Financial Ombudsman Service

Lending Standards Board Review of the Contingent Reimbursement Model Code for Authorised Push Payment Scams

Financial Ombudsman Service response

2 October 2020

Introduction

Role of the Financial Ombudsman Service

The Financial Ombudsman Service was set up by Parliament under the Financial Services and Markets Act 2000 to resolve individual complaints between financial businesses and their customers – fairly and reasonably, quickly, and with minimal formality. On 1 April 2019, our remit was extended to complaints made by more small businesses about financial services, and to complaints made by customers of claims management companies.

If a business and their customer can't resolve a problem themselves, we can step in to sort things out. Independent and unbiased, we'll get to the heart of what's happened and reach an answer that helps both sides move on. And if someone's been treated unfairly, we'll use our powers to make sure things are put right. This could mean telling the business to apologise, to take action or to pay compensation – in a way that reflects the particular circumstances. On 1 April 2019, the amount we can tell a business to pay changed to £350,000, and will rise in line with inflation each year. For 2020/21, the limit is £355,000.

In resolving hundreds of thousands of complaints every year, we see the impact on people from all sorts of backgrounds and livelihoods. We're committed to sharing our insight and experience to encourage fairness and confidence in the different sectors we cover.

The Financial Ombudsman Service's role is not to set regulation or to instruct firms how they should conduct themselves in general. We can make directions on a case-by-case basis as to what action we think a firm should take to put things right when something has gone wrong, and we will feedback to firms, as well as other stakeholders including the Financial Conduct Authority and Payment Systems Regulator, when we see systemic issues leading to complaints arriving at our service. Firms are also required under the FCA's DISP rules to learn from our decisions.

Background

In the last few years, we have noted a significant increase in the volume of complaints about fraud and scams being referred to our service. In the 2019/2020 financial year we received just under 11,000 new fraud and scams complaints. These complaints relate to a variety of different types of fraud and scam, including APP scams, which are continually evolving and can be extremely sophisticated and convincing.

When investigating complaints, we are required to decide individual cases on the basis of what's fair and reasonable in all the circumstances taking into account relevant: law and regulations, regulators' rules guidance and standards, codes of practice (including industry codes, such as the CRM Code), and what we consider to have been good industry practice at the time.

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It is important to note that the CRM Code is not the first step the industry has taken in recent years to help tackle fraud and to protect consumers from financial harm. Whilst parts of the CRM Code have undoubtedly strengthened consumer protection in this area – most notably, the commitment by CRM Code signatories to reimburse consumers in a 'no blame' scenario – other parts of the CRM Code build on, or replicate to some extent, existing commitments and standards of good industry practice as well as some legal and regulatory requirements.

For example, the CRM Code requires firms to detect, prevent and respond to APP scams – an expectation already created in slightly different forms by other pre-CRM Code voluntary arrangements such at the Banking Protocol and the British Standards Institute's October 2017 *'Protecting Customers from Financial harm as a result of fraud or financial abuse – Code of Practice'* as well as through anti-money laundering requirements and other legal considerations.

Whilst as the CRM Code strengthens consumer protection in certain areas, it is important to remember that the Code also reinforces and helps bring together in one place firms' existing obligations to protect consumers from financial harm arising from APP scams.

Observations on the CRM Code

Overall, we believe the CRM Code sets clear expectations of and standards for firms to meet as well as a clear framework for determining when they should reimburse victims of APP scams. The focus of this response is on our experience through the complaints we see on the application of the reimbursement provisions of the code.

Notwithstanding the clear framework set out the CRM Code, our investigations on individual complaints suggest a range of approaches by firms to the application of the CRM Code. While some firms appear to have embraced the spirit and expectations of the Code when a customer is the victim of an APP scam, our overall impression is that firms are applying the reimbursement provisions inconsistently and in some cases incorrectly – failing to reimburse consumers in circumstances anticipated by the Code

We engage extensively with individual firms to help them understand our approach to APP scam complaints where the CRM Code is a relevant consideration. While we have started to see evidence that some firms are applying the CRM Code more effectively, our view is that there remains significant room for improvement.

What we have seen in our casework broadly mirrors the LSB's findings in its summary report, *Review of approach to reimbursement of customers – provision R2(1) (c)*, published in April 2020.

Key findings from our casework

Effective warnings

Given the sophisticated nature and evolving complexity of many APP scams – often taking advantage of social engineering and preying on customers fears to make high-risk, in-the-moment decisions – a continuous pursuit of improved interventions and warnings will be required of firms to impact the incidence and success of APP scams.

In referring to the Code when deciding on cases, we find the Code itself to be clear on what constitutes an effective warning.

However, insight gathered from our casework suggests that some firms are declining to reimburse customers on the basis that a generic warning would have been visible to a customer without considering whether those warnings were effective – and in particular whether the warning was specific to the type of fraud, impactful in all the circumstances and likely to have a material impact on preventing the APP scam that took place.

Many warnings appear to be designed to appeal to logical reflective reasoning, rather than the reality of human beings being, at least partly, driven by a range of emotions often induced by fraudsters, and so may lack the impact required to alert the victim in the way that a personalised intervention, such as phone call from the firm or face-to-face intervention might.

We understand from our engagement that some firms have recognised the limitations of their warnings – particularly those used in the early months of the Code and are taking steps in increase and evidence the effectiveness of their warnings. Others continue to believe their warnings are already effective and are declining to reimburse customers on this basis.

We also note some firms recognise that, given the evolving nature of scams, an ostensibly effective warning may cease to be effective over time and when it comes to warnings, there is no 'magic bullet'. As the LSB code touches on, the warnings are there to be effective at stopping scams so we would expect firms to review them regularly and the approach to them to be dynamic as a result.

Inappropriately declining reimbursement

We have seen some firms inappropriately declining reimbursement on the basis that the customer did not have a reasonable basis for believing the transaction or recipient involved in an APP scam was genuine. In cases where this has been the case, we have seen examples of firms:

- Not giving reasons to customers for their decision not to reimburse under the Code: some firms are not providing a clear rationale for their conclusions, and in some cases firms do not mention the Code in Final Response Letters to customers. In other cases, it is unclear from the firm's response why, in the firm's view, a permitted exception to reimbursement applies – or how the firm met the Code's standards for firms in this regard.
- Not taking into account, or recognising, the full circumstances of the scam – for example, not giving adequate regard to the role of social engineering in an APP scam. A fundamental feature of many of the scams we see is a state of emotion in the consumer – for example fear – that has been carefully created by the fraudster. Time pressure is often a feature created by the fraudster too.
- Expecting a higher degree of caution and/or knowledge of scams on the part of the customer – for example, expecting the customer to make additional checks before making the payment – than might ordinarily be reasonable for customers generally, or in the particular circumstances of the transaction. We continue to see that some firms' "bar is not in the right place" in this regard.
- Making decisions not to reimburse based on assertion, rather than on the evidence.
- When declining to reimburse based on assertion, offering 50% reimbursement when 100% reimbursement would be appropriate. This presents the risk that customers may be

deterred by a partial offer from pursuing what may be valid complaints.

- Applying generic reasoning to individual complaints.

In many of the cases we have seen the impact of these approaches to “reasonable basis for believing” – and effective warnings – is that the presumption in favour of reimbursement set out in the Code is, in practice, effectively reversed. This would tend to suggest that some firms (but not all) are failing to properly recognise or meet their obligations under the Code, leading to legitimate claims from victims of fraud being incorrectly declined. We think this is an important area for the LSB to consider – and for all firms to consistently recognise the commitments under the Code around reimbursement, since it goes to the heart of the aims of the reimbursement section of Code and its success

Practitioners Guide

We note that the Practitioners Guide falls within the scope of this consultation. Whilst we do not typically refer to the Practitioners Guide when considering complaints, our casework suggests there is a risk that the Practitioners Guide may create different expectations about the application of the Code, deviating from what is contained within and intended by the Code itself.

We hope this information is useful and would of course be happy to discuss it in more detail. We will of course continue to share our insight on fraud and scams complaints with the Lending Standards Board and other stakeholders as well as continuing to work with industry to improve the handling of complaints.