

## The complaint

Miss C is unhappy that HSBC UK Bank Plc (“HSBC”) won’t refund the money she lost to an investment opportunity she now believes was a scam.

## What happened

The background to this complaint is well known to both parties and was set out in the investigator’s view of 10 November 2023. But briefly, between 23 November 2020 and 17 June 2021 Miss C made four payments (summarised below) to a company I will refer to as M for what she believed was a genuine investment opportunity. The payments were made via N – a genuine company trading on behalf of M. Miss C lost her capital and never received her returns so believes she has been the victim of a scam and would like HSBC to reimburse her.

Date	Amount
23 November 2020	£5,000
23 November 2020	£5,000
24 November 2020	£20,000
17 June 2021	£5,000

HSBC said the payments weren’t covered under the Lending Standard Board’s Contingent Reimbursement Model (CRM) Code. It explained that N was a legitimate and genuine business that has gone into liquidation.

Our investigator upheld the complaint in part. She felt Miss C had been the victim of a scam. For the first three payments - covered by the Contingent Reimbursement Model (CRM) Code - she considered Miss C had a reasonable basis for believing this was a genuine situation. She said that as the final payment was an international payment (and it isn’t covered by the CRM Code) she didn’t think HSBC would have been able to detect that this was a scam at the time – so didn’t recommend any redress for it.

Miss C accepted the investigator’s view. HSBC didn’t respond. It was granted a number of extensions to reply since the view and as we haven’t heard from HSBC since December 2023, I asked it to reply to me by 27 March 2024, but it hasn’t responded.

I issued my provisional decision on 8 July 2024 explaining why I was thinking of reaching the same conclusion as the investigator for the first three transactions but a different conclusion for the fourth transaction. I’ve also included some additional reasoning. Both parties accepted my provisional 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.

As neither party has provided any further evidence or arguments for consideration, I see no reason to depart from the conclusions set out in my provisional decision. For completeness, I have set this out below.

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

Where the evidence is incomplete, inconclusive or contradictory, I reach my decision on the balance of probabilities – in other words, on what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

In broad terms, the starting position in law is that a firm is expected to process payments and withdrawals that a customer authorises, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. However, where the customer made the payment as a consequence of the actions of a fraudster, it may sometimes be fair and reasonable for the bank to reimburse the customer even though they authorised the payment.

I take HSBC's final response to mean it believes the additional step of Miss C paying N (before the money was passed to M) means that the provisions of the CRM Code don't apply. Although it's not clear whether or not HSBC also considers Miss C didn't fall victim to a scam here - as it hasn't considered her claim under the CRM Code at all.

*Are the payments covered under the provisions of the CRM Code?*

The CRM Code does not require the initial recipient of a payment to be an account owned by and for the benefit of the fraudster. Neither does it require that account to be controlled by a party which is complicit in the fraud. Instead, the relevant test is whether an APP scam has taken place. In this case, I think the payment meets the definition of an APP scam under DS1(2)(a)(ii) in that Miss C transferred her funds to another person (N) for what she believed was a legitimate purpose but was in fact fraudulent. Specifically, Miss C believed that she was making a payment as part of a legitimate scheme but, in fact, she was being defrauded.

If the CRM Code required that the first recipient of funds also be the party that benefits from the fraud, a great many claims would be excluded. I say this because many first-generation accounts are not controlled by the fraudster themselves. The use of money mules (complicit or innocent) is well-known and the CRM Code does not require the sending firm to make an assessment of whether the recipient account holder was complicit in the fraud or not.

Instead, I need to consider whether the funds were effectively under the control of the fraudster at the point they arrived at N.

I've seen evidence that the funds that credited N's account were passed to M within a few days (seemingly minus a small fee retained by N). Given what is known of the relationship between N and M it's very likely that this subsequent transaction was carried out under a pre-existing agreement. More importantly, Miss C does not seem to have a customer relationship with N, the funds do not appear to credit an account in her name and she had no significant interactions with it. I'm satisfied N was acting on behalf of M and not Miss C and she had no reasonable way of preventing the onward transfer of funds to M.

It follows then that the money was both out of Miss C's control at the point it arrived at N and effectively under the control of M. Consequently, the circumstances in this case are not significantly different from a typical scam scenario - where funds are transferred into an account which is unlikely to be owned by the fraudster, but the recipient has agreed to pass funds on to an ultimate beneficiary.

That means that the payments Miss C made is capable of being covered by the provisions of the CRM Code. The Lending Standards Boards' consultation makes clear that certain multi-stage frauds are within the scope of the Code.

But, for the reasons I've already outlined, in this case there's no need to consider the payment from N to M (the onward transmission of funds) as the funds were effectively under the control of M once they reached N.

Finally, I've thought about whether it's fair for the CRM Code to apply in such circumstances. It's not clear if HSBC thinks that Miss C should complain directly to N and the fact it was FCA authorised (it entered liquidation in August 2021) is in itself enough to disapply the CRM Code. But, for the reasons I've already set out, the involvement of a genuine (or unwitting) intermediary does not exclude the possibility of the CRM Code applying. Neither do I think it is unfair for the Code to apply.

I am not sure if HSBC accepts, it would be liable (at least to consider the complaint under the Code) had the payment been made directly to M. But I think it's fair to say, I think, that the involvement of N was essentially incidental. And, whether the payment went directly to M or to N it's very unlikely it would have found that payment to be unusual and prevented it.

So, while I'm somewhat sympathetic to HSBC that it, rather than another financial business, will be solely responsible for Miss C's loss, given that HSBC is a signatory to the CRM Code, I don't find that HSBC being responsible creates an unfair outcome. Neither can I direct Miss C to pursue the matter solely with N which is, in any case, now in liquidation.

HSBC has previously said it hasn't fully considered this matter under the CRM Code, so if it wishes to make any further submissions about the applicability of the exceptions, it should do so in advance of my final decision. Subject to those submissions, I am likely to reach a decision as follows:

#### *The CRM Code*

It's not clear whether HSBC considers this was a failed investment rather than a scam. The Code doesn't cover

*private civil disputes, such as where a Customer has paid a legitimate supplier for goods, services, or digital content but has not received them, they are defective in some way, or the Customer is otherwise dissatisfied with the supplier;*

So it wouldn't cover a genuine investment that has subsequently failed.

An APP scam is where:

*The Customer transferred funds to another person for what they believed were legitimate purposes but which were in fact fraudulent.*

Miss C believed the purpose was that of an investment providing a fixed rate of return to a green energy investment company which would, in turn, provide small and medium sized renewable energy developers with short term funding. According to the literature it purported

*to only ever lend to sophisticated renewable energy investors and experienced renewable energy developers.*

I've considered whether there is convincing evidence to demonstrate that the true purpose of the investment scheme was significantly different to this, and so whether this was a scam or genuine investment.

Looking at M's records on Companies House – it hasn't posted accounts since 2021 and doesn't appear to have been audited. The nature of the business was listed as development of building projects and, whilst the listing had also included activities auxiliary to financial intermediation by the time Miss C made her investment, this doesn't appear to be in line with the investment purposes Miss C was led to believe she was investing in.

The FCA (Financial Conduct Authority) provided a warning in October 2021 about M providing financial services when it was not authorised to do so. Miss C invested before this date.

Z (an organisation that took over M in 2022) told investors the FCA warning was due to clone companies impersonating M - which doesn't appear to be true. And there's no current evidence to suggest a clone company was in operation as Z claimed.

It's also important for me to state that, to date, I've not been provided with any evidence to show that the business was operating in line with the way it described to, and agreed with, its investors prior to their investment. So based on the evidence I have, on balance, I believe this was a scam.

#### *Reimbursement under the CRM Code*

Under the CRM Code the starting principle is that a firm should reimburse a customer who is the victim of an APP scam, like Miss C. The circumstances where a firm may choose not to reimburse are limited and it is for the firm to establish those exceptions apply. R2(1) of the Code outlines those exceptions. Although HSBC has not established that any of those exceptions apply, for completeness I find that none apply in this case. I have explained why below:

#### *Did Miss C have a reasonable basis for belief?*

I need to consider not just whether Miss C believed she was sending money for an investment, but whether it was reasonable for her to do so.

The investigator outlined the reasons why she felt Miss C had a reasonable basis for believing this was a genuine investment opportunity and I agree - broadly for the same reasons. Miss C was actively looking for an investment opportunity and initiated contact with M rather than being cold called. I don't think the indicative rates of return suggested that the investment was too good to be true. And, in line with a genuine investment opportunity, the company's website stated that capital is at risk. The investment material I've reviewed appears professional and there was nothing in the public domain at the time about either M or N that Miss C could've reasonably inferred from that a scam was taking place. The most persuasive aspect of the scam that I've seen is that M used N, the firm regulated by the FCA at the time of the scam, to gain legitimacy and this was highlighted in the literature.

#### *Did Miss C ignore an effective warning?*

Another exception to reimbursement is if Miss C ignored an effective warning.

The CRM Code says that effective warnings should be risk based and, where possible, tailored to the APP scam risk indicators and any specific APP scam types identified through the user interface with which the customer is initiating the payment instructions.

The CRM Code also says that when assessing whether the firm has met those standards, consideration must be given to whether compliance with those standards would have had a material effect on preventing the APP scam that took place.

The CRM Code sets out the minimum criteria that a warning must meet to be an 'Effective Warning'. I appreciate that, in providing Miss C with the messages, HSBC took steps to provide her with an effective scam warning during this payment journey. However, despite this, I'm not persuaded the warnings met the minimum requirements of an Effective Warning under the CRM Code.

HSBC's electronic warning at the time of Miss C's payments advised her to talk to someone she trusts and check that the company is authorised by the FCA. Miss C says she discussed the investment with her partner and was reassured by the fact that N was authorised by the FCA at the time. And as I said above, I don't think the indicative rates of return suggested that the investment was too good to be true. In my view, Miss C had already been through the steps suggested to avoid a scam. Overall, I don't think the warning was sufficiently impactful or specific as required by the CRM Code. And given it focuses on pension scams, I think Miss C might reasonably have concluded the warning simply wasn't relevant to her.

In any event, I'm not convinced a better warning would have made a difference in this scenario anyway given the sophistication of this particular scam and so the effective warning exception cannot be fairly applied.

#### *Transaction 4*

The investigator concluded this transaction was an international payment (and therefore accordingly the payment wouldn't be covered by the CRM Code). However, I believe this payment was made to a UK bank account. And whilst it was transferred to a different bank account to the first three transactions – it was still an account belonging to N. So this transaction is covered by the CRM Code and for the same reasons I've set out above – can be considered under the CRM Code.

I've taken into account the circumstances surrounding this final payment - as it was some months after the initial investment. But I've seen nothing to indicate I should reach a different conclusion to that set out for the first three transactions (ie none of the exceptions apply).

From what Miss C has told us M contacted her a few times following the initial investment to ask if she wanted to invest more money. In June 2021 she decided to invest a further £5,000. She says she contacted N to check its association with M. I've seen the letter from N dated 11 June 2021 to confirm its association with M and N also emphasised the fact that it was '*authorised and regulated by the FCA*'. I think this would have further reassured Miss C that the investment was legitimate.

HSBC hasn't provided anything further than the warning I've described above- so for the same reasons as set out above, I don't think it can rely on this exception to reimbursement.

#### **Recovery of funds**

In light of my conclusions above, it is not necessary in this case to consider whether the bank also exercised enough care and urgency in trying to recover the stolen funds from the

payee bank before they were irretrievably removed by the scammers. But for completeness, even if there was a delay, I don't think it likely would have made a difference here.

The first three scam payments were made in November 2020 and the last scam payment was made in June 2021. The scam wasn't reported until 28 June 2022. I understand that Miss C didn't know she was the victim of a scam before this, but the delay means any recovery action was most unlikely to be successful - as scammers usually remove funds within hours.

### **Putting things right**

In order to put things right for Miss C, HSBC UK Bank Plc should

Refund Miss C in full for transactions 1-4.

Because Miss C has been deprived of this money, I consider it fairest that HSBC UK Bank Plc add 8% simple interest to the above from the date of the transactions to the date of settlement.

If HSBC UK Bank Plc is legally required to deduct tax from the interest it should send Miss C a tax deduction certificate so she can claim it back from HMRC if appropriate.

### **My final decision**

My final decision is that I uphold this complaint and I require HSBC UK Bank Plc to put things right for Miss C as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 15 August 2024.

Kathryn Milne  
**Ombudsman**