurate and that in any event, the Complainant received a crime reference number and that therefore there was no prejudice to the Complainant or the investigation into his complaint.

The Provider expresses sympathy for the Complainant but states that he entered his secret PIN code on a number of occasions without checking the amount that was to be charged to the card and furthermore he accepted the transactions' validity through a text message and went on to make several subsequent transactions. The Provider also points to the fact that the Complainant has admitted having had *"quite a lot of alcohol consumption"* when describing the incident on **29 August 2019**.

In essence, the Provider states that the Complainant's case falls under Condition 6.5(a) of the visa debit card terms and conditions, namely that due to the gross negligence of the Complainant, the Complainant is liable for the full amount of the unauthorised transactions made by him on **28 August 2019**. This gross negligence occurred by reason of the breach of the terms and conditions, particularly failing to confirm the amount due to be debited by reference to the point-of-sale terminal provided to him within the pole dancing club.

In its further submissions, the Provider states that its offer of €500 has not yet been accepted by the Complainant and continues to be available to the Complainant.

The Complaints for Adjudication

The complaint is that the Provider has wrongfully refused to reimburse the Complainant for unauthorised transactions on the Complainant's card, provided flawed advice to the Complainant when he requested assistance and failed initially to conduct a detailed investigation of the Complainant's complaint.

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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 23 April 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.

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

When considering whether the Provider should have reimbursed the Complainant for the disputed transactions, it is necessary to consider the terms and conditions of the Complainant's debit card as they apply to the factual circumstances of this matter. Of particular relevance are the following terms and conditions:

- Condition 3.2 states that the Complainant must prevent anyone knowing or using the card fraudulently or without his permission;

- Condition 3.4 states that the Complainant has to *"protect"* his card and take *"the greatest possible care to ensure it is not…used in an unauthorised way"*;

- Condition 3.6 states that if the Complainant does not protect his card he will be *"liable for any loss suffered as a result"*;

- Condition 4.2 states that the Complainant must make sure *"that a card transaction including the amount is correct before you enter your PIN"*;

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- Condition 6.5 states that the Complainant will be liable for the unauthorised transactions if they were made because of *"gross negligence"* by him or if *"someone possesses the Card with your consent and uses it"*; and

- Condition 14.1 states that the Complainant agrees that the Provider can conclude that transactions made by the debit card with the PIN are made by the Complainant.

In essence, the above conditions place an onus on the Complainant to ensure that he protects his card and PIN, checks the amount of a transaction before approving a payment and does not give his card to a third party to use. The Complainant admits making a number of authorised transactions in the pole dancing club on the night of **28 August 2019**. These transactions took place in the form of three transactions for €100.09, €50.05 and €50.05 respectively.

Subsequent to these transactions taking place, I accept that due to a security flag being placed on the Complainant's account, the Provider placed a temporary block on the debit card and sent a text message to the Complainant seeking confirmation as to whether the transactions were valid. I am satisfied that the evidence furnished by the Provider discloses that this security text was replied to in the affirmative, confirming that the debits were valid, by the Complainant.

Shortly after the confirmation from the Complainant that the transactions being carried out in this pole dancing club were valid, six transactions for €5,271.50, €2,874.06, €1,394.14, €695.88, €610.08 and €419.43 took place in the pole dancing club. I note that all the transactions took place with the correct PIN and that the Complainant himself admits to entering his PIN numerous times into a Point of Sale (POS) machine furnished by an employee of the pole dancing club.

The reality of this situation is that the Complainant placed himself in a position where he had, by his own admission, consumed a significant amount of alcohol and was in a private room at a pole dancing club in a foreign country with at least one female employee of the pole dancing club. Whether through alcohol voluntarily consumed or through his drink being spiked the Complainant lost his wallet and affirmed numerous transactions by entering his secret PIN for his debit card. Based on these events, it is clear that the Complainant breached the terms and conditions of his debit card by not protecting it adequately, not safeguarding his PIN adequately, not checking the amounts of transactions he was entering into and/or giving his card to a third party and allowing them to use the card. On that basis, it was not unreasonable for the Provider to conclude in its investigations into the incident that the Complainant was grossly negligent and liable for all of the transactions on his debit card.

The Provider's position in respect of the advice given to the Complainant during his second phone call with the Provider that he did not need to obtain a police report appears to have changed from its Final Response Letter dated **27 September 2019** to its submissions to this Office dated **09 July 2020** in response to the complaint.

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In its Final Response Letter, the Provider acknowledges that it incorrectly advised the Complainant that it would not be necessary for him to obtain a police report whereas in its submissions to this Office, the Provider stated that the advice given that it was not necessary to obtain a police report was accurate. While there is a clear and obvious contradiction between these two submissions from the Provider, it is important to note that there was no prejudice suffered by the Complainant as a result of the advice given by the employee of the Provider as the Complainant did in fact obtain a police report. I also note that the Provider has offered a goodwill gesture of €500 which still remains available to the Complainant in light of this second phone call, despite its changed position that the advice given on the phone call was accurate.

In respect of the complaint that the Provider failed to initially conduct a detailed investigation in respect of the disputed transactions, while I acknowledge that the Complainant *"felt as if zero effort was invested by the* [Provider] *into trying to help me recover my savings"* (submission dated **06 May 2020**), there is no evidence to support the contention that the Provider failed to initially conduct a detailed investigation.

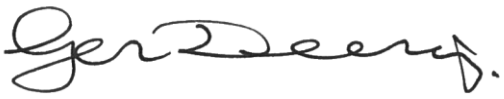
The Provider's letter to the Complainant dated **02 September 2019** clearly evidences that as part of its initial investigation it considered the transactions that took place on the card, the nature and timing of the transactions, as well as the telephone conversations between the Complainant and the Provider's employee and the Terms and Conditions of the Complainant's debit card. *"3.4 you should always protect your card and take the greatest possible care to ensure it is not lost, stolen or used in an unauthorised way.*

Based on the evidence available to me, I cannot accept the Complainant's contention that the Provider is obliged to reimburse him for the disputed transactions on his debit card account. Bearing in mind that the Provider has made an offer of €500 to the Complainant, and on the basis that this offer is still 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

14 May 2021

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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.