

## The complaint and background

Mr F complains about his bank Santander UK Plc. He says the bank failed to protect him from the financial harm caused by a company called MarketsCube.com ('Markets Cube'). He alleges they were scammers posing as a forex and CFD trading brokerage, as a result of which he lost around £5,700. He is unhappy with how the chargeback claim was handled.

Santander denies responsibility for the loss. Its position, broadly, is that at the time of the transactions in 2018 there was no adverse information about Markets Cube. Santander says it does 'blacklist' third parties based on intelligence. However, there was no adverse information about Markets Cube at the time of Mr F's transactions. Santander says insufficient information was known about typical binary options transactions to have real time transaction monitoring which would have identified Mr F's transactions to Markets Cube. Santander says it tried to assist by processing chargeback claims but these failed as Mr F was unable to provide the necessary evidence under the relevant chargeback 'reason code'.

On 21 July 2021, I issued a provisional decision upholding this complaint. For completeness, I repeat my provisional findings below:

- 1. Not every complaint referred to us and categorised as a binary-options scam is in fact a scam. Some cases simply involve high-risk investment 'bets' on the performance of (e.g.) commodities or stocks that resulted in very disappointing returns or losses. Some binary-options traders promoted these products—which were not regulated by the Financial Conduct Authority ("FCA") or its predecessor at the time—using sales methods that were arguably unethical and/or misleading. However, whilst customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud, i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).*
- 2. Banks and other Payment Services Providers ("PSPs") have duties to protect customers against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering (see below). But when simply executing authorised payments, they do not have to protect customers against the risk of bad bargains or give investment advice — and the FCA has confirmed that a fraud warning would not constitute unauthorised investment advice (see its predecessor's 2012 consultation paper on investment fraud, below). So, the first question to resolve is whether this particular retailer/trader was actually a fraudster.*
- 3. I am satisfied that Markets Cube were not carrying out legitimate forex, CFD or binary-options trades but were instead dishonestly defrauding customers, e.g. by not actually making trades/bets with the money received from clients but simply manipulating their online 'trading platform' to show purported gains—with initial token pay-outs—in order to induce further 'investments' from victims such as Mr F. In the absence of evidence to the contrary, I have concluded this because:*

- a. *In 2018, binary-options, forex and CFD traders operating in the UK were required to be regulated by the Financial Conduct Authority — whereas Markets Cube were not. Nor were they regulated in any other jurisdiction so far as I am reasonably aware. This indicates they were operating illegally, probably with dishonest intentions. Legitimate firms tend to comply with regulatory requirements.*
  - b. *On 15 October 2018, a warning about Markets Cube was placed on the Investor Alerts Portal of the International Organization of Securities Commissions (“IOSCO”). The Spanish Comisión Nacional del Mercado de Valores reported that they were offering financial services in its jurisdiction without authorisation. A warning from the FCA followed on 1 November 2018. Two more warnings from other regulators were published on the IOSCO’s Investor Alert Portal in 2019 and 2020.*
  - c. *There are several reports in the public domain—e.g. foreign press and online forums—stating that Markets Cube were scammers. This hearsay is not in itself sufficient evidence of fraud. But in the context of known regulatory facts, it may fairly and reasonably be regarded as circumstantial evidence that helps build an overall picture of scammers dishonestly seeking gains at the expense of others.*
4. *Having concluded that this was a scam rather than just a bad bargain or poor investment advice, I must now go on to consider four more issues in order to determine the outcome of the complaint:*
- a. *Did Santander deal with Mr F’s chargeback claims fairly?*
  - b. *If so, were any of the disputed transactions still so unusual or uncharacteristic for Mr F and/or his account that Santander fraud alerts ought reasonably to have triggered some sort of intervention?*
  - c. *If triggered, would Santander’s intervention have made a difference and prevented or reduced the loss?*
  - d. *And if so, was Mr F partly to blame for what happened such that it would be fair and reasonable to reduce compensation proportionately?*

#### chargeback

5. *Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two ‘presentments’. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa’s arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. Santander) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.*
6. *Mr F is upset because Santander refused to pursue his chargeback under Reason Code 13.5—‘not as described’—when it was defended by the ‘merchant acquirer’ on behalf of Markets Cube. (It may seem odd that a scammer would actively engage in a chargeback process, e.g. by supplying screenshots of transactions, payments out, terms of business, etc. However, I understand this is not uncommon for this type of investment scam, whose business model is often predicated on using payment services such as Visa.)*
7. *In my judgment, it was not unreasonable of Santander to drop the chargeback claim after its first presentment failed. First, it was clear that Markets Cube’s merchant*

*acquirer intended to defend the claim and Santander did not initially present the required evidence under the 'reason code' to enable it to ultimately take it to Visa's arbitration stage; and in any event, it is strictly a matter of discretion for the card issuer. In this case, when considering whether Santander exercised its discretion in a fair and non-arbitrary manner, I am mindful that the Visa chargeback rules did cover binary-options (or forex) trading from 14 October 2017, i.e. prior to the disputed transactions: see Visa Business News, 26 October 2017:*

*Effective 14 October 2017, issuers may use Reason Code 53 to address cases whereby a binary options (or forex) merchant has imposed obstacles to prevent cardholders from withdrawing funds. This chargeback right is limited to the amount available in the binary option account at the time funds are requested. Issuers cannot charge back more than the original transaction amount, so capital gains from binary options trades cannot be paid out via the chargeback process.*

*However, Reason Code 53 (later re-coded by Visa to 13.5) required Santander to present dated evidence that Mr F had an available balance (in the form of a screenshot or confirmation from the merchant) and that he tried to withdraw sums equal to, or less than, his available balances on the same day. Unfortunately, merchants like Markets Cube were aware of the specific requirements of the chargeback scheme and could manipulate the software used to remove the available balances once a withdrawal request was made even though no funds were actually remitted to the customer. I've noted this happened in Mr F's case.*

8. *Though not material to the circumstances of this case, it is worth adding for completeness that, from 1 December 2018, Visa's rules changed again to require unregulated and unlicensed binary-options merchants (and other "high-brand risk merchants") to be coded under Merchant Category Code ("MCC") 7995—Betting, including Lottery Tickets, Casino Gaming Chips, Off-Track Betting, and Wagers at Race Tracks. Visa Business News dated 6 September 2018 stated:*

*Visa has discovered that certain binary options, rolling spot forex trading, financial spread betting and contracts for difference merchants are being acquired in markets that do not require licensing or regulate merchant trading platforms. In addition, some of these merchants are selling into countries where local laws prohibit such transactions or require licensing by the relevant financial services authority.*

*This change gave a further chargeback right available to the card issuer – reason code 12.7 (invalid data). This is where a merchant used an invalid MCC; but it has a much shorter timescale of 75 days for a claim to be processed. This 'reason code' would not have been applicable at the time Mr F requested a chargeback as merchants like Markets Cube were not yet required by Visa to 're-code'.*

9. *As the disputed transactions occurred in 2018 (after the changes to Visa's chargeback reason codes were published), Santander could only have successfully pursued Mr F's chargeback further than it did if he had the required evidence. And by the time Mr F realised he'd fallen victim to a scam (after his final payment), Markets Cube prevented him from gathering this evidence. So, declining to take the case further in the Visa chargeback process in circumstances where there were no reasonable prospects of success was neither an unfair nor unreasonable exercise of Santander's discretion.*
10. *For the reasons set out above, I am not persuaded that Santander acted unfairly or unreasonably in connection with the chargeback claim at the time Mr F presented his case, so I cannot uphold this complaint on that ground.*

unusual or uncharacteristic activity

11. *Santander is aware of our general position on a PSP's safeguarding and due-diligence duties to protect customers from the risk of financial harm due to fraud. We have published many decisions on our website setting out these principles and quoting the relevant rules and regulations. It is unnecessary to rehearse them again here in detail.*
12. *It is common ground that the disputed payments were 'authorised' by Mr F for the purposes of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. This is because they were made by Mr F using the legitimate security credentials provided to him by Santander. These must be regarded as 'authorised payments' even though Mr F was the victim of a sophisticated scam. So, although he did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, Mr F is presumed liable for the loss in the first instance.*
13. *However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider Santander should fairly and reasonably:*
  - *Have been monitoring accounts—and any payments made or received—to counter various risks, including anti-money-laundering, countering the financing of terrorism, and preventing fraud and scams;*
  - *Have had systems in place to look out for unusual transactions or other signs that might indicate its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer; and*
  - *In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.*
14. *I am satisfied there were enough 'triggers' in this case to have alerted a responsible regulated bank such as Santander that Mr F's account was being subjected to unusual and uncharacteristic activity. There were reasonable grounds to suspect a fraud or scam, and therefore justify an intervention (such as phoning him in order to ask discreet questions about the nature and purpose of the payments).*
15. *First, regulated firms ought reasonably to take notice of common types of scams. As long ago as June 2012, the FCA's predecessor indicated—in its consultation paper entitled Banks' Defences Against Investment Fraud: detecting perpetrators and protecting victims—that it was good industry practice for firms to build up an updated watch-list of types of scams and potential perpetrators; and regularly to share "timely and detailed intelligence" with other banks, UK and overseas regulators, the police, etc. Whilst the regulator gave no specific timings, it is not unreasonable in my view to expect an international bank to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA or IOSCO. In my judgment, such alerts should automatically trigger alarm-bells—and lead to the payment being paused—pending further enquiries (and a possible scam warning) to the payer.*

16. In Mr F's case, there was no warning about Markets Cube on IOSCO's Investor Alerts Portal until after Mr F made all of his payments. I therefore do not think Santander ought to have automatically blocked payments to it. However, in light of the odd pattern of payments that followed, I do think this was a trigger for potential fraud, particularly given that this was also a new payee; also an international payee; and a payee trading in forex and CFDs without being registered with the FCA (as required at the time). Therefore, it would have been reasonable for it to have properly questioned Mr F before processing all the payments in order to satisfy itself that all was well.

17. The frequency of the payments and sums involved in relation to how Mr F normally operated his account should in themselves have alerted Santander to the risk of harm and prompted discreet queries almost from the outset.

18. The payments on the first five days of Mr F's 'trading' were as follows:

<b>date</b>	<b>payment</b>	<b>total</b>
23/04/2018	£200.00	£200.00
26/04/2018	£2,000.00	£2,200.00
27/04/2018	£2,000.00	<b>£4,200.00</b>

19. I set out all the disputed payments in **Appendix 1** below – but the above are enough for our purposes at this stage.

20. This was a highly unusual and uncharacteristic pattern of spending for Mr F compared with his recent history on the account — and was an indicator that something untoward might be happening (including, for example, an attempt to circumvent the anti-money laundering requirements by making a number of smaller payments in short succession to the same payee). Certainly by the time Mr F made the third payment, a pattern was emerging that ought reasonably to have caused Santander to make further enquiries of him about what was going on. I've noted from the technical evidence provided by Santander that it made no attempts to contact Mr F about his payments to Markets Cube.

21. If Santander had fulfilled its duties and carried out due diligence by contacting Mr F and asking suitably probing questions, there is no reason to doubt that he would have explained what he was doing. In such circumstances, whilst the bank had no duty to protect him from a bad bargain or give investment advice, it could have invited him to check whether the payee was registered with the FCA. It could have also explained its own customer experiences with merchants like Markets Cube in that customers would often be prevented from withdrawing available balances. After all, at that time, there was information in the public domain—which a bank ought to have known even if a lay consumer ought not—about the very high risks associated with binary options, forex and CFDs including many warnings of potential fraud (e.g. Action Fraud's June 2016 warning; the European Securities and Markets Authority's July 2016 warning; the Financial Conduct Authority's consultation paper of December 2016; the Financial Conduct Authority's forex trading scam warning of August 2017; and the Gambling Commission's December 2016 scam warning that "an unlicensed operator is likely operating illegally", and so forth).

22. There is no evidence that Santander provided Mr F with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he was making. It was a missed opportunity to intervene.

### causation

23. *If Santander had asked Mr F what the payments were for and the basic surrounding context, it is likely he would have fully explained what he was doing and that everything had been done over the phone and online with his 'broker'. Santander did not need to know for certain whether Mr F was dealing with a fraudulent binary options/forex/CFD trader or investing in a legitimate (albeit highly speculative) product; reasonable grounds for suspicion are enough to trigger a bank's obligations under the various regulations and principles of good practice. I consider there were such grounds here and, therefore, that Santander ought reasonably to have provided a scam warning in light of all the information then known to financial professionals about the risks associated with unregulated, overseas binary options.*
24. *If Santander had given a warning, I believe that Mr F would have paused and looked more closely into Markets Cube before proceeding. There is no evidence that he was willing to take high risks or had a history of speculative investments or gambling; these were his tuition fee monies after all. It seems more probable that he would have made further enquiries into binary-options/forex scams and whether or not Markets Cube were regulated in the UK or abroad. He could have discovered they were not and the various regulatory warnings about the risk of binary-options/forex scams (see above). In other words, I am satisfied that a warning from his trusted bank would probably have exposed Markets Cube's smoke and mirrors, causing him to stop 'trading' and preventing further losses.*
25. *Even if he had not worked out that this was a scam, it is likely that a warning would have alerted him to the common issues arising in relation to binary options dealers, which in turn would have revealed the truth behind his supposed broker's (mis)representations — i.e. that they were not really regulated UK investments but highly-risky international bets more akin to a wager in which the broker must lose if he is to win. So by the time Mr F attempted to make a withdrawal he would probably have stopped in his tracks. But for Santander's failure to act on clear triggers of potential fraud or financial harm, Mr F would probably have lost no money. I say this because at the time of his final payment, he had his full deposits available on his trading account. I think Markets Cube providing excuses as to why Mr F couldn't withdraw his available balances until he reached a required 'trading volume' would have prompted him to contact Santander for assistance with a chargeback claim. At this stage, he would have gathered the evidence required for Santander to have pursued a successful chargeback claim on his behalf.*

### contributory negligence

26. *Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000). In this case, I do not think that Mr F was to blame for what happened; that he did not foresee the risk of this sort of harm or any harm. At the time of his 'trading', there was no information in the public domain about this particular trader. In any event, I do not place too much weight on general but arcane information in the public domain for reasons previously alluded to about the information imbalance between financial professionals and ordinary consumers.*
27. *Shortly before Mr F's final payment of £1,500 on 14 May 2018, he attempted to make a withdrawal of some 'profits' totalling £1,000. His Markets Cube account manager declined this request and informed him that he first had to reach a*

*required 'trading volume' and a further deposit would enable him to earn enough to do this. Up until this point, Mr F's account had seemingly been steadily earning profits and he had no cause for concern. Unaware that this was one of the common deceptive tactics of scammers, as communicated by Visa to its acquirers and issuers in 2017, he unwittingly agreed to make a final payment. I do not think he could have foreseen the risk that the company he was dealing with was a scam and the trading account he was viewing was likely to be a simulation.*

28. *In the circumstances, I do not think it would be fair to reduce compensation on the basis that Mr F should share blame for what happened.*

29. *I have considered compensation for distress or inconvenience again as I contemplated £250 in my first provisional decision. On reflection, I do not think an award for non-financial loss is appropriate in the circumstances. I do think Santander attempted to assist Mr F as best as it could when he brought his chargeback claim to it. And whilst I think it ought to have acted on potential fraud triggers sooner, I'm satisfied my proposed settlement fairly and reasonably places Mr F back in the position he would have been had it done so.*

### **Responses to my provisional findings**

Mr F did not have anything further to add and accepted the provisional decision.

Santander disagrees with my provisional decision but has offered to settle the case in accordance with it. Whilst Santander did agree to settle the complaint, it raised a number of concerns and, for completeness and transparency, I think it appropriate to address those here.

Santander said it had not received a fair adjudication of the issues and we have applied a punitive rate of interest on top of the award. It explained why it disagreed with the decision and our approach more widely. I have carefully read and digested those submissions in full and I summarise the key points below:

1. Our investigator initially upheld the complaint because Santander did not pursue Mr F's chargeback claim after its first presentment failed. Our investigator felt a chargeback claim would have succeeded had it been pursued to arbitration, despite Mr F being unable to provide evidence specified by the scheme rules and Markets Cube defending the claim.
2. Following Visa's confirmation that it would not expect cases without the requisite evidence to be pushed to arbitration, we accepted that Santander did not act unreasonably in connection with the chargeback. However, we continued to uphold the complaint based on Santander's failure to interrupt and challenge the customer's authorised card payments in a reasonable time. We relied on the 2012 FSA paper on investment fraud which referred to it being good industry practice to build up a watchlist of scams and perpetrators. The merchant in this case was not subject to an FCA or investor alert warning at the time of Mr F's payments — but we felt Santander should still have interrupted the payments due to their unusual frequency and the uncharacteristic sums involved.
3. Santander asked how we had considered the risk-based nature of this guidance based on the information available to the industry in 2017/18 and balanced against Santander's obligations to honour legitimate card payment journeys to the same merchant codes and locations known today as those of 'bad actors'. Data was provided to support this point, but the provisional decision does not address it.

4. Santander asked whether it was industry practice in 2018 to conduct real time monitoring to interrupt and challenge customers on authorised card transactions to try to identify scams to merchants not subject to FCA or other warnings. The decision does not address this point.
5. Santander believes we have incorrectly interpreted the industry guidance of 2017/18. It believes it is speculative to suggest that Mr F would not have decided to invest with Markets Cube because there was no evidence of him previously being willing to take high risks; or that he would have ensured he obtained all the evidence necessary to enable him to submit a successful chargeback to recover all the payments.
6. Santander advised that it would be sending a copy of its disagreements to the FCA.

## My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have reconsidered all the evidence and arguments in light of Santander's response in order to decide what is fair and reasonable in all the circumstances of this complaint. Having done so, I remain of the view that this complaint should be upheld – for the reasons that follow:

1. Santander is correct that this complaint was originally upheld on the basis of the chargeback claim not being more vigorously pursued through the Visa chargeback scheme. Santander is also aware that we engaged with the relevant card schemes – including Visa – to gain a clear understanding of how they view claims such as Mr F's, along with the options available to card issuers like Santander.
2. When we engaged with Visa, one of the points it noted was the small volume of claims that had succeeded at arbitration based on the relevant code because card issuers were not presenting the required evidence. In a recent decision I issued to Santander, its customer did have all the required evidence to present a chargeback claim under the appropriate binary-options trading 'reason code'. But Santander declined to attempt a chargeback because it said that wasn't an option for its customer – which wasn't a correct interpretation of the chargeback scheme rules. Once Visa clearly explained its approach, we communicated this to Santander and other firms, which demonstrates we are being fair and reasonable to all parties, and resolving complaints in an open, transparent way.
3. DISP Rule 3.6.1 of the *Financial Conduct Authority Handbook* states that, "*The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.*" This wide remit is further clarified in DISP Rule 3.6.4:

In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:

- a. relevant:
  - i. law and regulations;
  - ii. regulators' rules, guidance and standards;
  - iii. codes of practice; and
- b. (where appropriate) what he considers to have been good industry practice at the relevant time.



4. We have explained to Santander on numerous occasions why our approach to fraud and scams is not inconsistent with the strict legal position; and why it is fair and reasonable for a bank or Payment Services Provider ("PSP") to take reasonable, limited steps to safeguard its customers in line with the prevailing regulatory and industry standards at the relevant time (see, for example, paragraph 13 of my provisional decision, above). That includes taking reasonable steps to guard against the risks of money-laundering and terrorism, which have been legal requirements for many years now, and long before the events that are the subject-matter of this dispute. Santander ought to take account of and follow our approach in line with its complaint-handling obligations in DISP 1.4.
5. Santander does not agree it was good industry practice (in 2018) to monitor authorised card transactions to merchants not subject to an FCA or international warning.
6. In December 2020, I wrote to Santander, in response to their statement that the BSI code didn't apply to card payments in Mr F's case. I said: *The BSI PAS Code document under 5.2 'Prevention of fraud and financial abuse', specifically 5.2.1 Design, it states, 'The organization should ensure that systems and controls to prevent known fraud and financial abuse are in place across all channels and products including: a) in branch; b) online banking/accounts; c) mobile banking/accounts; d) telephone banking/accounts; and e) payment systems, e.g. cards, cheques, CHAPS, BACS; and f) ATMs'.*

*Further along under 8.3.2 – minimizing financial loss it states: 'The organization should take immediate action to minimize financial losses and protect the customer against further financial harm, tailored to the individual's circumstances, which can include: a) stopping any further funds leaving the account to go to the fraudster e.g. by stopping cards or ATM withdrawals.*

7. Santander were signatories to the BSI code which came into effect on 31 October 2017. And whilst this is just one example of good practice for firms, the BSI code identified a series of fraud triggers that could indicate fraud or financial abuse – which were applicable to multiple payment methods, including card payments (as referenced above). Amongst other things, these included sudden increased spending, withdrawal or payment for a large amount, a payment to a new payee, financial activity that matches a known method of fraud or financial abuse. Paragraph 16 of my provisional decision notes that most of these indicators are present in Mr F's case.
8. Santander has previously advised (in relation to Mr F's case) that in 2018, insufficient information was known about the activity profiles, distribution channels, complexity/volume of typical binary options transactions, the typical operating environment of merchants etc such that it was the practice of the industry in 2018 to have real time transaction monitoring controls in place on card transactions, which would have identified Mr F's transactions to Markets Cube. I refer Santander back to paragraph 21 of my provisional decision where I explain the various credible sources of information that explicitly referenced the high risks associated with binary options investment trading, along with fraud risks as early as 2016. By 2017, the FCA had also given warnings about binary options investments along with the scams that occur. Visa had also updated its global rules to address specific claims relating to binary options trading and provided supplementary information to card issuers and merchant acquirers about the 'deceptive' conduct used by mainly unregulated and unlicensed merchants.

9. In January 2018, the sale and marketing of binary options were brought within the FCA's remit where it explained companies not regulated by it were 'likely a scam'.
10. In reference to the FSA's 2012 paper, in its opening, the FSA stated; 'Firms authorised by us have a regulatory duty to counter the risk they might be used to further financial crime'. It set out examples of good and poor practice as non-exhaustive guidance to firms. The 'real time payment screening against a well-formulated watch list' wasn't the only example of good practice for firms to set their automated payment screening. Good practice also included the 'quality of alerts', involving 'investment fraud subject matter experts' to set monitoring rules, 'transaction monitoring rules designed to detect specific types of investment fraud' etc...
11. These points are not new as I've previously written to Santander about them. So, I'm satisfied that binary-options investment fraud and the nature/pattern of the transactions, issues with unregulated and unlicensed merchants mostly operating overseas, ought to have been well known to an international bank like Santander.
12. However, I'd also refer Santander to point 16 of my provisional decision where I explain that I do not think the first, or second payments ought to have triggered automatic blocks. And that's because there was no previous FCA or IOSCO warning about Markets Cube. But by the third payment, there were enough indicators that something suspicious was happening with Mr F's normal account operation for Santander to have intervened. Whilst I'm persuaded that there were indicators that Mr F had fallen victim to a binary options investment scam based on the location, transaction pattern, merchant category code etc – and it would have been good practice for Santander to have subject matter experts setting its monitoring rules to look for specific indicators according to its regulator – I didn't uphold Mr F's complaint on this basis. I concluded that Santander didn't need to know, for certain, that Mr F had fallen victim to a binary options scam; it just needed to be aware that this was a common scam and be monitoring for unusual account activity – and Santander already had systems in place to monitor for unusual or suspicious activity.
13. Santander said that I failed to comment on the data it provided when considering how it balances its obligations to process genuine payments in accordance with its customers' instructions and monitor for binary options investment fraud. When Santander supplied this data, it was marked 'confidential' and I was asked not to share it as part of the customer's file. It went on to request that to the extent necessary, my decision should capture its point in generic terms. In order to be fair to both sides, it's very difficult for me to comment generically on specific data provided by Santander. I also didn't find it to be supportive of the point Santander attempted to make, hence I didn't deem it 'necessary' to comment. However, as Santander felt it was important, I will comment on it.
14. In point 8 of my provisional findings, I explain that Visa required unregulated and unlicensed binary options merchants to re-code under a 'high-risk' gambling code from 1 December 2018. The data Santander supplied was from 2020 and included data referencing merchant category code '6211' which ought not to be applicable to unregulated and unlicensed binary options traders after 1 December 2018. Any merchant operating under code 6211, ought to have the correct licensing. So it would have been more relevant to provide an overview of a date-range specific to the period of Mr F's transactions when unregulated and unlicensed merchants operated under this particular code.

15. Santander also used other 'merchant category codes' to support its position but again, the date range wasn't relevant to Mr F's complaint. Of the transactions it reviewed, Santander only identified a small percentage of a large data set of cases being 'ill-natured/fraudulent'. However, Santander could not explain how many customers within the data set it provided had requested chargebacks on investment grounds, without reporting the claim as fraudulent.
16. I'd like to refer Santander to its final response to Mr F where it addressed his complaint as a chargeback issue, not fraud, when he in fact reported he had been scammed. Its notes characterised Mr F's complaint as a card payment dispute, not fraud. So if its data wouldn't have recognised Mr F's claim as 'ill-natured/fraud', it is arguable that Santander is not accurately capturing the data it requires to suggest that a disproportionate number of 'genuine' payments are made without concern. To conclude on this point, I didn't find the data provided by Santander materially altered my conclusions on this particular case.
17. When making a determination, we do so on the balance of probabilities. In other words, I am required to conclude what most *likely* occurred. It is not a speculative finding as Santander has suggested but is based on the relative weightiness of the evidence presented by both parties. I found what we know of Mr F to be relevant to the likelihood of him taking a different course of action if warned by his trusted bank that he may have fallen victim to a scam. I found it unlikely that Mr F would have been willing to risk all of his money in the light of such a warning. The monies were funds he needed in the short term for his tuition fees. I didn't find that he had previously made large transactions or high-risk investments; and Santander presented no evidence to prove otherwise.
18. It remains my view that if his bank had given him more insight, which it was familiar with as the financial professional, then Mr F, as a layperson, would have acted differently. There was a high likelihood of a successful chargeback claim if the correct evidence were gathered and presented under the relevant code for binary option trading disputes. So, I would have expected Santander (as the expert) to have assisted Mr F with explaining what was required by Visa at the earliest opportunity. In my view, that opportunity arose at or shortly after the third transaction. If the bank had given Mr F a timely warning, a successful chargeback claim was more likely than not. Owing to Santander's omission, by the time Mr F realised he'd fallen victim to a scam (after his final payment), it was too late for him to gather the evidence required to present a successful chargeback claim. That is the basis for upholding this complaint and asking Santander to refund all payments, not just the ones from payment three onwards.
19. On the question of interest, 8% simple is not a punitive rate, as alleged, but simply represents a notional average cost of consumer borrowing to cover someone being without their money as a result of wrongdoing for which we are holding a firm liable; it does not represent actual loss of interest, which may now be zero on a current account or less than 1% on a savings account. Many consumers have to pay much higher interest in order to borrow, e.g. via credit cards or short-term loans.

## **My final decision**

For the reasons set out above and before, I have decided to uphold this complaint. I therefore require Santander UK Bank plc to refund to Mr F all his stolen payments (totalling £5,700).

This was a current account, so Santander should add interest to that sum (less any tax properly deductible) at our usual rate of 8% simple per year from the respective dates of payments (to begin from 27 April 2018 as this represents the date Santander ought to have warned Mr F) to the date of refund.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr F to accept or reject my decision before 1 November 2021.

Dolores Njemanze  
**Ombudsman**