An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0048
Sector:	Banking
Product / Service:	Banking Online Facility
Conduct(s) complained of:	Handling of fraudulent transactions Dissatisfaction with customer service Failure to process instructions
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a request to the Provider to recall payments made to a fraudulent company.

The Complainant's Case

The Complainant was engaged in online trading in **March 2018** through a third party merchant. In a submission made to this office on **14 March 2019**, the Complainant states:

> *"Beginning March 5, 2018, I fell victim to a fraudulent company offering me investment services. Several bank debit card transactions were instructed, in amounts exceeding 21,000 EUR. Additionally, many fictitious "transactions" were instructed without my authorization."*

The Complainant contacted the third party merchant to seek the cancellation and reversal of the disputed transactions, and states:

> *"Additionally, when I demanded to be refunded at the Merchant level, instead, the scam operator, blocked all my future attempts of contact and completely ceased communications*."

The Complainant states:

> "*The* [third party merchant] *promised their service to supply me with a platform to trade on the stock markets. This service was not forthcoming so I instructed them to return my money, this they would not do. As soon as I realized this I requested* [the Provider] *to charge back the monies paid to this company to my account.* [The Provider] *went through a process with* [the third party merchant] *and in the end rejected my chargeback.*

The Complainant contends:

> "[The Provider] *said that as I sanctioned the payment it would have to stand. They used screenshots of my trading history as proof the service had been provided. These screenshots were of a video game or simulation of an actual trading platform*. [The third party merchant] *have control of this video game they try to make it look like you lose your money on bad trades and walk* away."

The Complainant submits in his complaint form that "[t]*he point I wish to reiterate is no service was provided there for there was no contract"* and he contends that *"the recipient of these transactions is a scam and that the banking community was alerted to this during the relevant time period*."

The Complainant submits a statement of account for March 2018, highlighting transactions totalling €38,260. In resolution of his complaint, the Complainant states in his letter to this Office dated 14 March 2019: "*I demand that* [the Provider] *recall these direct transactions*".

The Provider's Case

In its Final Response Letter, the Provider noted that, because the Complainant had willingly provided his bank details, the Provider was obliged to honour the requests for payment. The Provider recounted its efforts to engage the chargeback procedure. The Provider concluded that, having exhausted this avenue, it was unable to dispute the transaction further through the Visa Dispute Resolution Service. The Provider invoked the terms of conditions of the account referable to '*Refunds and Cardholder's Claim'* in concluding that it could not advance the matter any further, for the Complainant.

In its response to this Office, the Provider stood over its assertion that it had exhausted the options available under the Visa Dispute Resolution Service. The Provider did however accept that "*it could have been clearer with the Complainant when discussing his dispute*" and that "*a full and comprehensive explanation was not provided to the Complainant outlining the reasons why his dispute was rejected*". The Provider offered its apologies in that regard, together with an offer of compensation in the amount of €3,000 for "*this failure in service*". This offer was declined by the Complainant however the offer was subsequently confirmed to "*remain open to the Complainant*".

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The Complaint for Adjudication

The complaint is that the Provider wrongfully permitted unauthorised transactions on the Complainant's account in March 2018, wrongfully refused to perform a chargeback operation in relation to these transactions, wrongfully refused to reverse fund transfers to the third party merchant, and failed to heed published warnings of regulatory authorities in respect of the third party merchant.

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 **11 January 2022**, 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Prior to considering the substance of the complaint, it is useful to set out certain parts of the terms and conditions of the Complainant's account which were operable at the time of the events which are the subject of this complaint. In that regard, the Provider relies on the following terms of the Complainant's debit account:

> ***15. Refunds and Cardholder's Claim***
>
> *(a) The account will only be credited with a refund in respect of a Transaction if we receive a refund voucher or other refund verification acceptable to us. Unless a refund voucher is issued and sent to us, then (subject to any rights vested in the Principal Cardholder by statute) the account will be payable in full.*

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(b) We will not be responsible for goods and/or services we do not supply and in relation to such goods and/or services, we will not have dealings with third parties on your behalf.

The Complainant states that, on foot of an advert on social media, he engaged with a third party company ('the Merchant') that purported to provide a stock market trading platform to customers. It swiftly transpired that this Merchant was a fraudulent operation designed to trick customers out of their deposits, either by refusing to facilitate withdrawals and/or by advising that deposits had been lost on bad investments or trades. It seems from the evidence that no deposits may actually have ever been applied towards the purchase of shares but instead, in all likelihood, the money was misappropriated by the Merchant.

The Provider has set out a chronology of events including the dates on which certain transactions were completed on the Complainant's account, and the amounts of each transaction. In the period of 19 days between 01 March 2018 and 20 March 2018, eight transactions were processed using the Complainant's Visa Debit Card in a total amount of **€17,760**. Each of the eight payments were completed on separate days, with the maximum single transaction being €2,500.

In addition, a further six transactions were processed within the same period, by way of electronic transfer in a total amount of €21,000. Each of these six payments were also completed on separate days (all occurring on days when debit card transactions were also executed), with the maximum single transaction being €5,000. The overall total amount transferred was therefore **€38,760**, however only €17,760 of that amount was capable of dispute through the Visa Chargeback process. Several other transfers were also attempted (in the total amount of €17,737.20) but these were rejected owing to the daily transfer limit being reached.)

I note that the Provider queried certain of these payments at the time when they were being attempted. On **01 March 2018**, in the course of a phone call from the Provider to the Complainant, the Complainant confirmed that he had authorised a payment to the Merchant. During a further phone call on **12 March 2018**, the Complainant confirmed the authenticity of further transactions in favour of the Merchant.

Thereafter, on **08 April 2018** (a Sunday), in the course of a further phone call ostensibly made for the purposes of querying a separate modest transaction on his account, the Complainant expressed his fear that he had been "*scammed out of all* [his] *savings by an online trading place*".

The Complainant was advised to contact An Garda Síochána and to call back the following day (a Monday) to speak with the '*non-plastic fraud team*'. This would seem to reflect that, at the time, the Provider believed that all transactions had been made by way of electronic transfer.

The Complainant duly called the Provider back on **9 April 2018** and reported the impugned transactions again. The Provider advised that:

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> "*for it to be deemed as fraud, for our fraud department to handle it […] it has to be where your information was taken from you without knowing, like you know they took your card details, but you've entered into a contract by giving them your information, you've entered into a contract yourself with this company to trade[…] if the account is up and running with them under their terms and conditions, there is really nothing we can do.*"

The Complainant was provided with a direct phone number for the fraud department, however it is unclear whether phone contact was ever made.

Thereafter, on **21 May 2018**, the Provider states that it received correspondence from the Complainant dated 30 April 2018 which included a written request for a chargeback. In this correspondence, which included several appendices, the Complainant noted that the transactions were authorised, but he contended that the services rendered were "*defective/not as described*". The Provider duly raised the chargeback request and confirmed this to the Complainant in a letter dated **08 June 2018** whilst also confirming that the disputed funds had temporarily been credited back to the Complainant's account.

The Provider then wrote to the Complainant by way of letter dated **22 June 2018** indicating as follows:

> *The Merchant has declined our dispute request stating "Merchandise or Service matched what was described" and attaching the enclosed documentation* [which comprised a 20-page submission defending its position]*. We have debited your account by the above amount.*
>
> *Please note that the next stage of the Visa dispute process is pre-arbitration. Should you wish to continue this dispute, please advise us in writing within 10 calendar days from the date of this letter outlining in full the reasons that you wish to continue with the dispute. If you have any information relevant to the continuation of the dispute, such as communications with the Merchant for example, please enclose this with your letter*

By letter dated **26 June 2018**, the Complainant indicated his wish to continue the dispute, and on 05 July 2018 the Provider confirmed that the matter had been "*continued into the pre-arbitration stage*". In a further submission on **06 July 2018**, the Complainant stated as follows:

> *Under the Consumer Protection Act of 2008, as Amended (the "Act"), the bank must assist and facilitate the process of this claim. Furthermore, in accordance with Visa Core Rules ID#0004630 5.2.1.2., before allowing a company or Merchant to accept payments via credit or debit card, there must be a physical inspection of the listed premises of the business. As I have proof that there is nothing at the listed premises of this company that means that this condition was not met as well*

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> *Attached are regulator bulletins* [the attachments included an online warning from the UK Financial Conduct Authority noting that the Merchant was not authorised to trade in the UK]*, and additional proofs that the recipient of these transactions is a scam and that the banking community was alerted to this during the relevant time period.*

I note that subsequently, on **16 July 2018**, the Provider confirmed that the Merchant had declined the pre-arbitration request (in doing so providing a further 20-page submission defending its position) which was stated to result in the Provider being "*unable to dispute this any further*" on the Complainant's behalf, noting that the Visa dispute resolution service "*is not intended to replace other avenues such as the legal system*". Further correspondence from the Complainant ensued which gave rise to the Provider logging the matter as a complaint, which then became the subject of a Final Response Letter dated **18 September 2018.**

In its Final Response Letter of 18 September 2018, the Provider noted that as the Complainant had provided his bank details willingly to the Merchant, the Provider was obliged to honour the requests for payment. The Provider went on to recount its efforts to engage the chargeback procedure. The Provider concluded that, having exhausted this avenue, it was unable to dispute the transaction further, through the Visa Dispute Resolution Service. The Provider invoked Clause 15 of the terms of conditions of the account referable to '*Refunds and Cardholder's Claim'* (as set out above) in concluding that it could not advance the matter any further for the Complainant. A further Final Response Letter was sent on **20 December 2018** in similar terms.

The Complainant seeks to rely on the '**Visa Core Rules** and **Visa Product and Service Rules'** (hereinafter, the 'Visa Card Rules'). Whilst these rules are of course relevant, they do not constitute the primary basis of the relationship between the Complainant and the Provider. The terms and conditions of the Complainant's debit card account govern the relationship between the parties, and it is appropriate to consider these terms and conditions in the first instance.

The terms and conditions of the Complainant's debit card account, as quoted above, state that the Provider will credit a refund only when it receives "*a refund voucher or other refund verification*". The Provider has plainly not received any such voucher or verification from the Merchant. Therefore, in terms of the position by reference to the law of contract, I am satisfied that the Provider acted appropriately.

That is not the end of the matter however as this Office has jurisdiction to look beyond strict legal entitlements and to examine conduct by reference to a standard of reasonableness, and fairness. In light of this, it seems to me to be appropriate to consider the Visa Card Rules. In that regard, it would seem to me that the Provider has done all in its power, subsequent to the written request for the chargeback issued by the Complainant dated 30 April 2018 (but not received by the Provider until 21 May 2018), to advance matters under the Visa Card Rules process.

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I do not accept that the Provider can be held accountable for the failure of that process. As the Provider had noted in its response to this office, "*the merchant had fulfilled its obligations under the Visa Scheme Rules in providing relevant documentation and information to support the legitimacy of the disputed transactions*". Whilst I accept that the Complainant questions the validity of this documentary evidence, nevertheless, the Merchant satisfied the requirements of the Visa Card Rules, in defending the transactions, and thus the Provider was not in a position to advance the matter any further.

I note other specific arguments advanced by the Complainant in his correspondence of 06 July 2018. The Consumer Protection Act of 2008, to which he refers, is not part of the legislative framework, within this jurisdiction, however I am satisfied, in any event, that the Provider has '*assisted and facilitated in the process'* of the Complainant's claim.

The suggested failure on the part of the Provider to carry out a physical inspection of the Merchant's premises is a matter set out at Section 5.2.1.2 of the 'Visa Core Rules and Visa Product and Service Rules which provides as follows:

> ***5.2.1.2 Due Diligence Review of Prospective Merchant or Sponsored Merchant***
> *Before contracting with a prospective Merchant or Sponsored Merchant, an Acquirer or a Payment Facilitator must conduct an adequate due diligence review to ensure compliance with the Acquirer's obligation to submit only legal Transactions into VisaNet. In the Europe Region, an Acquirer must conduct a physical inspection of the business premises of the prospective Merchant to ensure that the prospective Merchant conducts the business that it has stated to the Acquirer. The Acquirer must also obtain a detailed business description from a prospective Mail/ Phone Merchant and Electronic Commerce Merchant.*

In advancing this as an argument, it seems to me that the Complainant has misunderstood the role of the Provider here as an 'Acquirer' or a 'Payment Facilitator' in the context of the transactions which the Complainant wishes to rescind. This is not correct. Under the Visa Core Rules (in the context of a debit or credit card transaction) the Provider was in fact an 'Issuer' for the Complainant's transactions, rather than an 'Acquirer' or 'Payment Facilitator' as defined in those Rules.

With regard to the final paragraph of the **06 July 2018** submission quoted above, the Complainant is essentially suggesting that the Provider should have in some way vetted the entity to which the Complainant sent the money, and should have discovered that it was a fraudulent enterprise and thereafter warned the Complainant off the transaction. I do not accept this proposition. It would be utterly unfeasible for a financial service provider to vet every last payee to whom or to which its customers wished to voluntarily transfer funds.

There is no evidence that the Provider had actual knowledge of the fraudulent nature of the enterprise and the fact that the Complainant intended to transfer funds to such an enterprise. It would be unreasonable and impractical for a duty to be imposed on a bank to carry out the sort of vetting envisaged by the Complainant.

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The vetting that the Complainant implies should have been carried out by the Provider is, sadly, vetting that he should perhaps have conducted himself. In any event, I note from the evidence that the Provider did contact the Complainant to query some of the transactions and the Complainant nonetheless confirmed to the Provider, that the transactions were legitimate and authorised.

In its response to this office, the Provider stood over its assertion that it had exhausted the options available under the Visa Card Rules, however it did accept that "*it could have been clearer with the Complainant when discussing his dispute*" and that "*a full and comprehensive explanation was not provided to the Complainant outlining the reasons why his dispute was rejected*". The Provider offered its apologies together with compensation in the amount of **€3,000** for "*this failure in service*". This offer was declined by the Complainant however the offer was subsequently confirmed to "*remain open to the Complainant*".

Whilst this matter did not form part of the Complainant's original complaint to this Office, I am satisfied that this was an appropriate acknowledgement for the Provider to make. In my preliminary decision last month, I noted that the offer remained open to the Complainant, notwithstanding that he has previously declined the offer, and this was something which the Complainant might wish to re-consider. I note that since then, the Complainant has been in communication with the Provider to accept that offer, which has been paid to the Complainant by the Provider in full and final settlement of that separate matter.

In light of the entirety of the foregoing, and in the absence of evidence of wrongdoing by the Provider or conduct within the terms of ***Section 60(2)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, I do not consider it appropriate to uphold the 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.

MARYROSE MCGOVERN
Financial Services and Pensions Ombudsman (Acting)

7 February 2022

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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.