

## **The complaint**

Mr P and Ms P complain that Currencies Direct Ltd won't refund the money they lost when they were the victims of a scam.

## **What happened**

The details of this complaint are well-known to both parties, so I have just summarised some of the key events below.

In late 2021 Mr P saw an advert for an investment bank online and, as he was interested in earning more interest on his savings, he contacted them. Mr P exchanged a number of phone calls and emails with people from the bank and was sent a number of documents about the investments available, before ultimately agreeing to take out a fixed-rate bond they offered. Mr P then sent a payment of \$131,780 on 7 December 2021 from his Currencies Direct account to the bank details the investment bank gave him.

Mr P received a bond certificate confirming his investment. And he was in regular contact with people from the bank, who told him about an opportunity to invest in another bond with higher returns. So Mr P agreed to invest again and sent a payment of \$40,356 on 15 February 2022 to a second set of bank details the investment bank gave him.

Mr P's daughter, Ms P, was then also interested in investing. She was added to the Currencies Direct account as a joint account holder. And a third payment of \$101,000 was sent from the account on 7 July 2022 to a third set of bank details the investment bank gave.

Unfortunately, we now know the people Mr P and Ms P were speaking to were scammers who were impersonating a genuine investment bank. The scam was uncovered after Mr P tried to get in touch with the person he had been speaking to but didn't get a response. He then phoned the general switchboard for the genuine bank and was told the person he had been speaking to did not work there and he had likely been the victim of a scam. Mr P and Ms P then reported the payments to Currencies Direct and asked it to refund the money they had lost.

Currencies Direct investigated but said it had processed the payments as Mr P and Ms P had authorised and it was their responsibility to check who they were sending money to. It also said it had taken adequate steps to try to recall the payments. So it didn't agree to refund any of the money Mr P and Ms P had lost. Mr P and Ms P weren't satisfied with Currencies Direct's response, so referred a complaint to our service.

I sent Mr P and Ms P and Currencies Direct a provisional decision on 4 April 2024, setting out why I was intending to uphold this complaint. I explained I thought Currencies Direct should have done more to address the risk of financial harm I think it should have identified when speaking to Mr P about the payments and that, if it had done so, the scam would have been uncovered and Mr P and Ms P wouldn't have made any further payments. So I thought it was reasonable for Currencies Direct to refund Mr P and Ms P's loss from that point on.

Mr P and Ms P accepted the outcome from the provisional decision. Currencies Direct replied that it didn't think the decision was fair. It made a number of arguments including, in summary, that the provisional decision failed to properly take into account the Supreme Court's decision in *Philipp v Barclays Bank UK PLC*, overlooked the significant differences between banks and electronic money institutions and imposed obligations on it that were incorrect and unreasonable.

### **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.

In deciding what's fair and reasonable, I am required to take into account relevant law and regulations, regulators' rules, guidance and standards, and codes of practice; and, where appropriate, I must also take into account what I consider to have been good industry practice at the time.

In broad terms, the starting position at law is that an Electronic Money Institution ("EMI") such as Currencies Direct is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the Payment Services Regulations (in this case the 2017 regulations) and the terms and conditions of the customer's account.

And, as the Supreme Court has recently reiterated in *Philipp v Barclays Bank UK PLC*, subject to some limited exceptions banks have a contractual duty to make payments in compliance with the customer's instructions.

In that case, the Supreme Court considered the nature and extent of the contractual duties owed by banks to their customers when making payments. Among other things, it said, in summary:

- The starting position is that it is an implied term of any current account contract that, where a customer has authorised and instructed a bank to make a payment, it must carry out the instruction promptly. It is not for the bank to concern itself with the wisdom or risk of its customer's payment decisions.
- At paragraph 114 of the judgment the court noted that express terms of the current account contract may modify or alter that position. In *Philipp*, the contract permitted Barclays not to follow its consumer's instructions where it reasonably believed the payment instruction was the result of APP fraud; but the court said having the right to decline to carry out an instruction was not the same as being under a legal duty to do so.

In this case, the terms of Currencies Direct's contract with Mr P and Ms P modified the starting position described in *Philipp*, by allowing Currencies Direct to stop or suspend a payment "*if it has reasonable ground for doing so relating to...*

*(b) the suspected unauthorised or fraudulent use of the Online System, the API, the Personalised Security Credentials or an Onward Payment*".

So Currencies Direct was required by the implied terms of its contract with Mr P and Ms P and the Payment Services Regulations to carry out their instructions promptly, except in the circumstances set out in its contract, which included suspected unauthorised or fraudulent use.

Whether or not Currencies Direct was required to stop or suspend a payment for one of the reasons set out in its contract, the basic implied requirement to carry out an instruction promptly did not in any event mean Currencies Direct was required to carry out the payments immediately<sup>1</sup>. Currencies Direct could comply with the requirement to carry out payments promptly while still giving fraud warnings, or making further enquiries, prior to making the payment.

And, I am satisfied that, taking into account longstanding regulatory expectations and requirements and what I consider to have been good industry practice at the time, Currencies Direct should from December 2021 fairly and reasonably have been on the look-out for the possibility of fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances (irrespective of whether it was also required by the express terms of its contract to do so).

In reaching the view that Currencies Direct should have been on the look-out for the possibility of fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances, I am mindful that in practice all banks and EMI's like Currencies Direct do in fact seek to take those steps, often by:

- using algorithms to identify transactions presenting an increased risk of fraud;
- requiring consumers to provide additional information about the purpose of transactions during the payment authorisation process;
- using the confirmation of payee system for authorised push payments;
- providing increasingly tailored and specific automated warnings, or in some circumstances human intervention, when an increased risk of fraud is identified.

In reaching my conclusions about what Currencies Direct ought fairly and reasonably to have done, I am also mindful that:

- Electronic Money Institutions like Currencies Direct are required to conduct their business with “due skill, care and diligence” (FCA Principle for Businesses 2), “integrity” (FCA Principle for Businesses 1) and a firm “must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems” (FCA Principle for Businesses 3)<sup>2</sup>.
- Over the years, the FCA, and its predecessor the FSA, have published a series of publications setting out non-exhaustive examples of good and poor practice found when reviewing measures taken by firms to counter financial crime, including various iterations of the *“Financial crime: a guide for firms”*.
- Regulated firms are required to comply with legal and regulatory anti-money laundering and countering the financing of terrorism requirements. Those requirements include maintaining proportionate and risk-sensitive policies and procedures to identify, assess and manage money laundering risk – for example through customer due-diligence measures and the ongoing monitoring of the business relationship (including through the scrutiny of transactions undertaken throughout the course of the relationship). I do not suggest that Currencies Direct

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<sup>1</sup> The Payment Services Regulation 2017 Reg. 86 states that “the payer’s payment service provider must ensure that the amount of the payment transaction is credited to the payee’s payment service provider’s account **by the end of the business day following the time of receipt of the payment order**” (emphasis added).

<sup>2</sup> Since 31 July 2023 under the FCA’s new Consumer Duty package of measures, banks and other regulated firms must act to deliver good outcomes for customers (Principle 12), but the circumstances of this complaint pre-date the Consumer Duty and so it does not apply.

ought to have had concerns about money laundering or financing terrorism here, but I nevertheless consider these requirements to be relevant to the consideration of Currencies Direct's obligation to monitor its customer's accounts and scrutinise transactions.

- The October 2017, BSI Code<sup>3</sup>, which a number of banks and trade associations were involved in the development of, recommended firms look to identify and help prevent transactions – particularly unusual or out of character transactions – that could involve fraud or be the result of a scam. Not all firms signed the BSI Code (and Currencies Direct was not a signatory), but the standards and expectations it referred to represented a fair articulation of what was, in my opinion, already good industry practice in October 2017 particularly around fraud prevention, and it remains a starting point for what I consider to be the minimum standards of good industry practice now (regardless of the fact the BSI was withdrawn in 2022).

Overall, taking into account relevant law, regulators rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider it fair and reasonable that from December 2021 Currencies Direct should:

- have been monitoring accounts and any payments made or received to counter various risks, including preventing fraud and scams;
- have had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (among other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which firms are generally more familiar with than the average customer;
- in some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, or provided additional warnings, before processing a payment.

*Should Currencies Direct have recognised that Mr P and Ms P were at risk of financial harm from fraud?*

The first payment Mr P and Ms P made as a result of this scam, for \$131,780 on 7 December 2021, was for a very significant amount of money. It was also a significantly larger amount than previous payments out of the account. The previous payments had been sent to accounts in Mr P's own name, whereas the first scam payment was sent to an account in the name of a company Mr P hadn't sent money to before. And the previous payments were all sent in Euros, but the first scam payment was sent in US Dollars.

And it appears Currencies Direct did identify a risk here itself, as it had a number of conversations with Mr P about the payment before it was processed where it asked about where the money was coming from and what checks Mr P had done into the investment bank.

On 6 December 2021, the day before the first payment, Mr P called Currencies Direct for help making the payment. He told it he had an invoice he needed to pay, and that he had the name of the bank the payment was going to, its address and a reference number for the payment. Currencies Direct asked if the payment was going to his own account, and Mr P explained he was paying the invoice for a fixed-rate bond offered by the investment bank. Currencies Direct then asked if he had double checked the bank details, to check that they were correct and that the account belonged to who he wanted to pay and not to anyone else.

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<sup>3</sup> BSI: PAS 17271: 2017" Protecting customers from financial harm as result of fraud or financial abuse"

And Mr P replied that he wasn't sending the money directly to the bank offering the fixed-rate bond, but to a second bank he has a letter from which he describes as a holding account "*or whatever it's called*". Currencies Direct then helps him set up the beneficiary for the payment, during which Mr P says the account the payment is going to is in the name of another company – different from either of the two banks he has mentioned so far, and which he can't pronounce but has to spell out. Currencies Direct then confirms the beneficiary has been set up, and Mr P will have to call again once he has sent it the money for the payment.

On 7 December 2021, the day of the first payment, Currencies Direct spoke to Mr P over the phone twice. First, it spoke to him and asked about the source of the funds he had sent it, as they appeared to have come from a business account rather than a personal account. It asked him to send it bank statements showing the source of the funds, or the completion statement for the property sale the funds related to. And it explained it needed this information for anti-money laundering reasons.

Then later that day, Currencies Direct called Mr P to make the payment. It went through security and identity verification with him and confirmed the details of the payment. It asked the reason for the payment, and Mr P replied that it was an invoice for a fixed-rate bond. Mr P then asked what a routing bank was, and Currencies Direct replied that it was an intermediary bank. It then confirmed Mr P's instruction to make the payment and confirmed it had been sent.

In calls with Mr P after the first payment was made, Currencies Direct also asked if he had done checks into the investment bank, and was told he had spoken to them on the phone and seen his contact's profile on a professional networking website. And Currencies Direct asked questions about the address of the company receiving the payment and for a copy of the payment instruction Mr P had been given, which it was given.

So while Currencies Direct did ask some questions about the payments Mr P was making, seemingly to identify and address possible risks, I think the answers it received to the questions it asked should have led to it identifying a further risk here. The questions Currencies Direct did ask of Mr P revealed that he was making the payment for a fixed-rate bond, but also that there appeared to be a number of different companies and banks involved, that Mr P seemed unsure about the exact journey and destination of the payment he was making, and that the payment wasn't going to an account in the name of the investment bank offering the fixed-rate bond Mr P thought he was taking out or that he had been speaking to – but was instead going to an account in the name of another company.

As Currencies Direct specifically asked Mr P whether he had checked the bank details belonged to who he wanted to pay, it appears it recognised that payments being sent to companies other than who the customer intended is a common feature of this kind of scam. So I think the answers Mr P gave to the questions it asked – particularly that the payment was being sent to an account in a different name than the investment bank offering the bond or that Mr P had been speaking to – should have caused it some concern that he could be at heightened risk of financial harm from fraud. And having identified this risk, and given the amount of money involved and the potential harm to Mr P and Ms P, I think it would be reasonable to expect Currencies Direct to have asked additional follow-up questions, in order to address this risk.

Currencies Direct argued in response to the provisional decision that the answers Mr P gave it were reassuring enough for it not to have any further concerns. But I think it's clear from the conversations it had with Mr P that he's unsure about the exact journey of the payment he's making, who it is going to, which companies are involved and why he's not sending money directly to the bank he thinks he is investing with – which I think should have caused

concern for Currencies Direct. I also don't think the specific quotes from Mr P Currencies Direct has highlighted, such as him mentioning his "*financial guru guy*" or his "*financial advisor broker type person*" suggest Mr P has a particularly clear understanding of who he is dealing with or their role. And "*guru*" and "*broker type person*" don't sound like authorised individuals or legitimate parties, and are also common features of investment scams. So I still think Currencies Direct should have had some concerns about what Mr P and Ms P were doing following the answers Mr P gave and made further enquiries before processing the payments.

Currencies Direct has also argued it didn't have a long history of dealing with Mr P and Ms P. And it highlighted that the relationship between an EMI and its customer is different than the relationship between a bank and its customer. It said EMIs operate on the basis of relatively infrequent transactions, rather than ongoing day-to-day banking relationships, so have less information available and transaction monitoring is less likely to reveal potential fraud.

I agree that the relationship between an EMI and its customer is often different than the relationship between a bank and its customer, and that EMI's often have less information available when monitoring accounts and assessing transactions. But, as I explained above, I still consider it fair and reasonable that EMI's such as Currencies Direct should have been monitoring accounts and looking out for transactions which indicated a high risk of financial harm from fraud at the time.

And, in this case, Mr P's account with Currencies Direct had been open for more than a year before the first payment made as a result of this scam, and a number of payments had been made out of it during this time. So I think Currencies Direct had enough information to form a picture of what was normal or usual activity on Mr P and Ms P's account when assessing whether the payments carried a heightened risk of financial harm from fraud. And I don't think the relatively few payments made prevented it from assessing this risk or from identifying an elevated risk based on the answers Mr P gave to the questions it asked him.

Currencies Direct also said the nature of its business is that it is used for large, one-off transactions, and so it disagrees that the payments Mr P and Ms P made would or should have appeared suspicious. But while I appreciate that many customers will use EMI's such as Currencies Direct for large, one-off transactions, I think the expectation I've set out for Currencies Direct to look out for unusual transactions or transactions that might indicate its customers were at risk of fraud means transactions that are unusual or carry risk for that particular customer – not just transactions that are unusual or carry risk for EMI's in general. And, even taking into account that many customers will use EMI's for large one-off transactions, I think this payment was significantly unusual enough and the answers Mr P gave to its questions should have raised enough concern, that Currencies Direct should still have identified a risk here and done more to address it.

*Would further questions have prevented the loss Mr P and Ms P suffered from that point?*

I think Currencies Direct should have asked further questions of Mr P about the investment he was making, in order to address the risk I think it should have identified from the answers he gave to the questions it did ask. And I think proportionate questions to address this risk would have included questions such as where he'd found out about the investment, how he'd been communicating with the investment bank he was dealing with, what returns he'd been promised and what checks he'd done into the investment bank.

I've not seen anything to suggest Mr P would have lied or tried to mislead Currencies Direct if he was asked more details about the investments he was making. And in the calls that did take place, Mr P is honest about what he is investing in and who the payments are going to.

So, if asked further questions, I think he would likely have said he had found out about the investment bank through an advert on social media and had been communicating with it through the contacts he had made following that advert.

As finding investments on social media and communicating with people who aren't who they say they are or aren't who the customer thinks are common features of investment and impersonation scams, I think finding out this information should have caused Currencies Direct significant concern. And I think it should then have warned Mr P about the possibility of fake or cloned companies, highlighted the importance of making sure any communication is done through legitimate channels and suggested Mr P checked he was dealing with a genuine bank by contacting them using details from the bank's website or the FCA register.

As Currencies Direct is the expert in financial matters in this situation, I think it's concerns would have carried significant weight with Mr P. I think he would likely have checked online and seen that the Financial Conduct Authority had recently issued a warning about cloned companies using the name of the investment bank he thought he was dealing with, then checked his investment with the genuine bank and the scam would have been uncovered – as it was when he did ultimately contact the genuine bank.

Currencies Direct has argued that Mr P and Ms P were convinced it was a genuine investment and so would likely have made the payments regardless of any intervention it made. It's also said they tried to make two further payments after this scam to other likely scams offering to recover the money they had lost, which it blocked, and says this suggests their approach was to just go ahead with the payments.

But in the phone calls I've listened to, Mr P asks about the checks Currencies Direct will do on the payments several times and mentions the reassurance these checks are giving him about the investment. So I think he would likely have taken significant notice of any warning it gave and carried out any checks it suggested – as this would only have added to the reassurance he appeared to be seeking and thought he was receiving from Currencies Direct.

And from the correspondence I've seen, Mr P asked Currencies Direct for its opinion on the messages he received about recovery and then didn't attempt any payments after it suggested they may also be a scam. So I don't think this suggests Mr P and Ms P would have continued with the payments in any event. And I still think intervention from Currencies Direct would have prevented the payments Mr P and Ms P did make.

So if Currencies Direct had done more to protect Mr P and Ms P before processing the first payment here, as I think it should have done, I don't think Mr P and Ms P would have lost the money from this payment or any of the later payments. And so I think it would be reasonable for Currencies Direct to bear some responsibility for the loss Mr P and Ms P suffered from that point on.

#### *Should Mr P and Ms P bear some responsibility for their loss?*

I've also thought about whether it would be fair for Mr P and Ms P to bear some responsibility for the loss they suffered.

But this was a sophisticated scam where the scammers were pretending to be from a genuine investment bank. They had set up fake email addresses using the genuine bank's name, so their emails reasonably appeared to be coming from the genuine bank. The emails Mr P received from the scammers looked professional, with no obvious indications that they weren't from the genuine bank. And Mr P and Ms P were sent a significant number of documents relating to the investments, which also appeared to be genuine and professional

– and were likely copies of similar documents the genuine bank used. So I don't think there was anything about their contact with the scammers that should have caused Mr P and Ms P significant concern.

Mr P and Ms P also appear to have tried to check that the investment and the bank were genuine. Mr P says he spoke to the person he was dealing with over the phone a number of times. He says he asked for, and appears to have been given, a relatively plausible explanation for the intermediary banks the payments were being sent to. He confirmed the bank details for the payments in writing and over the phone. And he says he looked up the person he was dealing with online and saw their profile on a professional networking site, which matched what he had been told about them.

I appreciate that, with the benefit of hindsight, it's possible to identify a number of things about what was happening that could have caused Mr P and Ms P some concern. But, based on what I've seen, I don't think it was unreasonable that, at the time, they either didn't pick up on these things or weren't caused enough concern by them to overcome the parts of the scam that felt genuine. And I don't think it was unreasonable for them not to do further checks than they did, as I think they reasonably thought they were dealing with a well-known investment bank.

Currencies Direct has argued that there is a contradiction between the suggestion that it should have identified the fraudulent nature of the transactions but that Mr P and Ms P shouldn't bear any responsibility for their loss. But Currencies Direct is the financial expert in this situation and would specifically be aware that customers should contact firms using genuine contact details, from the FCA register if necessary. So I don't think it's unreasonable to hold it to a higher standard than Mr P and Ms P. I also didn't suggest that the seemingly genuine and professional documents Mr P and Ms P were sent as part of the scam should have put Currencies Direct on notice of the scam – merely that it wasn't unreasonable that these documents didn't cause Mr P and Ms P significant concern.

So I still don't think it would be fair to say Mr P and Ms P acted unreasonably, or that they should bear some responsibility for their loss.

### Interest

If this scam had been prevented when Mr P tried to make the first payment on 7 December 2021, I think Mr P and Ms P would instead have invested their money in an alternative fixed-rate bond. And so I think it would be fair for Currencies Direct to also pay interest on the refunds at the Bank of England monthly average rate for two-year fixed-rate bonds at the point the payments were made, as set out below:

- Payment of \$131,780 – 0.54%
- Payment of \$40,356 – 1.17%
- Payment of \$101,000 – 2.1%

### **My final decision**

For the reasons set out above, I uphold this complaint and require Currencies Direct Ltd to:

- Refund Mr P and Ms P the three payments they made as a result of this scam



- Pay Mr P and Ms P interest on these refunds, at the interest rates set out above, from the date of the payments until the date of settlement

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Ms P to accept or reject my decision before 5 December 2024.

Alan Millward  
**Ombudsman**