

The complaint

Mr N complains that The Co-operative Bank Plc (Co-op) didn't do enough to protect him from the loss of debit card payments to an investment scam.

What happened

Mr N has explained that in 2016 and 2017, he made the following payments using his Co-op debit card to a merchant going by the name of TorOption, which he later realised was an investment scam.

No.	Date	Amount (£)
1	19 September 2016	5,000
2	26 September 2016	5,000
3	26 September 2016	5,000
4	27 September 2016	5,000
5	29 September 2016	10,000
6	04 October 2016	2,500
7	06 October 2016	3,000
8	01 November 2016	10,000
9	03 November 2016	7,985.45
10	03 November 2016	8,018.88
11	04 November 2016	8,007.73
12	07 November 2016	10,000
13	07 November 2016	10,000
14	08 November 2016	8,000
15	08 November 2016	10,000
16	14 November 2016	5,016.49
17	14 November 2016	5,016.49
18	02 December 2016	5,021.66
19	05 December 2016	4,995.12
20	30 December 2016	10,000
21	03 January 2017	10,060.46
22	03 January 2017	10,062.09
Total		157,684.37

Mr N received credits from TorOption in November and December 2016 totalling £13,000. He also incurred some non-Sterling transaction fees attached to the above payments which, for the sake of simplicity, I haven't listed above.

Mr N got in touch with Co-op to report he'd been scammed. When Co-op said they wouldn't reimburse his losses, Mr N referred his complaint about Co-op to this service. As our investigator (who didn't recommend that the complaint be upheld) was unable to resolve the matter informally, the case has been passed to me for a decision.

I sent Mr N and Co-op my provisional decision on 18 October 2022, explaining what I was minded to conclude and why.

Mr N replied to my provisional decision on 26 October 2022 and, in summary: asked me to reconsider including payments 8 to 10 in the compensation calculation; explained that he didn't think the credits totalling £13,000 ought to be deducted from the compensation calculation because, he said, these credits related to payments he made before payment 11; and he said he thought it would be fairer for the 50% blameworthiness deduction to be applied to the total payments he made, rather than the £84,504.96 explained in my provisional decision.

Co-op replied to my provisional decision on 8 November 2022 with some queries which I subsequently responded to. Co-op subsequently offered to settle the base recommendation amount of £42,252.48. But it explained it thought compensatory interest calculated at 3% simple per year was fairer than 8% simple per year.

Our investigator subsequently let Mr N know that I was minded to find compensatory interest calculated at 3% simple per year (rather than 8%) fair and reasonable. Mr N replied to explain why he disagreed.

I'm now ready to explain my final decision.

What I've decided – and why

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

Having done so, I've reached the same conclusions as explained in my provisional decision and as subsequently explained to the parties. The only difference is that I have decided interest at 3% simple per year (rather than 8%) is fair and reasonable. I'll explain my reasons again, with further comment where appropriate.

Recovery

As these were debit card payments, after the payments were made, the only possible avenue for recovery of the payments was through the chargeback scheme.

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 or be deemed a 'valid claim'. Our role in such cases is not to second-guess Visa's arbitration decisions or scheme rules, but to determine whether the regulated card issuer (i.e. Co-op) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.

I agree with what the investigator said about this. Before 14 October 2017, Visa's rules didn't yet specifically cover investment trading – Co-op at this time could only have successfully presented a chargeback claim if TorOption had promised in writing Mr N returns that weren't received. I'm aware most scam merchants conduct most of their interactions over the phone and I think that's what happened here. Mr N hasn't provided persuasive evidence showing otherwise. So I don't think Mr N would have had a valid chargeback. The change in Visa's rules on 14 October 2017 only applied to transactions made on or after that date – so a later retrospective chargeback wouldn't have succeeded either.

Prevention

Having decided the above, I can only uphold this complaint if I think Co-op reasonably ought to have prevented some or all of Mr N's payments to TorOption in the first place – therefore preventing his loss or part of it.

It's common ground that Mr N authorised the scam payments in question here. He was tricked by the scammers into instructing Co-op to make the payments. I accept these were 'authorised payments' even though Mr N was tricked. So although he didn't intend the payments to go to scammers, Mr N is presumed liable for the loss in the first instance.

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 Co-op 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.

My fellow ombudsmen and I have referenced the relevant rules, codes of practice and good industry practice at the time in many previous decisions published on our website.

Bearing this in mind, here I need to decide whether Co-op acted fairly and reasonably in its dealings with Mr N when it processed his payments to TorOption.

The prior activity of Mr N's account with Co-op is an important consideration when considering whether these payments were sufficiently unusual or uncharacteristic for Mr N's account such that Co-op should have paused the payments, pending further enquiry, before allowing them through.

From the account statements I've seen prior to Mr N's payments to TorOption, I can see that his spending was generally unremarkable. Although in July 2016 he did make three payments to Hargreaves Lansdown totalling £22,000, in tranches £3,500, £3,500 and £15,000 respectively and all on the same day. These were payments to a legitimate FCA regulated business, which Mr N has said he was happy with. Mr N argues that these payments to Hargreaves Lansdown were unusual and uncharacteristic for his account. But even so, they're not the subject of this complaint, and Mr N has said he was happy with them. So by the time of Mr N's first payment to TorOption in September 2016, I'm satisfied it wouldn't have been unreasonable for Co-op to take them into account as part of assessing whether subsequent payment instructions from Mr N did or did not reasonably warrant intervention before processing them. With this said, I'll address the specific payments Mr N made to TorOption and whether I think I can reasonably say Co-op ought reasonably to have been obliged to intervene before processing them.

Payments 1 to 5

Mr N's first four payments were each for £5,000 and were spread over nine days. Bearing in mind what I've said about the payments to Hargreaves Lansdown earlier in the year, I'm not satisfied these payments were sufficiently unusual or uncharacteristic for Mr N's account to say Co-op ought to have been obliged to have intervened.

Payment 5 was for £10,000 which, again bearing in mind Mr N's previous account activity, wasn't, by itself, sufficiently uncharacteristic or unusual enough to reasonably say Co-op ought to have been obliged to have intervened. And even taking payment 5 with payments 1 to 4 together – these totalled £30,000, spent over 11 days. I'm not sufficiently persuaded these ought to have looked so unusual or uncharacteristic to Co-op, bearing in mind Mr N had made payments totalling £22,000 in just one day previously (to Hargreaves Lansdown) to say Co-op ought to have been *obliged* to intervene before processing them.

Payments 6 and 7

These were smaller payments, sent six and seven days after the payment 5. Since Mr N hadn't, by then, raised any concerns about payments 1 to 5 (and bearing in mind what I've said about payments 1 to 5 above), I'm not sufficiently satisfied I can reasonably say these ought to have yet triggered Co-op either.

Payments 8 to 10

In his response to my provisional decision, Mr N asked that I reconsider these payments. He's pointed towards the fact that he had, by the time he instructed payment 8, made payments totalling £35,500 to TorOption; that payments 8 to 10 were for large amounts; payments 9 and 10 were international payments; and he still doesn't see how the previous payments he made to Hargreaves Lansdown ought to affect this, as they were a regulated and well-regarded UK company. But I've considered this carefully and I am still not persuaded it's reasonable to say Co-op's systems reasonably ought to have been triggered quite yet. As explained in my provisional decision, payment 8 followed an almost one-month break since payment 7. So I don't think it would have been unreasonable for Co-op to take account of both the Hargreaves Lansdown payments (for reasons already explained) *and* payments 1 to 7 to TorOption (which Mr N hadn't yet raised any concerns about) in assessing whether these payment instructions warranted intervention. So I don't think, on this basis, payments 8 to 10 would reasonably have stood out sufficiently to warrant intervention. I appreciate payments 9 and 10 appear to have been international payments, but I still don't think this would have reasonably triggered Co-op's systems, bearing in mind the prior activity.

Payment 11

However, I think that at the point of Mr N's instruction for payment 11, things ought to have looked unusual to Co-op. This was a lot of money to be sending to one merchant. And with payment instruction 11 – which was an international payment – Mr N was asking to increase his total payments, in this latest batch of payments to TorOption, from around £26,000 to over £34,000. I'm satisfied, in order to meet its obligations I've summarised above, that at this point Co-op reasonably ought to have spoken to Mr N, before allowing the payment through, to check everything was in order, to protect him against the risk of financial harm.

What would have happened if Co-op had intervened?

Where I can't be certain about something like this, I need to make my decision based on the balance of probabilities – in other words, based on what I think most likely would have happened, bearing in mind all the available evidence.

For the reasons I've explained, I think Co-op reasonably ought to have spoken to Mr N before processing his instruction for payment 11, to check everything was in order before it processed the payment, to protect him from the possibility of financial harm.

During such a conversation with Mr N, I would reasonably expect Co-op to have asked Mr N who the payment was for, what it was for, and for the basic surrounding context, and to have then proceeded appropriately from there, with the intention to disturb or unearth a potential fraud or scam. I have no reason to believe Mr N wouldn't have been open with Co-op. Co-op reasonably ought to, therefore, have quickly learned from its conversation with Mr N the basic background to the payment instruction – that Mr N was sending money for a binary-options/forex type investment with TorOption.

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. Further, at the time of Mr N's payments, there was information in the public domain – which a bank like Co-op ought to have known even if a lay consumer ought not – about the very high risks associated with binary options trading, including many warnings of potential fraud (e.g. Action Fraud's June 2016 warning; and the European Securities and Markets Authority's July 2016 warning). Such that I think at the time of Mr N's payments, Co-op reasonably ought to have known that, at the time (before January 2018), and reflecting the risky nature of such products, binary-options traders operating in the UK were required to be regulated by the Gambling Commission.

From what I can see, TorOption was not regulated by the Gambling Commission. Nor was it regulated in any other jurisdiction so far as I am reasonably aware. This indicates it was operating illegally, probably with dishonest intentions – legitimate firms tend to comply with regulatory requirements.

The International Organization of Securities Commissions (IOSCO) is an international body that brings together the world's securities regulators. The FCA also has its own warning list in place to share alerts and insight about merchants that have been identified as potentially being fraudulent. Upon checking these, I cannot see they contained any information about TorOption until a warning was first published on 10 May 2017 (after Mr N's payments). But here I don't think this changes things. As I've said, Co-op reasonably ought to have been aware TorOption was required to be regulated by the Gambling Commission. TorOption wasn't regulated by the Gambling Commission. And I think in circumstances like this, Co-op really ought to have given Mr N a warning that there was a significant risk he was being scammed.

It's possible that Mr N would have wanted to proceed with payment 11 (and subsequent payments) regardless. After all, I understand that he's said that he worked at an international bank looking after contracts between suppliers and the bank, not in foreign exchange or anything like that, but that he obviously had some knowledge (albeit no experience) of investments like this. I also note that Mr N had already invested with Hargreaves Lansdown in funds and shares and he specifically choose to invest with TorOption for a higher risk/reward profile. However, I understand this was Mr N's pension money, and he'd already

'invested' a significant amount of this with TorOption (prior to payment 11) and was proposing to increase this. And I think it's reasonable to suppose that the conversation Co-op ought to have had with him most likely would have put enough doubt in his mind so as to result in further caution on his behalf. He could likely have had it confirmed to him from a quick call to the Gambling Commission that TorOption was required to be regulated by the Gambling Commission but wasn't; that there had been an increase in fraud and scams in this area of 'investment'; and the [www.toroption](http://www.toroption.com) website at the time showed TorOption based in Scotland which didn't overtly square with some of the payments being international.

Overall, therefore, I think it's most likely that if Co-op had done what I've explained it reasonably ought to have done, Mr N ultimately wouldn't have proceeded with payment 11, nor indeed payments 12 to 22.

Putting things right

I've explained why I don't think Mr N would have made and lost payments 11 to 22 (which total £96,180.04) if Co-op had done what it reasonably ought to have done. Mr N was also charged non-Sterling transactional fees totalling £1,324.92 in relation to these payments, charges he wouldn't have occurred if he hadn't made payments 11 to 22 to TorOption. However, I note that Mr N received credits back from TorOption totalling £13,000 in November and December 2016. In his response to my provisional decision, Mr N has argued that these credits related to payments 7 and 8, and not therefore the payments I think ought to have been prevented by Co-op, and so he doesn't think these should be deducted from any compensation award here. However, the credits totalling £13,000 were received on 23 November 2016 and 14 December 2016. I'm not persuaded, if Mr N hadn't made payments 11 to 22 (and payment 11 was on 4 November 2016), that it is most likely Mr N would have received these credits from TorOption bearing in mind how it appears from Mr N's submissions and the evidence overall it was in the business of operating. So I remain of the opinion that it's reasonable to assume he wouldn't have received these credits back if he hadn't made payments 11 to 22 – so these should be deducted from Mr N's loss. The total loss in this regard is therefore £84,504.96 (that is £96,180.04 plus £1,324.92 less £13,000).

I have thought about whether Mr N should bear some responsibility by way of contributory negligence. And I think it's fair to say Mr N really wasn't as careful with his payments as he reasonably ought to have been. This was an incredibly large amount of money to 'invest' without thorough due diligence. And I think Mr N reasonably ought to have been aware of some risk of financial harm but he proceeded anyway. I'm satisfied in circumstances like this, Mr N should bear 50% blameworthiness. I acknowledge Mr N's points on this in response to my provisional decision. But I'm satisfied the 50% blameworthiness should apply to the loss of £84,504.96 identified above (and not to the overall amount Mr N lost, when, for the reasons I've explained, it's only the £84,504.96 I would reasonably expect Co-op to have prevented).

Co-op should therefore pay Mr N £42,252.48 (which is 50% of £84,504.96). I understand from Mr N's submissions that Co-op may indeed have already paid this amount to Mr N (between the date of my provisional decision and the date of this final decision), and if this is the case it obviously doesn't need to pay it twice.

In addition, Co-op should pay Mr N interest on this amount, calculated at 3% simple per year, from the date of the loss to the date of settlement. As the parties are aware, in my provisional decision I suggested a rate of 8% (and not 3%). However, in its response to my provisional decision, Co-op argued that a rate of 3% would be fairer. And in the particular circumstances of this case I'm satisfied this is fair and reasonable. I say this because Mr N, by his own submissions, was looking to take a higher risk with the money than he had done through his Hargreaves Lansdown funds and shares investment(s). So I think it's fair to say

if Mr N hadn't lost this money to the scam, it's most likely that he would still have sought to invest it in something relatively high risk. Mr N has said this most likely would have resulted in a better return than 3%. But I don't think that's clear. It's possible that Mr N might not have made any money at all, or indeed lost money on such an investment. So bearing this in mind, I'm satisfied that 3% is fair and reasonable in this case.

My final decision

For the reasons I've explained, I uphold this complaint in part, and I direct The Co-operative Bank Plc to pay Mr N £42,252.48, plus interest on this amount calculated at 3% simple per year, from the date of the loss to the date of settlement. If Co-op deducts tax from this interest, it should provide Mr N with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 6 February 2023.

Neil Bridge
Ombudsman