



<b><u>Decision Ref:</u></b>	2022-0126
<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 a chargeback request.

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

The Complainant had a current account and a credit card account with the Provider. In the complaint form submitted to this Office in **May 2020**, the Complainant set out that on **17 September 2018** he made the first of a number of fund transfers to an investment company.

Between **September 2018** and **May 2019** the Complainant made eight fund transfers – totalling €39,499.00 – to an investment company. He transferred €2,000.00 from his current account in **September 2018**. He made a further seven payments by credit card totalling €37,499.00 to three different entities, between **March 2019** and **May 2019**.

The Complainant states that he later discovered the investment company was a “*scam operation*” and on **28 November 2019** he lodged a “*dispute*” with the Provider because he had transferred the funds “*utilizing the Provider's [banking] services*”.

In a letter to this office on **6 March 2020** the Complainant states that he and his wife “*have been scammed by [a] fraudulent investments company who has taken all of [his] retirement plans and left [him] with nothing*”.

He further states that when he authorised the payments he did not know that the investment company was not genuine. He says that when he discovered the investment company was not genuine, he asked the Provider to take responsibility and asked for a

*“chargeback/recall because no service or investment were supplied” but the Provider said if “can only dispute transactions for a period of 120 days”.*

The Complainant contends that the Provider:

*“did not alert [him] to a potential scam or fraud, exhibiting that there was no issue with the recipient.... and transferred the funds”.*

The Complainant asserts that the Provider *“is taking responsibility off [its] shoulders and offloading it to the [inexperienced] client”.* He states that:

*“[the Provider] should advise customers on the risks of sending money offshore to people they don’t know, and the low likelihood of the money being recovered once the customer realizes they have been scammed”.*

The Complainant states that the Provider was in breach of credit card merchant rules by not physically inspecting the investment company’s listed premises *“before allowing [it] to accept payments”.* Further, he states that the Provider should have been aware that the transfers he made to these entities were part of a scam operation as there was *“MASSIVE warnings against [the investment company]”* on various U.K. and E.U. financial regulators’ websites.

The Complainant asserts that *“[his] only intention was to invest some money to make [his] retirement more secure”* for himself and his spouse. He says that the funds were *“[his] life’s work”* and the loss of the funds has affected his relationship with his family, and his health has suffered with the onset of *“anxiety attacks”.* He says he had expected to be *“comfortable”* in his retirement and now he has to work six days a week.

In a letter to this office on **28 December 2020** the Complainant stated that he had received a *“goodwill”* offer of €200.00 from the Provider and that this was not satisfactory considering he has lost his life savings.

The Complainant submits that the Provider failed in its duty of care to him as its customer and that it failed to meet the requirements under the **“Payment Services Directive 2”** on *“safeguards and corrective measures”* and *“Transaction-Risk analysis”* by failing to take action with regard to the unusual pattern of large transfers of funds to different entities *“or raise the possibility of a scam with [him]”.* He states that:

*“[the Provider] failed to take a proactive approach to minimise risks, impact and incidence of financial harm and never utilised the systems and tools they advertised to [him] for the prevention and detection of fraud and financial abuse”.*

The Complainant contends that he would have *“thought twice”* if the Provider had telephoned him to discuss the unusual activity on his account and warned him about the *“risk of authorising payments in these circumstances”.*

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The Complainant asserts that he was *“unable to detect and prevent this scam from happening until it was too late”*, and that the Provider failed to advise him *“of the possibility of being scammed”* and therefore failed to protect him.

### **The Provider’s Case**

In its Final Response Letter dated **13 December 2019**, the Provider states that it was unable to dispute the Visa card transactions as it can only dispute them for a period of 120 days following the transaction(s) and this timeframe had already expired.

The Provider submits that ***Consumer Credit Act, 1974*** cited by the Complainant is a U.K. law, and is not applicable to it, as it is regulated in Ireland.

The Provider contends that it cannot comment on the requirements for the merchants to become part of the Visa and/or Mastercard payment schemes, as it acted in this matter as a card issuer only.

The Provider states that, as the Complainant willingly gave his card details to the merchant, and therefore accepted their terms and conditions, under Visa rules the merchant can call for payment from his account and the Provider must honour that request.

The Provider says that the transactions were all confirmed by the Complainant as being authorised and as a result, the Provider would not have queried the matter further with the Complainant. The Provider says that although it has systems in place to establish fraud trends in the marketplace, it does not monitor authorised transactions in the same manner. As a cardholder, the Complainant is entitled to use his cards to purchase goods and services, at his absolute discretion.

The Provider points out that it acted as the card issuer to facilitate its customer’s card transactions for the Complainant. It says that it is the responsibility of the merchant’s bank (also known as the acquiring bank) to conduct any checks when onboarding a merchant with access to process card transactions, through the Visa card scheme. As a result, the Provider does not carry out checks relating to specific individual merchants; rather, the Provider conducts monitoring on all card transactions for fraud and security reasons.

The Provider has cited the terms and conditions of the Complainant’s account with it, which state:

*“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 a Cardholder’s behalf”.*

The Provider says that the Complainant first raised the matter with the Provider when it received his correspondence on 6 December 2019.

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The Provider points out that, in its response to the Complainant dated 4 February 2020, it had noted that in the event where there was a service due to the Complainant 540 days from the date of the transaction, he could submit documentary evidence which would allow the Provider to review the matter further. The Provider points out however, that it has no record of receiving any such documentation following its letter of 4 February 2020.

The Provider states that the Visa dispute resolution service is a service offered by Visa to allow disputes to be resolved between cardholders and merchants, but it is not intended to replace other avenues such as the legal system.

### **The Complaints for Adjudication**

The first complaint is that the Provider implemented the Complainant's payment instructions between September 2018 and May 2019 without firstly conducting due diligence regarding the intended payee and by reason of this failure it did not detect that the payee was not genuine, did not query the out of character transactions and it did not warn the Complainant on the risks of making transfers to third parties.

The second complaint is that the Provider has wrongfully refused to credit a refund to the Complainant's accounts.

The Complainant wants the Provider:

*"to perform a chargeback and/or recall and/or otherwise credit [his] account, for the full amount of these payments, in the total amount of 39,499 EUR.*

### **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 **10 March 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. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant carried out the following eight transactions which are the subject of this complaint:

<b><u>2018</u></b>		
• 17 September 2018	€2,000.00	Debit card
<b><u>2019</u></b>		
• 5 March 2019	€5,000.00	Credit card
• 8 March 2019	€1,000.00	Credit card
• 19 March 2019	€6,500.00	Credit card
• 10 April 2019	€5,000.00	Credit card
• 10 April 2019	€5,000.00	Credit card
• 10 April 2019	€4,999.00	Credit card
• 30 April 2019	€10,000.00	Credit card

The total disputed amount is **€39,499.00**.

I note that each transaction was carried out by the Complainant providing his debit and credit card details to the merchant.

I note that when the first transaction in **September 2018** was being effected, the Provider contacted the Complainant on Thursday 13 September 2018, and he confirmed the transaction was genuine. The Provider points in that regard to its records showing the contact made with the Complainant regarding the transaction in the amount of €2,000 in order to query whether the transaction was genuine. The Complainant confirmed that the transaction was genuine and the agent of the Provider explained that the call was simply to verify the authenticity of the transaction.

The Provider says that the Complainant raised a query at that time regarding a code that would appear each time he made a payment to the merchant in question. In response, the Provider advised the Complainant that he would have to direct his query to the Bank's online Banking Department and the Complainant agreed. The Provider points out that when the Complainant confirmed the transaction as being genuine, his customer profile was noted accordingly which had an impact on future activity, insofar as the Provider would not continue to telephone the Complainant for similar spending, having confirmed the initial transaction over the telephone.

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The Provider also points out that on a separate occasion (20 January 2019) a staff member contacted the Complainant regarding a security check, in order to verify a recent transaction with the Complainant (which is not specific to this complaint, but is mentioned in the context of the Provider's actions to verify transactions). The Provider says that the Complainant advised that he did not recognise the transaction in question and, as a result, his Visa card was cancelled for security reasons and arrangements were made to issue a new card to him.

I note that by letter dated **28 November 2019** the Complainant requested that the Provider effect a chargeback on these transactions or otherwise reverse the transactions. The Complainant had made these payments to what he had believed was an investment company, but he now believed that it was in fact fraudsters posing as an investment company, and they were now ignoring his requests for refunds.

It is useful at this point to set out the relevant terms and conditions which govern the operation of the debit card, the credit card, and the Visa Core Rules and Visa Product and Service Rules.

#### **Terms and conditions of the debit card**

The use of the debit card was governed by the ***Terms & Conditions and Personal & Business banking charges*** (13<sup>th</sup> January 2018).

Within this document, the Provider relies on General Terms and Conditions Section 16 ("Instructions"); Current Account Terms and Conditions Section 15 ("Participating Merchants"); and, Bank Cards (Excluding Credit Cards) Terms and Conditions Section 2 ("The Card").

#### **16 INSTRUCTIONS**

- (a) *Each time you give us an instruction, you will be deemed to warrant to us that such instruction can be followed without breaching any law or regulation...*

#### **15 PARTICIPATING MERCHANTS**

- (c) *We have no liability for the acts, omissions or defaults of Participating Merchants or for any goods or services which you acquire from or through Participating Merchants, and the terms on which you acquire such goods and / or services shall be a matter entirely between you and the relevant Participating Merchant.*

#### **2 THE CARD**

- (a)

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(b) *There is a variety of means by which you can authorise such Transactions, these include:*

(i)

..

(ii) *authorisation by means of your Card number and in some cases where required, a security code, VbV password or codes for Transactions by mail, telephone, internet or using a Secure System.*

### **Terms and Conditions of the Credit Card**

The use of the credit card was governed by ***Conditions of use for [Provider] Visa Credit Card*** (13<sup>th</sup> January 2018).

The Provider relies on Section 10 (“Instructions”); Section 14 (“Authorisations”); Section 15 (“Refunds and Principal Cardholder’s Claim”); and, Section 17 (“Liability”).

#### **10 INSTRUCTIONS**

(a) *Each time you give us an instruction, you will be deemed to warrant to us that such instruction can be followed without breaching any law or regulation...*

#### **14 AUTHORISATIONS**

(b) *Once received by us for execution, Transactions are irrevocable. However, if you wish to amend or cancel a Transaction that you have given us we will use our reasonable endeavours to make such amendment or cancellation if it is possible for us to do so.*

#### **15 REFUNDS AND PRINCIPAL CARDHOLDER’S CLAIM**

(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.*

#### **17 LIABILITY**

(a) *To the extent permitted by law and except as otherwise set out in these Conditions we will not be liable for, and shall be indemnified in full by you against, any loss, damage or other liability that you or we may suffer arising out of or in connection with any payment from, or payment or intended payment to, your Account unless such loss, or liability is caused by our fraud, wilful neglect or gross negligence...*

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### **VISA Core Rules and VISA Product and Service Rules**

The Complainant seeks to rely on what he says was a failure of the Provider to carry out due diligence on the payee, and he points to the Provider's failure to inspect the premises of the payee as part of such due diligence.

This appears to be a reference by the Complainant to the **Visa Core Rules and Visa Product and Service Rules**. The version of these rules relevant to this complaint is the version published on 14 October 2017. The section relied upon by the Complainant 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.*

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 which is cited by the Provider:

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*An issuer may initiate a Dispute under Dispute Condition 13.1: Merchandise/Services not received according to the following time limits:*

*A dispute must be processed no later than either:*

- *120 calendar days from the Transaction Processing Date*
- *120 calendar days from the last date that the Cardholder expected to receive the merchandise or services.*

### **Additional Authorities Cited by the Complainant**

In addition to the foregoing terms and conditions, the Complainant has also cited the following items in support of his complaint:

#### **DIRECTIVE (EU) 2015/2366 on Payment Services in the Internal Market (“PSD2”)**

The Complainant cites Article 68 of PSD2 in support of his complaint. However, in his submissions to this office the Complainant omitted the first two words of Article 68 (“If agreed”). Article 68 provides as follows:

*“If agreed in the framework contract, the payment service provider may reserve the right to block the payment instrument for objectively justified reasons relating to the security of the payment instrument, the suspicion of unauthorised or fraudulent use of the payment instrument or, in the case of a payment instrument with a credit line, a significantly increased risk that the payer may be unable to fulfil its liability to pay.”*

The ***European Union (Payment Services) Regulations 2018*** implemented PSD2 in Ireland, and these have “direct effect” on the Provider.

Regulation 92(2)(2) of these regulations implement Article 68 of PSD2.

The Complainant contends that these provisions impose a duty on the Provider to block fraudulent transactions.

I don’t accept this. The above provisions do not impose a duty on the Provider for which the Complainant contends. The provisions confer a discretion on the Provider to do so, not an obligation.

### **European Banking Authority (EBA) Guidelines (July 2018)**

The Complainant has cited Section 18 of the EBA Guidelines on fraud reporting under PSD2:

*By contrast, and although the reporting of data under the category of 'fraud by manipulation of the payer' may not be completely reliable yet, the EBA is of the view that such fraud cases are caused by a third party manipulating a payer into making a payment and that it is, at least partially, the responsibility of the PSP to identify any such potential case. This is particularly the case with regard to the use of transaction monitoring systems, and in particular TRA. This is of particular concern to the EBA, given that this type of fraud has significantly increased in recent years, suggesting that fraudsters may be shifting to this modus operandi. Therefore PSPs and CAs will need to report data to this category alongside data in the category of unauthorised transactions.*

[My underlining for emphasis]

In my opinion, these guidelines do not assist the Complainant – they are published by the EBA regarding the reporting of fraudulent transactions on a national and EU level, in a regulatory context. I note that this guideline recognises that the fraud in question in such circumstances, is caused by a third party, rather than the payment service provider. Whilst reference is made to partial responsibility on the payment service provider to identify such instances, I note that in this particular matter, the Provider took the trouble to telephone the Complainant in September 2018 in order to verify with the Complainant that the transaction he was instructing, was a genuine one.

### **United Kingdom Legislation / Regulation**

The **Consumer Credit Act 1974** cited by the Complainant is a U.K. law and has no application to the operations of the Provider in this jurisdiction, where it is regulated by the Central Bank of Ireland.

Similarly, the rules and by laws of the Prudential Regulation Authority and of the Financial Conduct Authority relate to regulation of providers in the United Kingdom and have no application to the conduct of the Provider, in this matter.

### **FCA / BiFAN notices**

I note the Complainant's reference to the United Kingdom Financial Conduct Authority and Germany's BaFin having issued warnings in relation to the entity, to which the Complainant made the payments.

I do not accept however, that these notices imposed a duty on the Provider (which is regulated in Ireland) to supervise all transactions on customer accounts to ensure that its customer did not make a payment to this entity.

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## Analysis

I note that the Complainant paid a total of €39,499.00 via debit and credit card transactions to an entity abroad (“the Merchant Payee”) for the intended purpose of investing and trading in financial products. All of the disputed transactions in this complaint were authorised by the Complainant.

The Complainant contends that it subsequently became apparent to him that the Merchant Payee had not invested his money but had, in fact, simply tricked him and stolen his money. He submitted a chargeback request in a letter received by the Provider on 6 December 2019 but the Provider declined to dispute the transactions under the Visa chargeback procedure, on the basis that any chargeback was out of time. The Provider also points out that the payments were authorised by the Complainant, and consequently, it was not in a position to refund them.

The Visa Core Rule invoked by the Complainant relates to the carrying out of a “due diligence review” in respect of a merchant to include a “physical inspection of the business premises”. I note that this obligation is stated to fall on the “Acquirer” or on the “Payment Facilitator”, but this was not the Provider, in this instance.

In my opinion, the Complainant has misunderstood the Provider to have been an ‘Acquirer’ or a ‘Payment Facilitator’ in the context of the transactions he sought to rescind. The Provider was neither of those things in the circumstances here. Rather, the Provider was the ‘Issuer’ of the card as understood within the Visa Core Rules and had a contractual relationship with the cardholder (the Complainant) not with the Merchant. Accordingly, Rule 5.2.1.2 has no direct bearing on the determination of this complaint.

Whilst the Visa Core Rules are of course relevant, they do not constitute the basis of the relationship between the Complainant and the Provider. The terms and conditions of the Complainant’s accounts govern the relationship between the Complainant and the Provider. Nonetheless, in circumstances where the last Transaction Processing Date was **30 April 2019**, and the chargeback request was not submitted until **28 November 2019**, I accept that Provider was entitled to refuse to dispute the transaction using the Visa chargeback procedures, owing to the relevant chargeback period having elapsed.

I would note that it is not at all clear whether or not Visa chargeback rules would have resulted in the Complainant being successful with his chargeback request, had it been processed in November 2019, or indeed earlier, as the chargeback scheme operated by Visa may not apply to transactions relating to investment, traders and brokers and indeed, in any event, a Merchant can simply dispute and deny a chargeback request. Furthermore, there is every possibility that the acquiring bank would not have been in a position to recover any funds from the Merchant Payee’s account.

The Complainant has placed reliance on a number of other texts, but I do not accept that these are of any assistance to him in this complaint.

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The terms and conditions for both the debit card and credit card, which govern the relationship between the Complainant and Provider, exclude liability for the Provider in circumstances where the Complainant authorised the payments.

The Complainant submits that the Provider should have in some way vetted the entity to which the Complainant sent the money and discovered that it was a fraudulent enterprise, and thereafter warned the Complainant off the transactions. I don't accept this. It would be unfeasible for a financial service provider to vet every individual payee to whom/which its customers wished to voluntarily transfer funds. It would be unreasonable and impractical for a duty to be imposed on a bank to carry out the vetting envisaged by the Complainant. Regrettably, the sort of vetting which the Complainant has in mind, is the type of vetting that he himself should perhaps have undertaken, before transferring funds to the merchant in question.

The Complainant in this complaint is seeking to apportion all of the responsibility for his misfortune on to the Provider, but I don't accept that the Provider has a case to answer in that regard.

In those circumstances, having considered the evidence, I am not satisfied that there are grounds to uphold a complaint in relation to the Provider's conduct in:

- implementing the Complainant's payment instructions between September 2018 and May 2019 without firstly conducting due diligence regarding the intended payee; or
- failing to identify the payee as not genuine; or,
- failing to warn the Complainant on the risks of making transfers to third parties.

The Provider did in fact query the first of these transactions with the Complainant, who confirmed to the Provider that it was genuine.

I am also satisfied that the Provider was entitled to decline to credit a refund to the Complainant's accounts. I accept that the Provider has no liability to the Complainant in that regard.

I sympathise with the Complainant, who states he has lost his life savings as a result of this ordeal. He certainly lost a considerable amount of money that he paid to the merchant, largely using his credit card, but as the evidence discloses no wrongdoing by the Provider, there are no reasonable grounds on which to uphold his 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 April 2022

## PUBLICATION

### Complaints about the conduct of financial service providers

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.

### Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.