



<b><u>Decision Ref:</u></b>	2021-0443
<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>	Rejected

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

This complaint concerns two disputed transactions made on the Complainant's Visa Credit Card which is held with the Provider.

#### **The Complainant's Case**

The Complainant holds a Visa credit card with the Provider and that card was used twice in the early hours of the morning in a night club in a European City, to make the following two payments:

Date	Time	Merchant	Amount	Status
8 February 2020	04:19	Nightclub	€1,029.83	Authorised
8 February 2020	04:50	Nightclub	€993.43	Authorised

These amounts are reflected on the Complainant's Credit Card statement from the Provider dated **25 February 2020**. By letter dated **31 December 2020**, the Provider said that *"the Complainant discharged the disputed transactions in full on 13 March 2020."*

The Complainant argues that he contacted the Provider in good time and that he contacted the Gardai and reported the matter. After a telephone call on **11 February 2020** with the Provider, the Complainant cancelled the Visa credit card which is the subject of this complaint.

The Complainant submits that he believes *“the [Provider] offered very little protection to me the credit card user – I notified them about the dubious charges very quickly (within a few hours) – the circumstance of the incident I reported to the police.”*

The Complaint contends that the two transactions are theft. On the *Visa Incident Report* form dated **20 February 2020** and signed by the Complainant, in response to the questions *“was your card lost or stolen?”*, he says *“no.”* When asked to detail the circumstances of the incident the Complainant says *“entered a nightclub in [location] and was given a free drink which I believe was drugged. I have very little recollection of events following the drink I was offered.”*

He wants the Provider to refund him the disputed charges totalling €2,023.26 (two thousand and twenty three euros and twenty six cent). The Complainant submits that:

*“I would like to dispute the amount charged on my card I believe I was charged above and beyond what was reasonable – I would like a full refund of the charges incurred in the dispute.”*

The Complainant says that the two transactions were taken from his credit card at a club in [location] in the early hours of the morning of **8 February 2020**. He asserts that his credit card was taken and returned to him and that he was drugged. He contends that he informed the Provider in good time.

### **The Provider’s Case**

The Provider asserts that because the transactions were verified by chip and pin and the physical card was present, the Complainant authorised these two disputed transactions, he is in breach of the credit card’s terms and conditions and he remains liable for the monies in question.

The Provider asserts by letter dated **6 April 2020**, addressed to the Complainant, that:

*“Although these transactions may not have been authorised by you, from our records we can confirm that the transaction occurred prior to the Card being reported misused and were verified by the Personal Identification Number (“PIN”). We can confirm there were no genuine Chip and PIN transactions approved just prior to the disputed transactions..”*

By letter dated **31 December 2020**, the Provider outlines as follows:

*“The [Provider] issued a Visa Credit Card to the Complainant on account opening, with a chip embedded in the physical Card. This chip is read by a merchant's Card Payment machine, on each occasion the Card is presented for a Point of Sale (POS) transaction. Therefore, when a transaction log notes that a transaction was completed using a chipped card, it is not possible for this transaction to be completed without the physical Card being present at the time.”*

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By letter dated **31 December 2020**, the Provider asserts as follows:

*“while the transactions were reported within acceptable timeframes, this had no bearing on the outcome of the [Provider’s] fraud case, or the [Provider’s] decision to hold the Complainant liable for the disputed transactions.”*

By letter dated **31 December 2020**, the Provider also submits that:

*“the [Provider] is unable to raise both a Fraud Dispute and a Visa Chargeback dispute in relation to the same disputed transactions. Furthermore, it would have been likely that a Visa Chargeback dispute would have been inappropriate in this case, as the Complainant had authorised the disputed transactions with his chip and PIN, had not received a receipt, and had authorised the transactions with the intention of receiving goods/services.”*

The Provider’s case is that that both payments were confirmed using chip and pin, that the actual card was presented at the machine and that the Complainant’s credit and debit cards had identical pins such that this amounted to gross negligence and a breach of the Provider’s terms and conditions.

### **The Complaint for Adjudication**

The complaint is that the Provider wrongfully refused to reimburse the Complainant the sums debited to the Complainant’s credit card account, in **February 2020**, notwithstanding that the Complainant contacted the Provider within hours of the transactions occurring, advising that they were unauthorised by him.

### **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.

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A Preliminary Decision was issued to the parties on **28 October 2021**, 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, the final determination of this office is set out below.

Recording of 9 telephone calls has been furnished in evidence which I have considered. Of particular relevance are the calls of **8 February 2020**, **11 February 2020** and **12 February 2020**.

On **8 February 2020** (06:16) the Complainant calls **Provider Agent 1** and has a conversation about a fraudulent transaction which occurred on **8 February 2020** on a *debit* card held with the Provider. Importantly, this *debit* card is not the subject of this decision but the telephone call offers context to the night in question and the *credit* card transactions. The telephone conversation went as follows:

Provider Agent 1: *"is that related to your Visa debit card or your Visa credit card."*

Complainant: *"correct yes, my Visa debit yeah, yeah."*

Provider Agent 1: *"debit card, yeah."*

...

Provider Agent 1: *"you still have your card on you, yeah?"*

Complainant: *"I still have my card on me yeah."*

Provider Agent 1: *"all right."*

Provider Agent 1: *"and anybody know your pin code, your password?"*

Complainant: *"no, I don't think so, no."*

....

Complainant: *"I am in [location] at the moment and that is why I saw the charge coming up and my credit card got refused and so I was just wondering what is going on."*

...

Provider Agent 1: *"were you drinking in that place in [Nightclub]."*

Complainant: *"I was yes, I was yes."*

....

/Cont'd...

Provider Agent 1: *"... it's really unlikely for chip and pin and Visa customer have somebody else know his pin code for that to happen, you know, so that transaction [inaudible] where you put your card in, you tap your pin in."*

Complainant: *"do those transactions normally get refunded because what I was told is that the charge would go on and then it would be refunded to me."*

Provider Agent 1 cancels the *debit* card and refers the case to fraud department. On **8 February 2020** (6:24) Provider Agent 1 calls the Complainant back to ask him to retain any receipts he might have for drinks bought. The calls include:

Provider Agent 1: *"...quick question there, so that transaction .... do you have any receipt for that?"*

Complainant: *"zero."*

....

Provider Agent 1: *"did you buy any drink, any drink, or any receipt for any drink in that place."*

Complainant: *"I did buy drink, I did buy drink but I didn't [inaudible], that is a huge charge....I don't know."*

....

Provider Agent 1: *"just keep the receipt just in case okay."*

Complainant: *"I have no receipt though, I don't have any receipts."*

Provider Agent 1: *"but you didn't buy any drink over there at all, that is what you are saying?"*

Complainant: *"yeah."*

Provider Agent 1: *"but were you in that place in [Nightclub] yeah?"*

Complainant: *"I don't know where that place is, no I wasn't [Provider Agent 1]."*

Provider Agent 1: *"you were not there."*

Complainant: *"no."*

Provider Agent 1: *"but the card was over there though, and."*

Complainant: *"yeah but I wasn't there."*

Provider Agent 1: *"and the card is still with you..."*

/Cont'd...

...

Complainant: *"...my card is still here but I wasn't there...I did buy drinks tonight on the card, I did the tap, you know the tap thing."*

On **11 February 2020** (11:12) the Complainant calls the Provider to report the two disputed charges which relate to the Visa *credit* card and which are the subject of this investigation, and the telephone conversation with Provider Agent 2 went as follows:

Complainant: *"...I have two charges on my credit card that I haven't, eh I didn't authorise, eh, I was in a bar in [location] at the weekend, eh it was charged to my account..."*

...

Complainant: *"I had already cancelled my debit card at the weekend because I thought that something dodgy going on but it seems like I just see the charges now appearing on my credit card today.."*

Provider Agent 2: *"which charges are they?"*

Complainant: *"one for nine hundred and something and one for a thousand?"*

Provider Agent 2: *"yeah [Nightclub] in [location]?"*

Complainant: *"yeah, our fraud department have been trying to contact you since the 8<sup>th</sup>, so if you bear with me a sec and I will put you through to them..."*

On **11 February 2020** (11:16) the Complainant speaks to Provider Agent 3 in the Provider's fraud department:

Provider Agent 3: *"...we were trying to contact you there.... we just wanted to verify a transaction there, there was a few ones there for [Nightclub]"*

Complainant: *"yeah, yeah I want them all, all cancelled."*

Provider Agent 3: *"were they yourself."*

Complainant: *"yes"*

Provider Agent 3: *"did you do the transactions [Complainant]?"*

Complainant: *"yeah I was there but I was told that it was only for 150 euros."*

Provider Agent 3: *"okay, so they took more money than they.."*

/Cont'd...

Complainant: *"yeah they took way more than I authorised."*

Provider Agent 3: *"but it was a chip and pin transaction, did you put your pin in and everything?"*

Complainant: *"yeah, I did yes, yes."*

Provider Agent 3: *"okay, so the first transaction there is..."*

Complainant: *"and they told me it was rejected. They told me it was rejected, but they told me it was rejected, then they used my debit card as well, then they kept going around in the cards.."*

Provider Agent 3: *"no they took a lot of money from you there, it's gone, we are just , we are contacting you because it did look strange, they tried a lot more money, would you like to set up a fraud case for those transactions, but it's the fact that it was yourself that put the card and pin in I don't know if we would be able to refund that money..."*

Complainant: *"really."*

...

Provider Agent 3: *"yeah because, right, so you were at the bar is it."*

Complainant: *"yes."*

Provider Agent 3: *"and you put in your pin and all but they put in one thousand ..."*

Complainant: *"yeah but they told me they were only going to charge one hundred and fifty euro."*

...

Provider Agent 3: *"...we can't take that on as fraud, because you would have put in your pin and everything, so the country where that happened, [European Country] is it?"*

Complainant: *"yeah."*

Provider Agent 3: *"so you would have to report that to the authorities there, because you know the bar and the place and probably the people that did it to you but we cannot take it on as fraud since you put in your own details ..."*

Complainant: *"you can't those payments at all."*

Provider Agent 3: *"no, the payments are gone from the bank like."*

Complainant: *"ah no."*

/Cont'd...

....

Provider Agent 3: *"would you like me to cancel the card though if they have your details..."*

Complainant: *"yes please."*

On **12 February 2020** (10:12) the Complainant speaks to Provider Agent 4:

Complainant: *"...I just want to report fraud on my card.."*

...

Provider Agent 4: *" is it on the debit card is it? "*

Complainant: *"what happened was I was in a bar in [location] and I used my debit card so I got confused, I rang in yesterday to report the fraud and but they told me I couldn't because I entered my pin number, but I only entered the pin number for the debit card, I think there is a six hundred and something charge which again there should be a dispute open for that, because I was told I was being charged one hundred and fifty euros, I don't know what is going on with that ..."*

....

Provider Agent 4: *"did you speak to the fraud team yet?"*

Complainant: *"no, well I got through to somebody on the fraud team, but they told me because I entered my pin number, but I didn't realise I was through, they were talking about the Visa card which I didn't use at all, I used my debit card."*

...

Complainant: *"so I entered the pin number on my debit card but I didn't enter the pin number on my credit number, I didn't use my credit card."*

....

Provider Agent 4: *"... I just want the, definitely, I want the two thousand gone, there is no way I am paying that, it's ridiculous, it's stolen from me, I didn't enter any numbers, I didn't do anything there. What happened was, I think I was drugged, my drink was spiked, I think they might have stolen the card off me and put it back in my wallet..."*

On **12 February 2020** (10:21) the Complainant speaks to the fraud department and Provider Agent 5 asks him to recall the initial report made by telephone to the Provider on **8 February 2020** regarding the debit card transaction.

Complainant: *"all I was aware of was the charge in that card, which was the six hundred and eighty something..."*

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...

Complainant: *"I said I paid one hundred and fifty euros in that club."*

Provider Agent 5: *"that was chip and pin, was it."*

Complainant: *"that was chip and pin and I did enter my pin on that debit card."*

Provider Agent 5: *"did they take the machine away from you when you made that transaction."*

Complainant: *"yes."*

Provider Agent 5: *"they did."*

Provider Agent 5: *"and did you get a receipt."*

Complainant: *"no."*

Provider Agent 5: *"you didn't."*

Provider Agent 5: *"following that did you use your credit card in the same place or what happened."*

Provider Agent 5: *"I believe I was drugged, I was given a drink and it was spiked and from there on I don't really recall anything of the night, I kinda became awake on the street, I walked back to my hotel and I was really worried and I so logged into my, I was worried about the fact that I was in a club paying with a credit card they wouldn't take cash, or with my debit card."*

Provider Agent 5: *"you paid initially with the debit card, and do you remember using your credit card at any point."*

Complainant: *"no. I don't recall using my credit card at all, I wouldn't have used my credit card...it's just mental."*

...

Provider Agent 5: *"would your two pins, the pin for your debit and credit card, would they be the same."*

Complainant: *"they are the same pin."*

Provider Agent 5: *"and at any stage did you lose your wallet or anything, you are not sure."*

Complainant: *"yes, my wallet, I couldn't find it I went looking for it, then all of a sudden, I found it under me."*

/Cont'd...

Provider Agent 5: *"okay and were any of your cards out of place following that or are you not sure."*

Complainant: *"I am not sure, then I kind of can't recall after that."*

Provider Agent 5: *"you had a drink and you say you that you don't really remember [inaudible]."*

Complainant: *"yeah I think I was drugged."*

Provider Agent 5: *"can you remember the gap of time, as in the last thing you remember."*

Complainant: *"I went in ultimately at three o'clock in the morning and I came out at six."*

.....

Provider Agent 5: *"and the last thing you remember before that then."*

Complainant: *"the last thing I remember is drinking a shot a little kind of purple shot."*

Provider Agent 5: *"yeah and can you remember what time that was."*

Complainant: *"I have no idea."*

Provider Agent 5: *"not sure."*

Complainant: *"not sure."*

Provider Agent 5: *"that is all right."*

Complainant: *"that was after being awake and aware of the 150 euro transaction."*

Provider Agent 5: *"what time did you make the 150 euro."*

Complainant: *"that must have been 4 o'clock."*

...

Provider Agent 5: *"so well say there is about an hour in there that you don't recall."*

...

Complainant: *"...I was with my two buddies."*

....

Complainant: *"and I do remember my friend coming in to try and pull me out of there and they pulled him away."*

/Cont'd...

I note that on **8 February 2020** (06:16) the Complainant's report to Provider Agent 1, two hours after the disputed credit card transactions had occurred, did not include a request to cancel this credit card. During this telephone call the Complainant says that his credit card got refused, he confirms that he was drinking at [Nightclub] and he also noted that *"what I was told is that the charge would go on and then it would be refunded to me."*

If the Complainant's credit card went missing on the night of the **8 February 2020** as he asserts, it is unclear why he didn't report this on the morning of the **8 February 2020** as he was cancelling the debit card, but I am satisfied that the onus was on him to communicate to the Provider which of his cards were at risk.

Immediately after this call, Provider Agent 1 calls the Complainant back, to ask him to retain receipts and the Complainant notes that he did buy a drink at that place, but then when asked later in the call was he at [Nightclub] he says *"I don't know where that place is, no I wasn't ..."*

I am satisfied that this answer is inconsistent with the version of events he gave shortly beforehand, to the same Provider Agent 1. The Complainant also agrees that the card was in [Nightclub] but then says that he wasn't there, which is not consistent with his declaration on the *Visa Incident Report* form dated **20 February 2020** and signed by the Complainant, where he says *"no"* in response to the question *"was your card lost or stolen?"*

On **11 February 2020** (11:12) the Complainant calls Provider Agent 2 and is informed that the fraud department has been trying to contact him since **8 February 2020** and he is transferred to the fraud department where he confirms that he did carry out the transaction but that he *"was told that it was only for 150 euros."* During this call he confirms that he put his chip and pin in, he also notes that *"they told me it was rejected, then they used my debit card as well, then they kept going around in the cards."* I am satisfied that the Complainant was aware that this call referred to the credit card. The Complainant also clearly refers to both cards being used together.

It is not until the fifth telephone conversation with the Provider on the **12 February 2020**, that the Complainant says he was drugged and that he didn't enter the pin for the credit card. This occurs after the fraud department has confirmed on **11 February 2020** that as he used his chip and pin, then the money is unlikely to be refunded to him.

On **12 February 2020** the Complainant says he was confused when he spoke to the Provider's agents on **11 February 2020** when he said he entered the pin number for the debit and credit card and now he says in fact, he only entered the pin number for the debit card. I am satisfied that he was clear that the telephone conversation on the **11 February 2020** was about the credit card. At the start of the call he says the call is about *"two charges on my credit card."*

Having assessed the evidence, I am not satisfied that the Complainant can offer a reliable explanation for what occurred on the night of 8 February 2020. It seems likely from the evidence available that the pin was entered for both cards, but the amounts entered were increased by [Nightclub].

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The Provider's *Fraud Case File* says in relation to the Visa credit card that there were no missed pin attempts prior to the transactions occurring. The fact that there were no missed attempts at entering the pin suggests that it was reasonable for the provider to conclude that it was the Complainant who entered the pin. The second possible, though perhaps less likely, explanation in my view, is that the Complainant may have left his debit card pin number obvious to the merchant and that this same pin was then used with his stolen credit card.

Having reviewed the evidence I am satisfied that the Complainant's reporting to the Provider lacked consistency and that whatever version of events unfolded, the Provider was entitled to form the opinion that the Complainant left his pin vulnerable to misuse, by failing to ensure the machine was kept in his eye line, by failing to check his internet banking between transactions, by failing to get a receipt and by failing to have separate pins for each card.

I note that the Complainant cancelled the debit card in a timely fashion but inexplicably failed to cancel the other credit card on **8 February 2020**, despite noting on that call that the "credit card got refused." In all, I am satisfied that the provider was entitled to form the opinion that an appropriate level of care was not applied by the Complainant when using a card with such a substantial credit allowance in an unfamiliar bar. Although the Complainant says that he was drugged by a drink given to him on entry to the club at "three o'clock in the morning" and that he was waking up on the street at 6am on **8 February 2020**, he nevertheless offered a distinct recollection of details of the night, including the card machine being removed, the credit card being missing and the subsequent location of the card, all of which must have occurred after the first transaction at 04:19 – more than an hour after entering the bar.

The Provider submits, by letter dated **31 December 2020**, the following:

*"The onus is on the Complainant as Cardholder to ensure all transactions are processed correctly at the time. In the Complainant's telephone call with the [Provider] on 11 February 2020 [Evidence Reference 7b], the Complainant confirms that he intended to process a transaction with his Card in the amount of €150, however a larger transaction amount was instead authorised without his knowledge."*

By letter dated **31 December 2020**, the Provider outlines as follows:

*"The Complainant states on his telephone call with the [Provider] on 12 February 2020 [Evidence Reference 7b] that he recalls using his Visa Debit Card and PIN for a transaction in the early hours of 8 February 2020 in a venue in an EU country. The Complainant advised the [Provider] that he does not however recall using his Visa Credit Card or PIN. The Complainant confirmed on this call that the PIN on both his Visa Debit Card and Visa Credit Card are identical. The Complainant also confirmed that the Card Payment machine was taken out of his sight during the authorisation process, and the venue did not provide him with a receipt when the payment was completed."*

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*Furthermore, the Complainant confirmed that his wallet containing his Visa Credit Card was missing from his pocket for a time, and was later found on his seat beneath him with the Cards in place. Based on this information, the [Provider] is of the opinion that the Complainant was negligent in his actions with regards to the safekeeping of his Visa Credit Card details and PIN, and as a result found him to be in breach of the terms and conditions of the Visa Credit Card account."*

The Provider relies in particular on condition 6, 8, 10 and 19 of its *Conditions of Use* document which is their terms and conditions for their Visa credit card. The *Conditions of Use* document says at Section 4 ("The Card"), subsection (f), page 8, says that "*the Cardholder must only use the Card, PIN, and other Security Credentials in accordance with these Conditions and this Agreement.*" At Condition 6 ("PIN and Other Security Credentials, Including VbV/3DS Passcode"), subsection (a) and (b), page 10, it says as follows:

*"(a) The PIN and a Cardholder's Security Credentials will be known only to the Cardholder and we shall not disclose a Cardholder's PIN or other Security Credentials except to the Cardholder. The Cardholder must destroy and/or delete the PIN notification and/or notification of any other Security Credential immediately on receipt.*

*(b) When the Cardholder uses his/her Card in a Retailer's outlet the Cardholder may be requested to enter the Cardholder's PIN to authorise the Transaction. Apart from where there is a Contactless Transaction, the PIN should be entered and should not be disclosed to the Retailer. Failure to enter the PIN may result in the Transaction being declined."*

At Condition 8 ("Safeguarding the Card, the PIN, the VbV/3DS Passcode and Security Credentials"), subsection (a), (b) and (c), page 12, it says as follows:

*"(a) The Cardholder shall keep safe the Cardholder's Card and prevent the PIN and other Security Credentials linked to the Card 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 or other Security Credentials became known or available to a third party who then has access to the Card (e.g. a finder or thief); or*
- (ii) Someone possesses the Card with the Cardholder's consent and uses it or gives it to someone else; or*
- (iii) The Cardholder's PIN or other Security Credentials are easily obtained or guessed by someone else.*

*(b) In addition to taking the necessary steps to safeguard the Card, PIN or other Security Credentials as set out in Condition 8(a) and Condition 4, the Cardholder must keep the Cardholder's Card secure at all times and must not:*

- (i) Let anybody use the Card, PIN or other Security Credentials;*

/Cont'd...

- (ii) *Reveal the Card number to anyone except when completing a Transaction or when reporting the Card lost or stolen or where it is likely to be misused; or*
- (ii) *Disclose, record or write the Cardholder's PIN, VbV/3DS Passcode or other Security Credentials or record the PIN, VbV/3DS Passcode or other Security Credentials on the Card or on any item which the Cardholder usually keeps or carries with the Card or in any form that would be intelligible or otherwise accessible to someone else.*

*(c) The Cardholder shall take all measures necessary to make himself/herself aware of the circumstances set out in Condition 8(b)."*

At Condition 10 ("Account"), subsection (b), page 13, it says as follows "

*"(b) .... you will be liable to pay all sums that are charged to the Account in respect of or resulting from all Transactions including where such Transactions are effected by telephone, mail order, internet, PIN or other Security Credentials, signature or in breach of these Conditions. The Cardholder should therefore check the amount of every Transaction before he/she authorises it."*

At Condition 19 ("Liability – Unauthorised Payments"), page 24-25, it says as follows:

*"Unauthorised payments*

*(e) Notwithstanding Condition 18 (a), where you are a Consumer or, a Micro-Enterprise, we will in accordance with our obligations under the PSD and subject as hereafter mentioned, refund to you the amount of any payment debited to your Account which was not authorised by a Cardholder and, where necessary, restore your Account to the state it would have been in had the Transaction not taken place.*

*(i) Your liability will be limited to the sum of €50 for any losses incurred in respect of unauthorised payments arising from the use of a lost or stolen Card or from a failure to keep the Card, PIN, other Security Credentials or other security device or procedures or personalised security features safe.*

*(ii) Except where a Cardholder has acted fraudulently, you will be liable for the initial €50 of your loss unless the theft or misappropriation of the Cardholder's Card was not detectable to you or the Cardholder prior to a payment or the loss was caused by acts or lack of action of any of our employees, agents, branches, our service providers or subcontractors.*

*(iii) You will be liable for the full amount of the unauthorised Transactions where:*

*(a) a Cardholder intentionally, fraudulently, or with gross negligence fails to adhere to the safe keeping and/or disclosure requirements of the Cardholder's Card, PIN or other Security Credentials or other security device or procedure; or*

/Cont'd...

*(b) any payments were effected as a result of a breach of Condition 8; or*

*(c) any Card is used by any person outside the terms of this Agreement and who has possession of it with your or an Authorised User's consent; or*

*(d) you or an Authorised User has intentionally, or because of your lack of reasonable care, failed to notify us without undue delay of the loss, theft or misappropriation of a Card or any Security Credential or failure to follow any procedure.*

*(iv) If there is undue delay on your part in notifying us of the unauthorised payment, we will not be liable to make good any loss you suffer. We will normally consider that there has been undue delay in this regard if you fail to notify us within 30 days after receipt by you of a Statement or payment advice detailing the relevant debit to your Account. In any event a failure to notify us within 13 months of the payment being debited to your Account will always amount to undue delay."*

The transactions were subject to Council Directive 2015/2366/EC, the Payment Services Directive 2 ("**PSD2**") which was introduced to Irish law by the **European Union (Payment Services) Regulations 2018** (the "**Regulations**"). Regulation 98 says as follows:

*"Payer's liability for unauthorised payment transactions*

*98. (1) Notwithstanding Regulation 97 and subject to paragraph (3), a payer shall bear the losses relating to any unauthorised payment transactions, up to a maximum of €50, resulting from the use of a lost or stolen payment instrument or from the misappropriation of a payment instrument.*

*(2) Paragraph (1) shall not apply where—*

*(a) the loss, theft or misappropriation of a payment instrument was not detectable to the payer prior to a payment, except where the payer has acted fraudulently, or*

*(b) the loss was caused by an act or omission of an employee, agent or branch of a payment service provider or of an entity to which its activities were outsourced.*

*(3) Notwithstanding Regulation 97, a payer shall bear all of the losses relating to an unauthorised payment transaction where the losses were incurred by the payer—*

*(a) acting fraudulently, or*

*(b) failing to comply with its obligations under Regulation 93 either intentionally or as a result of gross negligence on its part."*

[Underlining added for emphasis]

/Cont'd...

Regulation 93 reads as follows:

*"Obligations of the payment service user in relation to payment instruments and personalised security credentials*

93. (1) *A payment service user entitled to use a payment instrument shall—*

*(a) use the payment instrument in accordance with the terms governing the issue and use of the payment instrument, which must be objective, non-discriminatory and proportionate, and*

*(b) notify the payment service provider concerned, or an entity specified by the latter for that purpose, without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument.*

*(2) For the purposes of paragraph (1)(a), the payment service user concerned shall, in particular, as soon as it is in receipt of a payment instrument, take all reasonable steps to keep its personalised security credentials safe."*

Regulation 96 of the Regulations provides as follows:

*"Evidence on authentication and execution of payment transactions*

96. (1) *Where a payment service user denies having authorised an executed payment transaction or claims that the payment transaction was not correctly executed, the burden shall be on the payment service provider concerned to prove that the payment transaction was authenticated, accurately recorded, entered in the accounts and not affected by a technical breakdown or some other deficiency of the service provided by the payment service provider.*

*(2) Where a payment transaction is initiated through a payment initiation service provider, the burden shall be on the payment initiation service provider to prove that within its sphere of competence, the payment transaction was authenticated, accurately recorded and not affected by a technical breakdown or other deficiency linked to the payment service of which it is in charge.*

*(3) Where a payment service user denies having authorised an executed payment transaction, the use of a payment instrument recorded by the payment service provider, including a payment initiation service provider as appropriate, shall in itself not necessarily be sufficient to prove either that the payment transaction was authorised by the payer or that the payer acted fraudulently or failed with intent or gross negligence to fulfil one or more of the obligations under Regulation 93.*

*(4) A payment service provider, including, where appropriate, a payment initiation service provider, shall provide supporting evidence to prove fraud or gross negligence on the part of a payment service user."*

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By letter dated **31 December 2020**, the Provider asserts as follows:

*“Furthermore, the Complainant provided the PIN for his Visa Debit Card when processing an earlier transaction, which made it accessible to a third party for use with his Visa Credit Card, as the PIN was the same. As the Complainant maintained the same PIN for both Cards, this created a situation where his PIN could be easily guessed or obtained by a third party, which is in breach of the terms and conditions outlined above. The [Provider] issued a unique PIN to the Complainant for both his Visa Debit Card and his Visa Credit Card, however the PIN was subsequently changed by the Complainant.”*

By letter dated **31 December 2020**, the Provider outlines as follows:

*“the [Provider] found the Complainant to have acted with gross negligence in this case, and therefore the [Provider] held the Complainant liable for the disputed transactions, in accordance with the terms and conditions of the Card.”*

The Provider’s *Conditions of Use* document which is their terms and conditions for their Visa credit card says in particular at Condition 8, *“we consider lack of reasonable care to be but not limited to circumstances where: **The Card is lost or stolen and the PIN or other Security Credentials became known or available to a third party** who then has access to the Card (e.g. a finder or thief...the Cardholder’s **PIN or other Security Credentials are easily obtained or guessed by someone else.**”* Condition 10 says *“you will be liable to pay all sums that are charged to the Account in respect of or resulting from all Transactions including where such Transactions are effected by telephone, mail order, internet, PIN or other Security Credentials, signature or in breach of these Conditions. **The Cardholder should therefore check the amount of every Transaction before he/she authorises it.**”* Condition 19 says that the Provider will refund amounts that are unauthorised by the cardholder and that liability will be capped at €50 *“arising from the use of a lost or stolen Card or from a failure to keep the Card, PIN, other Security Credentials or other security device or procedures or personalised security features safe.”*

However, there is an exception to this cap on liability, in keeping with Regulation 98 (3)(b), where *“a Cardholder intentionally, fraudulently, or **with gross negligence fails to adhere to the safe keeping and/or disclosure requirements of the Cardholder’s Card, PIN or other Security Credentials or other security device or procedure; or any payments were effected as a result of a breach of Condition 8.**”*

I am satisfied that the provider was entitled to take the view that the Complainant breached Condition 8 by exercising a lack of reasonable care by allowing the PIN to be guessed by someone else and breached Condition 10, by failing to check the amount of every transaction before authorising it. As a result, the Complainant does not benefit from the limitation of liability under Condition 19, in line with Regulation 96 (4).

Under Regulation 96, the Provider has the burden of showing that the disputed transactions were authorised and not affected by a deficiency in the service provided. To meet this burden, or to show gross negligence on the part of the Complainant, the Provider must provide evidence that goes beyond the mere record of the payment.

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As per Regulation 97, the Provider is obligated to refund unauthorised payments made on the customer's account. However, pursuant to Regulation 98(3)(b), the customer will be fully liable for the payments in the event of a failure to comply with Regulation 93. The Provider submits that in this instance, the Complainant did not comply with Regulation 93, owing to his gross negligence.

Therefore, the first issue to be determined is whether the Complainant's conduct amounts to gross negligence.

Gross negligence is not defined in the 2018 Regulations. In its Parent Directive, **Directive (EU) 2015/2366**, the following is stated at Recital 72:

*“(72) In order to assess possible negligence or gross negligence on the part of the payment service user, account should be taken of all of the circumstances. **The evidence and degree of alleged negligence should generally be evaluated according to national law.** However, while the concept of negligence implies a breach of a duty of care, **gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness**; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties. Contractual terms and conditions relating to the provision and use of a payment instrument, the effect of which would be to increase the burden of proof on the consumer or to reduce the burden of proof on the issuer should be considered to be null and void. Moreover, in specific situations and in particular where the payment instrument is not present at the point of sale, such as in the case of online payments, it is appropriate that the payment service provider be required to provide evidence of alleged negligence since the payer's means to do so are very limited in such cases.”*

[Emphasis added]

The definition of gross negligence was considered at the national level by the Supreme Court in *ICDL GCC Foundation FZ-LLC and Others v European Computer Driving Licence Foundation Ltd* [2012] 3 IR 327. In the majority judgment at 348, the Court stated:

*“The trial judge emphasised the fact that the term was here being used in a commercial contract. It followed, in his view, that whether it was a term of art used in any particular area of law might not be particularly significant. The words had to be construed by reference to their text but in their context. **He concluded that the term "gross negligence" meant a degree of negligence involving a breach of the relevant duty of care by a significant margin.** Business efficacy had to be given to the clause.*

*Thus, in order for the exclusion clause to be ineffective, it was necessary to find that any breach of contract established resulted from a **significant degree of carelessness** by the defendant.”*

[Emphasis added]

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In determining whether the Complainant engaged in a significant degree of carelessness, I have had regard to the Provider's reliance of the Complainant's original account of the night in question. I have also had regard to the Complainant's clarification of his account, and his explanation of his memory issues.

I am satisfied that sufficient evidence has been furnished by the Provider that the Complainant acted not only with a lack of reasonable care, but also with gross negligence in failing to adhere to the safe keeping and/or disclosure requirements of the Cardholder's Card, PIN or other Security Credentials or other security device or procedure and such payments were effected as a result of a breach of Condition 8. Of particular importance in this assessment, are the Complainant's inconsistent accounts to the Provider as to the circumstances of the transactions, the fact that the pin was left vulnerable to misuse, the failure to keep the card machine in his eyeline and the failure to get a receipt or to have separate pins for each card. Each of these items alone may simply indicate a lack of reasonable care but, taken together, in my opinion all of those items are evidence of gross negligence on the part of the Complainant.

I am also satisfied with the Provider's explanation, by letter dated **31 December 2020**, that it *"is unable to raise both a Fraud Dispute and a Visa Chargeback dispute"* and that *"a Visa Chargeback dispute would have been inappropriate in this case, as the Complainant had authorised the disputed transactions with his chip and PIN, had not received a receipt, and had authorised the transactions with the intention of receiving goods/services."*

In summary, I am satisfied that the Provider acted in accordance with the contractual terms and conditions of the Complainant's Visa credit card when it declined to refund the payments charged to the Complainant's account on **8 February 2020**, and consequently, I take the view that this complaint cannot reasonably be upheld.

### **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.**



**MARYROSE MCGOVERN  
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

23 November 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.

