



<b><u>Decision Ref:</u></b>	2022-0087
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Debit Card
<b><u>Conduct(s) complained of:</u></b>	Disputed transactions Dissatisfaction with customer service Handling of fraudulent transactions
<b><u>Outcome:</u></b>	Rejected

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

This complaint concerns a request for the retrieval of funds transferred from a credit card account to what transpired to be, a fraudulent company.

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

The Complainant states that on **6 February 2018** he opened an account with a company purporting to be a "FOREX trader". The Complainant states that as an account holder he was initially provided access to the company's "software on which to view live my money being traded automatically". The Complainant states that he also had an account manager who would contact him regularly offering advice on potential investment options. The Complainant states that when using the software he could track the investments, which tended to indicate profits on his investments.

The Complainant submits that between **February 2018** and **October 2018** he invested €11,000, however by **January 2019** he issued a request to withdraw his money and it then became apparent that the company he had invested in, was fraudulent and he was unable to retrieve his money. The Complainant states that he invested the €11,000 using a credit card he held with the Provider and upon discovery of the fraud, his first course of action was to notify the Provider.

The Complainant submits that the Provider *“was not helpful”* and that he had been left *“devastated and shocked”* by the Provider’s response. The Complainant contends that the Provider failed in its duty of care as it did not alert him to the potential fraud, and instead authorised the transfer of the funds to the fraudulent company.

The Complainant contends that the Provider has been *“unaccountable”* and takes *“advantage of their customers by not taking insurance against cyber-crime and online fraud”*. The Complainant further contends that the Provider should offer advice to its customers in relation to sending money offshore. The Complainant states that when he issued the payments he did not know that the merchants were fraudulent, however, he contends that the Provider should have had a better idea, given that it has a much more sophisticated systems for detecting fraud and consequently, it should have detected the fraud, before authorising the payments.

The Complainant states that since he has learnt of the fraudulent company he has realised that there were bulletins issued by member states within the EU and that there were *“other regulators worldwide, as well as consumer protection bureaus, warning the banking community against allowing the instruction of payments to the Company”*. The Complainant states his belief that the Irish banking community were made aware of this fraudulent company around the time his transactions were taking place.

The Complainant contends that the Provider is bound by *“Know-your-customer”* and *“Anti-Money-Laundering procedures”*. The Complainant also contends that under EU protections relating to *“Guarantees and Returns”* if a product or service is bought online or outside of a retail premises, then a consumer has the right to cancel their order and request payments returned. The Complainant also cites that the Provider failed in its obligations under the card provider scheme, wherein it states that there *“must be a physical inspection of the listed premises of the business”*.

The Complainant states that he is *“exercising [his] right to file a charge-back under reason 13.5”* of the branded card’s own charge back reason codes. The Complainant explains his belief that these transactions fell under consideration for misrepresentation, on the basis that when he transferred the money *“it wasn’t used for any investment, trading or purchasing shares as was promised to me, my money wasn’t used for paying for service I didn’t get”*.

In submissions to this Office dated **30 May 2021**, the Complainant criticises the Provider for allowing *“criminals steal thousands from hardworking citizens”* and states that the *“only intention”* of the Provider is to bury its head in the sand.

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Ultimately, the Complainant wants the Provider to *“perform a chargeback and credit [his] account, for the full amount of these payments, in the total amount 11,000 EUR”*.

### **The Provider’s Case**

In its Final Response Letter dated **17 April 2020**, the Provider states that since the Complainant *“willingly participated in these transactions and provided the merchant with [his] card details we are unable to dispute the fraud”*. The Provider states that it did not offer any investment advice in relation to the company nor did it recommend investing with it. The Provider states that it is therefore not liable for the service the Complainant received, in relation to the transactions paid using his card.

The Provider references the terms and conditions of the card which state:

*“Save to the extent that we are unable under applicable law to disclaim such liability, we are not responsible for the delivery or condition of any goods and/or services paid for by a Card. We accept no liability for any loss or damage suffered in connection with any goods and/or services paid for by Card”*

In relation to the Complainant’s contention that the Provider did not conduct an adequate due diligence review of the merchant, the Provider states that since it was not the merchant’s bank/acquirer, then it was not its customer and therefore it has no responsibility for carrying out any such due diligence. The Provider also submits that it fully complied with any anti-money laundering regulation, in this instance.

The Provider states that in general it endeavours to assist its cardholders in *“retrieving refunds for transactions on their card that they have encountered an issue with”*, however when raising a chargeback through the card’s dispute resolution scheme, there are strict rules that apply. The Provider states that under the chargeback rules, it can only process a chargeback request if it *“can meet the conditions as stipulated by [card] and can support the case with required documentary evidence”*. The Provider adds that disputes relating to trading and investment are complex and chargeback rights are very limited.

The Provider further states that chargeback rules dictate that it can only raise a dispute against the company/merchant which has charged the Complainant’s card. In this instance the Provider says that it was two third party finance entities used by the fraudulent company, which facilitated the transfer of funds and had charged the Complainant’s account, and as a result, it could only raise a dispute with these third-party entities, as opposed to the company under question. The Provider states that it appears that these third-party entities had, upon request from the company, provided services to the Complainant for transferring funds to the company.

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The Provider made submissions to this Office dated **25 March 2021**. The Provider states that the Complainant telephoned it on **23 April 2019** stating that he had set up an online trading account and the value in it, had gone down, and he wanted to dispute the transactions with the Provider. The Provider states that the Complainant outlined to the Provider that he had gotten involved with the company and seemed to be making money for around a year, when all of a sudden, he started making losses and this is why he was checking to see if the Provider could dispute the transactions.

The Provider states that it received correspondence from the Complainant on **25 February 2020** in relation to the disputed transactions and that it replied on **2 March 2020** confirming the reasons why chargebacks could not be processed for the transactions the Complainant wished to dispute, principally because the Complainant had used the services of two third party financing entities, to transfer funds to the company. Therefore, the Complainant did not process any card transactions directly with the company the Complainant was complaining about.

The Provider states that the transactions of €500.00, €1500.00, €3000.00 and €3000.00 which took place from **6 February 2018** to **20 March 2018**, were not flagged or queried by the Provider. In respect of the transaction that took place on **22 October 2018** for €3,000, the Provider states that it specifically asked the Complainant via text message was he authorising this transaction and the Complainant responded with a "Y".

The Provider states that it can only monitor transactions on the credit card account. It has no way of knowing what the recipient of the Complainant's funds ultimately wished to do with those funds. The Provider states that the Complainant *"voluntarily entered into these transactions for the purpose of transferring funds to an online trading company. Trading through an unregulated entity, carries a large amount of risk and the Complainant must assume such risk"*.

The Provider states that dispute condition 13.5 of the applicable rules covers disputes related to misrepresentation. It also specifically covers investment products or services. The Provider states that strict conditions apply and the Provider can only use this dispute condition for investment products or services, when the merchant refuses to allow the cardholder to withdraw their available balance. The Provider states that this dispute condition could never be applicable in the Complainant's case, as he has no transactions on his card with the company. Furthermore, the Provider states that there is no dispute condition under the applicable rules, that allows for processing a chargeback against a merchant who provided the service of transferring funds because there is a dispute between the cardholder and the subsequent recipient of the transfer. The Provider asserts that the third party financing entities in this scenario, have provided the service requested, namely to transfer funds to a specified recipient, chosen by the Complainant.

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In respect of the Complainant's assertion that the ***European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003*** applies, the Provider states that should the Complainant wish to assert his rights under this legislation it would be as against the producer or seller of the goods or service. The Provider states that in this instance it was merely facilitating the Complainant's request for payment of funds and such requests were fully authorised by the Complainant, in each instance.

The Provider further states that as the entity which issued the credit card, there is no obligation on it to inspect the premises of the entity which accepted the payment, pursuant to credit card rule 5.2.1.2.

By way of email dated **4 June 2021**, the Provider made further submissions to this Office. It stated that while it is *"sympathetic in respect of the Complainant's position"*, the Complainant *"voluntarily entered into and authorised the transactions on his credit card with the [two third party financing entities] ... for the purpose of transferring funds to [the fraudulent company] for investment services"*.

The Provider states that it has no:

*"duty to vet or review transactions that customers enter into"*  
and it

*"does not have a duty to advise customers on the wisdom or prudence of their transactions"*

The Provider states that it did investigate the Complainant's dispute but the third party financing entities which actually debited his card, did in fact provide the services requested of them.

Therefore, the Provider's position is that the customer can have no dispute with the third party financing entities and in fact his dispute is with the company alleged to be carrying out fraudulent trading. In short, the Provider was *"unable to raise a chargeback against this entity whom the customer claimed defrauded him, as his card transactions were not with this entity directly"*.

### **The Complaint for Adjudication**

The complaint is that the Provider failed to provide adequate customer service which obstructed the retrieval of €11,000 which had been transferred from the Complainant's credit card account to a fraudulent company.

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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 **31 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.

By way of background, I note that the Complainant carried out the following transactions:

**6 February 2018:** Transfer of €500 to third party financing entity A

**15 February 2018:** Transfer of €1500 to third party financing entity A

**6 March 2018:** Transfer of €3,000 to third party financing entity A

**20 March 2018:** Transfer of €3,000 to third party financing entity A

**22 October 2018:** Transfer of €3,000 to third party financing entity B

## Visa Core Rules and Visa Product and Service Rules

The Complainant seeks to rely on Section 5.2.1.2 of the 'Visa Core Rules'. These are the 'Visa Core Rules and Visa Product and Service Rules' and the version of these relevant to this complaint is the version published in **October 2019**. The section sought to be relied upon by the Complainant provides as follows:

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***“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.”*

The term ‘Acquirer’ is defined as follows:

*A Member that signs a Merchant or Payment Facilitator, provides a Cash Disbursement to a Cardholder, or loads funds to a Visa Prepaid Card, and directly or indirectly enters a Transaction into Interchange.*

*In the Europe Region, a Member that either:*

- *Enters into an agreement with a Merchant for the display of any of the Visa-Owned Marks and the acceptance of Visa products and services*
- *Disburses currency to a Cardholder, except where “Acquirer” is otherwise defined for the Europe Region in the Visa Rules*

The term ‘Issuer’ is defined as follows:

*In the AP Region, Canada Region, CEMEA Region, LAC Region, and US Region, a Member that enters into a contractual relationship with a Cardholder for the issuance of one or more Card products. There are other sections of the Visa Core Rules which are relevant to requests for chargebacks or ‘disputes’, in particular Section 11.*

Based on the definitions set out in the core rules, I accept that the Provider in this instance, in respect of the Complainant’s transactions, is the ‘Issuer’ rather than the ‘Acquirer’ and therefore, the due diligence requirements as set out in section 5.2.1.2 do not apply. Similarly, any submissions raised by the Complainant in respect of the anti-money laundering requirements the Provider is under, are somewhat misplaced in this instance, because any due diligence/anti money laundering requirements attach to the provider which provides banking services to the alleged fraudulent company, rather than the Provider responding to this dispute, which provided the credit card and credit card account to the Complainant.

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I note that rule 11.10.6 Dispute Condition 13.5 'Misrepresentation' has been referenced by the Complainant. This condition is relevant and it allows an 'Issuer' to raise a dispute for *"Investment products or services...where the merchant refuses to allow the cardholder to withdraw available balances"*. This condition is not applicable in the Complainant's case however, as he has no transactions on his card with the alleged fraudulent company; all of his transactions are with third party financing entities, which it seems he authorised to transfer his money.

***The European Communities (Payment Services) Regulations 2018*** are also applicable to this dispute. In this respect, Regulation 88 is relevant and states:

*"A payment transaction is authorised by a payer only where the payer has given consent to execute the payment transaction"*

In the circumstances arising in this complaint, I am satisfied that the Complainant gave consent to the Provider, regarding the payments made and indeed, and in respect of the final payment of €3,000.00 in October 2018, he confirmed this consent via text message at the request of the Provider by way of further authentication,

In respect of the Complainant's assertion that the ***European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003*** applies, again I note that the Provider was acting only as a facilitator for the Complainant's authorised transaction requests to third party financing entities. Any remedies which the Complainant is asserting pursuant to these Regulations, should be sought against the alleged fraudulent company directly, and not from the Provider, as the payment facilitating intermediary.

Bearing the foregoing in mind, I am satisfied that the Complainant made the informed decision to transfer money to two third party financing entities during February, March and October 2018, with the understanding that that money would be sent on to an investment/trading company. There was an element of risk involved in his intended investments of this nature, which the Complainant accepted. I note that the Complainant has not disputed that he authorised any of the transactions to the third-party financing entities, and I also note that he was fully aware that he was trading on the investment platform and indeed, it wasn't until after he had been trading for a number of months and started suffering losses, that the Complainant raised an issue with the Provider about the services the investment company was providing.

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Since the preliminary decision of this Office was issued, the Complainant has submitted:

*“There is no acknowledgment of the fact that at no stage did [Provider] show any interest in me or what had happened to me.*

*Their only contact was adversarial in its approach to me showed no interest in the fact that I had been devastated by the fraud that still causes me anxiety and depression.*

*How can they claim to have any interest in protecting its customers when an opportunity to investigate a case like mine is pushed aside with no consideration for the effect of such action.*

*From day one [Provider] treated me like the perpetrator instead of the victim thus making me a victim twice.*

*If it is your opinion that [Provider] have treated me as a customer is entitled to expect to be treated or deserves to be treated, I am their victim too.”*

The evidence available regarding the circumstances that have led to this complaint against the Provider, demonstrate that, regrettably, the Complainant appears to have been tricked into believing that he was transferring funds which would facilitate him in engaging in “FOREX” trading. It seems however, that it may well be that his funds were never applied to trades and that, rather, the software to which he was given access to monitor his trades, may have simply been a visual indication of value, with no substance.

As far as the role of the Provider is concerned however, there is no evidence of any wrongdoing on its part. I am satisfied that the Complainant authorised the transactions in question which he is now seeking to reclaim, and I do not accept that the Provider was under any obligation to secure a successful chargeback, due to the unfortunate loss of the Complainant’s monies. Whilst the Complainant takes the view that the Provider showed no interest in his predicament, the only action to be taken by the Provider, in the circumstances which arose, was to seek to reclaim the funds, if such a claim met the requirements of the chargeback rules.

The Provider has explained, and I accept, that it can only raise a dispute against the company/merchant which has charged the Complainant’s card, but in this instance it was two third-party finance entities used by the fraudulent company, which facilitated the transfer of funds and charged the Complainant’s account. As a result, it could only raise a dispute with these third-party entities (as opposed to the company under question) and these third-party entities had provided services to the Complainant, in return for the transfer of funds to the company, and hence it was not possible to meet the criteria for a successful chargeback.

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Accordingly, in the absence of any evidence of wrongdoing on the part of the Provider, 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**  
**Financial Services and Pensions Ombudsman (Acting)**

10 March 2022

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.