Ombudsman Decision
CIFO Reference Number: 19-000290
Complainant: Mr M
Respondent: HSBC Bank plc, Jersey branch

Complaint

Mr M complains, in summary, that HSBC Bank plc, Jersey branch, failed to identify that he was the subject of an investment fraud/scam. He holds the bank accountable for not having noticed the change in his transactional behaviour and for failing to contact him to question the payments he was making. Had it done so, Mr M considers that the scam would have been uncovered and he would not have made most, if not all, the payments he did.

Background and Provisional Decision

I previously set out the background to this complaint in my Provisional Decision dated 30 March 2021 – a copy of which is attached, and forms part of my Final Decision.

The outline background is that, in early 2017, Mr M was approached by a company offering 'contract for difference' trading called BinaryXChange (which I am told later became MarketsXChange). He decided to invest and trade, and between 24 March 2017 and 10 October 2017 made 8 EUR payments totalling EUR324,909.03 and 2 GBP payments totalling £80,710.15. He then made a further 9 payments to another trading platform called Quanto Markets between 8 November 2018 and 25 January 2019 totalling USD257,521.87.

[1] Financial Services Ombudsman (Jersey) Law 2014 Article 16(11) and Financial Services Ombudsman (Bailiwick of Guernsey) Law 2014 Section 16(10)

Mr M subsequently came to suspect that he had been the victim of an investment fraud/scam. He contacted HSBC in May 2019 to ask the bank to reimburse him for the payments he had made, but it declined to do so – on the basis that it did not consider it had made any error when processing the payments in accordance with Mr M's instructions.

By way of my Provisional Decision I concluded, in summary, that:

- HSBC acted sufficiently in accordance with its obligations in Jersey such that I did not accept that – in these specific circumstances – the bank was under a duty to have identified and/or questioned Mr M about any of the payments he had asked it to make before the money was released; but that

- even if HSBC had done so, and bearing in mind the limitation on the extent of any enquiries the bank might reasonably have made, I found it unlikely – on the balance of probabilities – that Mr M would not then have made his payments.

Subsequent Submissions

HSBC accepted my Provisional Decision, saying it had nothing further to add. But Mr M did not accept it. He asked me to review my provisional conclusions (as is provided for under our procedures), and to issue a formal determination on his complaint. Together with re-emphasising several of the points he had previously made he set out, in summary, the following principal observations:

- He did his 'due diligence' by searching companies on the internet, and BinaryXChange was well recommended. He now believes that what he read – and believed – at the time were probably false reviews. He subsequently stopped trading with BinaryXChange/MarketsXChange because the new account manager/trader assigned to him didn't seem to be experienced enough, making him lose money. He then decided to concentrate on Quanto Markets trading "*while waiting for an answer regarding the new person to trade with MarketsXChange.*"

- He had not seen the security section of HSBC's public website, and he does not recall having received any communication from the bank about it. But, either way, he does not consider that HSBC had the "*right tools*" to detect fraud – especially because this type of fraud was not new. Importantly, by making his payments his transactional behaviour changed – his Jersey accounts "*were showing almost zero transactions for years and suddenly* [he] *started to make many*

[payments] *to the same beneficiaries.*" Most of his prior transactions had been intra-HSBC transfers, either to or from his Jersey accounts or with HSBC in Malta and who – in contrast to HSBC Jersey – did block his account in 2017 when his transaction behaviour changed. If HSBC is "*serious about combating fraud*" the bank should have identified this significant change.

- He does not accept that if HSBC had asked him questions about his payments it would not have made a difference. Rather, if the bank had "*asked some simple questions about* [his] *investment, that would have triggered a discussion where he would* [have asked] *questions and* [that] *would have made him discover the scam … and stopped sending money to criminals.*" Moreover, if HSBC had asked him additional questions about the one payment it did speak to him about it "*would have made* [him] *discover that* [he] *was getting scammed without knowing.*"

- He didn't know he was making payments to unregulated companies; in fact, he didn't know that unregulated companies existed until after he had made his last payment. He thought he knew the people he was dealing with, but he now understands that they were hiding their real identities – making "*it all look correct*" when it was not. "*HSBC could have prevented* [him] *at least not getting into the trap of the 2nd scam with Quanto Markets.*"

- By making his payments online – as the bank prefers – customers should receive the same protection against fraud as they would by "*speaking to a real person on a phone call.*" If by making payments online it puts a customer "*at risk then the bank is guilty of not offering the same fraud protection … Just for that,* [CIFO] *should uphold* [his] *complaint. … Any customer facing company … must compensate its customers if it fails to provide the expected service.*"

- He considers that HSBC should have done more to help track down the people who withdrew his money from the beneficiary accounts; those payments should be traceable. Indeed, "*HSBC should be able to force the beneficiary banks to send back the money as a punishment for not doing … proper due diligence and accepting criminals as customers.*"

- He asks if the UK Code of Practice that was introduced in 2019 (the UK CRM Code), under which some fraudulent payments may be refunded to customers, applies in Jersey – and, if so, why it did not

"*work for him.*"

Findings

I have considered (and, where I had previously received it, re-considered) the available evidence and arguments to decide what is, in my opinion, fair and reasonable in the individual circumstances of this complaint. Where necessary and/or appropriate, I reach my conclusions on the balance of probabilities; that is, what I consider is (or would have been) most likely to have happened, in light of the evidence that is available and the wider surrounding circumstances.

In setting out the background to this complaint and the parties' submissions in response to my Provisional Decision I have, as previously, condensed everything – distilling the main points so that I may focus my findings and conclusions on what I consider to be the central and material issues. I take this approach because of the framework under which CIFO operates, having been established to consider complaints about financial services providers in the Channel Islands as an informal alternative to the civil courts. My findings and conclusions are, therefore, set out in less detail than the submissions I have received. However, for the avoidance of any doubt, I confirm that I have read and considered everything which has been provided to me.

The impact of a loss of around £550,000 is almost unimaginable; at the very least it must be a severely distressing – and I have no doubt potentially life- changing – event for Mr M and his family to be facing. I believe HSBC acknowledges this, and my understanding is there is no dispute that he remains out-of-pocket to the full extent of the payments he made.

As I set out in my Provisional Decision, in order to determine this complaint I believe there are two issues I need to consider and decide:

1. should HSBC have identified, before the money was released, that one or more of Mr M's payments may have been going to an ultimate beneficiary which was operating a potentially fraudulent or scam 'investment' scheme, advising him and recommending that he check to make sure he was making genuine investments?; such that

2. he would then have taken action which would have resulted in some or all of the payments not being made.

But first, I respond to Mr M's question about why the UK CRM code of practice did not 'work for him'. This is as I explained in my Provisional Decision; not only does the UK CRM code not apply in Jersey but it does not cover international payments, which is what Mr M made. So, even if he had made his payments from an account in the UK, the CRM Code would not have helped him.

In my Provisional Decision I set out the regulatory obligations in Jersey under which HSBC is required to operate – in summary, and in particular, to have systems in place to guard against involvement in financial crime, and to have appropriate polices, processes, and procedures in place for managing operational risk in relation to fraud to seek to prevent both itself and its customers from being victims of financial crime. This includes being sufficiently aware of the indicators of fraud and, where appropriate, bringing them to the attention of customers before they make high-value and/or unusual payments. In this respect I particularly take note of, and agree with, Mr M's point that, by making payments online a customer should not receive any lesser degree of service or protection than if they make them by any other means. Indeed, online payment instructions – which I consider the bank is likely to prefer operationally – can entail a greater level of risk compared with, for example, a customer making a payment either by speaking to a member of the bank's staff or in a branch.
Mr M made the following payments:

Date	**Payment To**	**Amount**
24 March 2017	UPAYCARD LTD	EUR29,750.00
11 May 2017	TRANSFERWISE LTD	GBP16,897.86
6 June 2017	TRANSFERWISE LTD	GBP63,812.29
4 July 2017	UPAYCARD LTD	EUR52,506.43
4 August 2017	UPAYCARD LTD	EUR32,952.67
23 August 2017	UPAYCARD LTD	EUR33,305.30
25 August 2017	UPAYCARD LTD	EUR12,425.37
14 September 2017	UPAYCARD LTD	EUR34,903.03
2 October 2017	UPAYCARD LTD	EUR34,281.81
10 October 2017	UPAYCARD LTD	EUR94,784.42
8 November 2018	ETE Limited	USD10,000.00
9 November 2018	ETE Limited	USD35,000.00
15 November 2018	ETE Limited	USD20,000.00
26 November 2018	ETE Limited	USD25,000.00
13 December 2018	ETE Limited	USD30,000.00
8 January 2019	ETE Limited	USD22,029.11
15 January 2019	ETE Limited	USD81,426.18
15 January 2019	ETE Limited	USD8,838.03
25 January 2019	ETE Limited	USD25,228.55

Whilst they fall into two broad groups – the first sequence ultimately made to BinaryXChange/MarketsXChange and the second sequence ultimately made to Quanto Markets – the pattern of the payments changed over time. The first sequence started relatively slowly but then quickened as from late August 2017. The second sequence

happened much more rapidly – less than three months in total (from late 2018 to early 2019) compared with seven months for the first sequence. What this means is that – in my view – there were three principal possible opportunities for the bank to have intervened: at the outset in early 2017; in mid-late 2017 when the pace quickened; and when the second sequence started in late 2018.

Throughout the total 18-month period during which Mr M made his payments banks' general awareness of fraud was increasing – especially in the UK, where as far back as late 2016 the UK Payment Systems Regulator had responded to a 'super complaint' from the consumer group *Which?*.

The following year the UK Payment Systems Regulator then started to consider the way payment service providers could change their behaviour to help minimise the impact of frauds and scams on customers. Although I acknowledge that HSBC in Jersey was not directly involved in the UK negotiations and discussions which ultimately led to the introduction of the UK CRM Code, HSBC in the UK was – and it is now a signatory to it.

It's also clear from our discussions with the Jersey Financial Services Commission (JFSC) – both in the past and more recently – that for a financial services provider such as HSBC which has a large UK presence, the regulator expects a bank in Jersey to operate to at least the same levels and standards as its UK counterpart offices. Indeed, it would seem counter- intuitive to suggest otherwise, because that would imply an acceptance that a Jersey customer might – in comparison – receive an inferior service (and/or level of protection, where relevant and applicable). I cannot see how it would be fair or reasonable to say that that could generally be right. In any event, banks in the Islands are not insulated from what is happening in the UK, especially where there are clear parallels – and there is precedent which shows that banks have followed and adopted the UK approach on issues which are broadly similar and which affect a number of their customers. So, in broad terms, I would expect a bank such as HSBC in Jersey to be no less alert to the indicators of fraud than its UK counterpart – and, unless prevented from doing so by (for example) any technical limitations, to react to them in much the same way.

Since I issued my Provisional Decision it has become clear that there *was* a significant change in Mr M's transactional behaviour in respect of the payments he made. This is because it has now come to light that all the payments he made from his HSBC Jersey accounts in the prior six months were simply intra-HSBC transfers to his own accounts. Whilst the intra- Jersey transfer was evident to me from his account statements, the transfers Mr M made to his other HSBC accounts outside Jersey were not; HSBC has only recently made this clear.

In my view, this strengthens Mr M's argument that HSBC ought – at some point in the overall sequence of events – to have reasonably identified his change in behaviour and

asked him about the payments he was making. Not only has HSBC said that it had a range of tools and procedures in place to help prevent fraud – not least in order for it to comply with its regulatory obligations – but in light of the information I now have available to me I find the bank's argument that its systems did not highlight any of Mr M's online payments because they did not appear to be 'out-of-line' with his prior account activity to be uncompelling. Whilst the amounts might have been similar, at least to begin with, and Mr M initiated them himself through internet banking after funding his accounts by inward transfers, the beneficiaries, frequency, and stated underlying nature of the payments (as revealed by his account statements) were not.

So, notwithstanding that the payments were made to intermediary payment institutions rather than directly to the ultimate beneficiaries – whose identities would not have been known to HSBC from the payment instructions alone – I no longer accept the bank's position that the overall pattern of the transactions was sufficiently similar to Mr M's prior account activity for the bank not to have identified the change in account behaviour and asked him any questions about his payments. Instead, I find that HSBC ought reasonably to have done so – if not at the outset then at least at the second and/or the third of the three principal possible opportunities I set out earlier – i.e., in mid-late 2017 when the pace of the first sequence of payments quickened and/or at around the time the second sequence started in late 2018.

However, the second principal conclusion of my Provisional Decision was that – even if HSBC had done what I now find it should have done –
I believed it was unlikely, on the balance of probabilities, that Mr M would not then have made his payments. In exploring this further, there are two key issues I need to consider:

1 – what should HSBC have asked Mr M about his payments?; and,

2 – as a result, what (if anything) would he have done differently?

Mr M has set out in detail what he considers HSBC should have asked him; indeed, during the course of my enquiries he presented a 'script' which he suggested the bank should have followed together with the responses he would have given. This reflects his belief that, amongst other things, HSBC should have asked him who the ultimate beneficiaries of his payments were – and that, in light of his answers, HSBC should have then not only warned him about unregulated/fraudulent investment companies but told him that "*Binary Options are not recommended*" and asked him "*not to send any more funds*" before the bank had investigated the companies on his behalf.

I accept that HSBC *could* have done some or all of this. But the question
I need to consider and determine is whether it *should* have done – in other words, whether (by asking Mr M any questions about his payments) the bank would have been under a duty or obligation to have made enquiries to the broad extent Mr M maintains it

should have done and, as a result, to have drawn such detailed responses from him.

After very careful consideration, I find that I do not agree with Mr M's contention that the bank was under an obligation to have gone as far as he illustrates. I said in my Provisional Decision that I felt what Mr M had set out was taking things too far, and I added that even if HSBC had been apprised of who the ultimate beneficiaries were (the payments were made to intermediary payment institutions, not directly to those ultimate beneficiaries) this needed to be balanced against the obligation on an investor to make their own 'due diligence' enquiries – in order to decide for themselves about any potential investments. I remain of that view. Whilst, as I have set out above, I consider that HSBC should have asked Mr M some questions about at least some of his payments, a bank's principal purpose in making such enquiries is to check/confirm that the customer is satisfied that the payments they are making are genuine and as intended; I do not consider a bank's duties or obligations extend to, for example, looking into the background of an intended ultimate beneficiary on behalf of a customer before processing a payment instruction. As a matter of general principle, only if a bank is 'put on inquiry' – in the sense that it has reasonable grounds for believing, as a result of some simple questions, that the payment instruction is an attempt to misappropriate funds – should it intervene. This is because it needs to be remembered that a bank's primary duty is to act on its customer's instructions and to make the payments it is asked to make.

Mr M accepts that he had made his own 'due diligence' enquiries ahead of starting to make his payments and that, at the outset, he had read good reviews about BinaryXChange. He has also explained why he continued to make his payments; despite earlier losses and his apparent lack of comfort with some of his experiences, he did so in part to try to recover those losses – with this particularly extending to his decision to start to make his second sequence of payments where the ultimate beneficiary was Quanto Markets. Against this overall background, and on the balance of probabilities, I consider it unlikely that – bearing in mind the limitation on their reasonable extent – any enquiries HSBC might properly have made would have been enough to have caused Mr M to adopt a different approach.

I further consider that, even if Mr M did not know about or fully understand the difference between regulated and unregulated investments, he did nevertheless have a clear idea about what he was doing – and what he was trying to achieve – by making his payments. Unregulated investments are not generally, or of themselves, illegal; some investors choose to make such investments knowing that the higher potential returns achievable from pursuing advanced investment strategies can more often than not entail a higher degree of risk. I therefore find it most likely, on the balance of probabilities, that – if Mr M had been asked – what he would have explained to HSBC about his investment strategy would have been enough for the bank to have been adequately reassured by what it was being told. Moreover, it was not for HSBC, when

processing Mr M's payments, to have known – for example – any detail about the two ultimate beneficiary companies. But in any event, Mr M did not seek advice from HSBC before he decided to make his investments and/or his payments – which he has since explained were in fact for contracts for difference, rather than binary options – and those in the bank who process payments are, in my view, unlikely to be at all knowledgeable about such specialised investments. Ultimately, these are decisions for customers to make for themselves – and, as Mr M has himself said, he thought he knew who he was dealing with and they made it 'all look correct'.

I very much understand all that Mr M has described about how he believes he would have reacted to any enquiries HSBC might have made. I therefore recognise that he is likely to disagree strenuously with the conclusions I have reached. But in giving everything very careful and lengthy consideration I have to make my assessment based on the position, reasonable knowledge, and respective duties and responsibilities of the parties at the time. Having done so, and for the reasons I have explained, I find I am unable fairly or reasonably to conclude that – but for HSBC's failure to identify the change in the pattern of behaviour of Mr M's accounts – he would not have made the payments he did. In presenting his claim Mr M ideally sought a refund of all the payments he made but, at the very least, he asked to be reimbursed for the second sequence.
However, given the rationale he has explained for starting to make that second sequence I am unable to accept that – but for the lack of any intervention by the bank at that stage – Mr M would not have done so.

Finally**,** Mr M considers that HSBC should have done more to help track down the people who withdrew his money from the ultimate beneficiary accounts in Denmark and Hungary, and that HSBC should be able to force the beneficiary banks to return the money "*as a punishment for not doing … proper due diligence and accepting criminals as customers.*"

Importantly, however, the payments Mr M made from his HSBC accounts were to intermediary payment institutions, not to the ultimate beneficiary banks. So it could not have been for HSBC to do as Mr M has suggested, not least because it had no direct transactional relationship with those beneficiary banks. But, even so, and as I said in my Provisional Decision, by the time Mr M contacted HSBC more than two years had passed since he had first started to make his payments and several months had passed since the final payment had been made. After so much time had elapsed it is extremely unlikely that any money would have been available to, or recoverable by, the overseas beneficiary banks. Such action is generally only successful where an approach is made by the remitting bank to the beneficiary bank within a very short time after a payment has been made such that the beneficiary bank can 'ring fence' the money.

Final Decision

I am very much aware that there is a substantial amount at stake here, and that what I have set out above will come as a profound disappointment to Mr M. I doubt that anyone could feel anything other than acute sympathy for him, given that he has lost so much money in the way that he has. However, for the reasons I have explained and after very detailed and careful consideration of all the evidence, I do not consider that it would be fair or reasonable for me to impose a liability on the bank for the payments Mr M authorised HSBC to make.

My Final Decision, therefore, is that I do not uphold this complaint.

Next steps for Mr M

Mr M must confirm whether he accepts this Decision either by email to ombudsman@ci-fo.org or by letter to the Channel Islands Financial Ombudsman, PO Box 114, Jersey, Channel Islands, JE4 9QG, **within 30 days of the date of this Decision** – that is, by 24 July 2021. The Decision will become binding on Mr M and HSBC if it is accepted by this date.

However, if there are any particular – and exceptional – circumstances which prevent Mr M from confirming his acceptance before the deadline, he should contact me with details. I may be able to take these into account, after inviting views from HSBC, and in these circumstances the Decision may become binding after the deadline. I will advise both parties of the status of the Decision once the deadline has passed.
Please note there is no appeal against a binding Decision, and neither party may begin or continue legal proceedings in respect of the subject matter of a binding Decision.

If we do not receive an email or letter by the deadline, the Decision is not binding. At this point Mr M would be free to pursue his legal rights through other means.

David Millington Ombudsman
Date: 24 June 2021

COPY Ombudsman Provisional Decision

CIFO Reference Number: 19-000290
Complainant: Mr M
Respondent: HSBC Bank plc, Jersey branch

It is the policy of the Channel Islands Financial Ombudsman (CIFO) not to name or identify complainants in any published documents. Any copy of this decision made available in any way to any person other than the complainant or the respondent must not include the identity of the complainant or any information that might reveal their identity.[1]

A decision shall constitute an Ombudsman Determination under our law.

Complaint

Mr M complains, in summary, that HSBC Bank plc, Jersey branch, failed to identify that he was the subject of an investment fraud/scam. He holds the bank accountable for not having noticed his change in behaviour and for failing to contact him to question the payments he was making. Had it done so, Mr M considers that the scam would have been uncovered and he would not have made most, if not all, the payments he did.

Background

In early 2017, Mr M was approached by a company offering binary options trading called BinaryXChange (which I am told later became MarketsXChange). He decided to invest and trade, and between 24 March 2017 and 10 October 2017 made 8 EUR payments totalling EUR324,909.03 and 2 GBP payments totalling £80,710.15. He then made a further 9 payments to another binary options platform called Quanto Markets between 8 November 2018 and 25 January 2019 totalling USD257,521.87.

Mr M subsequently came to suspect that he had been the victim of an investment fraud/scam. He contacted HSBC in May 2019 to ask the bank to reimburse him for the payments he had made, but it declined to do so – on the basis that it did not consider it had made any error when processing the payments.

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[2] Financial Services Ombudsman (Jersey) Law 2014 Article 16(11) and Financial Services Ombudsman (Bailiwick of Guernsey) Law 2014 Section 16(10)

Mr M says, in summary:

- After he started to invest and trade with BinaryXChange "*there were good and bad days but overall* [his] *account was steadily growing and making profits. They created a dream and the illusion that this was* [a] *real and profitable investment. Then through their manipulation, they convinced* [him] *to become a diamond customer… by bringing* [his] *account to 250K EUR. That explain*[s] *the transfers until July 2017.*"

- Shortly thereafter, BinaryXChange made him lose his money, which is "*an important part of their scam … and then you enter into their recovery mode* [where] *they say they will put all their best resources to help* [you] *recover* [your] *losses but* [to do so he] *had to invest more.*"

- By early 2018 he had asked BinaryXChange to return his newly-invested money but was told he "*had to trade 40 times the value of the leverage … before* [he could] *withdraw a single EUR.*" This meant he "*had no choice* [but] *to play the game.*" However things then started to go "*very wrong*", and he finally stopped trading because he thought a new company – Quanto Markets – would be the solution to his problems. This was because a former employee of BinaryXChange had told him it would be difficult to recover his money in view of the BinaryXChange trading leverage but that Quanto Markets had a different model and were returning profits.

- Although he was sceptical, his initial results with Quanto Markets were good. But then, through their "*manipulations and lies* … [he was persuaded to] *put the rest of* [his] *entire life savings*" into trading – although by early 2019, following a "*change in the way they were communicating* [he] *started to really believe* [he] *was dealing with criminals*." He asked for his money back, was refused, and by May 2019 realised that everything was lost.

- "*HSBC has all the tools to detect unusual activities but they did not act. They should have contacted me and asked me the right questions such as why am I suddenly sending so much money to the same beneficiary. What is the purpose? What am I investing in? What is this investment company? I would have explained what I was doing and with all the tools and knowledge HSBC have, they should have explained to me that I was investing in a non-regulated trading company and explained what it means.*"

- The bank should then have told him to 'stop' immediately, report the matter to the Police, and it should also have sought the return of the money from the beneficiary banks in Denmark and Hungary. He does not think that HSBC made the position clear to those banks, and considers it should have been "*very strong in demanding that* [his] *money be returned.*"

- The money he has lost are the "*savings of a lifetime.*" What has happened has had a hugely adverse impact not just on his life but also on his wife and family, changing things "*forever.*"

HSBC's position, in summary, is that:

- Mr M made all the payments himself using internet banking. "*They did not flag for any additional reviews prior to release primarily due to the value of the payments*[s] *being similar to the customer's usual activity. It is also worth noting that at the time the transactions took place, HSBC had a security section on* [its] *public website, warning customers of the possibility of frauds and scams.*"

- The larger payments Mr M made were to beneficiaries to which he had already paid smaller amounts, so they didn't need to be 'validated' with him. The bank did, however, contact Mr M in January 2018 – albeit as part of a more general review of his account – when it asked him about the payment he had made on 4 July 2017. HSBC's records show that Mr M explained it was for an investment, with the money having come from another investment he had cashed in.

- HSBC in Jersey is a separate legal entity from HSBC in the UK. This means, amongst other things, that the Code of Practice which was introduced in the UK in May 2019 (known as the CRM Code) whereby some fraudulent payments may be refunded to customers does not apply to these transactions. Indeed, a recent High Court case in the UK said it would be wrong to treat the Code as if it applied when it does not. But, even so, the bank does have "*systems and procedures in place to combat fraud and* [to] *act in the best interest of* [its] *customers.*"

- When Mr M raised his complaint the bank investigated the matter fully, even if its response was relatively brief. However, even if it had provided a fuller response – including by way of its initial submissions to CIFO – the bank's position would not have been any different. Mr M knew that the investments he was making were unregulated, and he didn't seek financial advice before doing so.

Findings

I have considered the available evidence and arguments to decide what is, in my opinion, fair and reasonable in the individual circumstances of this complaint. Where necessary and/or appropriate, I reach my conclusions on the balance of probabilities; that is, what I consider is (or would have been) most likely to have happened, in light of the evidence that is available and the wider surrounding circumstances.

In setting out the background to this complaint I have condensed the submissions which both parties have provided to me – distilling the main points so that I may focus my findings and conclusions on what I consider to be the material issues. I take this approach because of the framework under which CIFO operates, having been established to consider complaints about financial services providers in the Channel Islands as an informal alternative to the civil courts. However, for the avoidance of any doubt, I confirm that I have read and considered everything which has been provided to me.

The impact of a loss of the total of Mr M's payments (they amount to about £550,000) is almost unimaginable. At the very least it must be a severely distressing – and I have no doubt potentially life-changing – event for him and his family to be facing. I believe HSBC acknowledges this, and that there is no dispute Mr M remains out-of-pocket to the full extent of the payments he made.

The underlying issues in this complaint reflect a type of fraud which, when viewed collectively, are generally known as 'Authorised Push Payment' (APP) frauds. They typically entail the bank's customer making payments – using the payment details provided by a fraudster, and often for large amounts of money – inadvertently, or unwittingly, to an account controlled by the fraudster.

More often than not, APP frauds are relatively short-lived – not least because fraudsters generally aim to withdraw the money from the receiving account as quickly as possible before the customer realises a fraud has taken place. But the circumstances are very different here, because Mr M made his 19 payments over a period of a little under two years, with a gap of about a year between the two sets of payments. So his claim differs from many I have seen, because he is essentially saying that the entities to which he made the payments – albeit to the correct ultimate beneficiary bank accounts – were acting fraudulently by way of the 'investment services' they provided to him. It is also the case that Mr M knew to whom he was making the payments, and he was actively engaging with them throughout the two periods – which, again, is a different characteristic from many APP frauds.

All of that said, in order to determine this complaint I believe there are two issues I need to consider and decide:

1. should HSBC have identified, before the money was released, that one or more of Mr M's payments may have been going to an ultimate beneficiary which was operating a potentially fraudulent or scam 'investment' scheme, advising him and recommending that he check to make sure he was making genuine investments; such that

2. he would then have taken action which would have resulted in some or all of the payments not being made.

But before I do so, I believe it is appropriate for me to set out some relevant principles under which CIFO operates. Firstly, the law which gives us our powers (for this case, the applicable law is the Financial Services Ombudsman (Bailiwick of Jersey) Law 2014) requires us to reach our decisions having regard to – but not being bound by – any relevant law, regulation, codes of practice, and good industry practice. In addition, and overarching this, we are required to come to our decisions on the basis of what we consider to be fair and reasonable in the individual circumstances of each complaint we consider. That 'fair and reasonable' remit means it is appropriate for us to consider the applicable wider overall position, and to take account of whatever we consider to be relevant in order to reach what we assess to be a fair and reasonable outcome in the specific case – taking into account the perspectives of both parties to the complaint.

HSBC's submissions point out that Mr M's account is in Jersey. I infer from this that, in coming to my conclusions on these Jersey transactions, the bank considers I would be wrong to have regard to – for example – UK regulation and relevant developments in the UK relating to APP frauds. However, I do not accept the implication of what the bank has said about this – firstly as a matter of general principle for the reason I have just set out, and secondly because (even though the bank in the Channel Islands is a separate legal entity from the bank in the UK) its branch in Jersey offers its customers a set of products and services which are largely similar to those which a UK customer might receive from a comparable branch office in the UK. So, overall, and unless there is (for example) an express regulation to the contrary, I consider it is reasonable that a Jersey customer should expect to receive the same broad level of service – and, where relevant, protection – from the bank's Jersey branch as a UK customer would receive from a branch in the UK when receiving a similar service.

In any event, it's also clear from our discussions with the Jersey Financial Services Commission (JFSC) – both in the past and more recently – that for a financial services provider such as HSBC which has a large UK presence, the regulator expects a bank in Jersey to operate to at least the same levels and standards as its UK counterpart offices. Indeed, it would seem counter-intuitive to suggest otherwise, because that would imply an acceptance that a Jersey customer might – in comparison – receive an inferior service and/or relevant level of protection. I cannot see how it would be fair or reasonable to say that that could generally be right. Moreover, banks in the Islands are not insulated

from what is happening in the UK, especially where there are clear parallels. Indeed, there is precedent which shows that banks have followed and adopted the UK approach on issues which are broadly similar and which affect a number of their customers – for example, the assessment of Payment Protection Insurance complaints.

However, I accept that it would not be correct for me to *directly* apply UK regulation to my consideration of the circumstances of Mr M's complaint. Whilst, as a matter of first principle, a bank is expected to process payments in accordance with its customers' instructions, my parallel starting point is the regulatory environment in Jersey – which includes, where relevant, the expectation I have just outlined. In addition, Principle 2 of the JFSC's Code of Practice for Deposit-taking Business (also known as the Banking Code) requires a bank, amongst other things, to act with "*due regard for the interests of its customers*". The Banking Code also requires banks to have systems in place to "*guard against involvement in financial crime*" (paragraph 3.2.3.9), along with broader and over-arching requirements relating to the management of risk (section 3.9). These risk management requirements also refer to section 5 of Appendix 1 of the Banking Code – which, in particular, sets out the requirement to have "*appropriate policies, processes and procedures* [in place] *for managing operational risk in all material products, activities, processes and systems*" (5.2). This includes, but is not limited to, "*internal and external fraud*" (5.2.5). The legal connection with the Banking Code arises from The Banking Business (Jersey) Law 1991 which, itself, sets out the threshold conditions a bank must meet to hold a registration and which, in Article 10(3)(f), refers to compliance with any code of practice. Furthermore, the JFSC's licensing policy for deposit-takers under the Banking Business (Jersey) Law 1991 requires a licensee to demonstrate it has "*due regard for the interests of its customers*" (5.1.5) and to provide "*appropriate supervision and training to its employees*" (5.1.6)

In acknowledging that the UK CRM code does not formally extend to the Islands, in light of the above and in all the circumstances I believe it is difficult to see how it would be fair to disregard both the provenance and the intent of that code – including the support given to it by the wider financial services industry – for customer payments made by banks in Jersey. And whilst accepting that the code is limited to domestic UK payments, I consider it relevant to note that it was not the first step that had been taken in the UK to help tackle fraud and to protect banks' customers from financial harm. Although parts of the CRM code have undoubtedly strengthened that earlier protection, other parts of it have largely built on – or replicated to some extent – existing and well-established commitments and standards of good industry practice, as well as some UK legal and regulatory requirements. For example, the CRM code requires banks to take relevant and appropriate steps to seek to detect, prevent and respond to APP scams. This is an expectation that had been created some while earlier in slightly different forms by pre-CRM code voluntary arrangements such as the UK 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 by anti-

money laundering requirements and other legal considerations.

In other words, when Mr M authorised his payments between early 2017 and early 2019 I consider that HSBC will have known that banks in Jersey and in the UK had been under largely similar regulatory obligations – in particular, to have systems in place to guard against involvement in financial crime, and to have appropriate polices, processes, and procedures in place for managing operational risk in relation to fraud to seek to prevent both themselves and their customers from being victims of financial crime. This includes being sufficiently aware of the indicators of fraud and, where appropriate, bringing them to the attention of customers before they make high-value and/or unusual payments.

With all of the above in mind I now turn to the specifics of this complaint.

As I have already outlined, the starting point is that a bank is expected to act in accordance with its customers' instructions and to make the payments it is asked to make. That is the underlying basis of the contract between a bank and its customer. There is no dispute that Mr M intended to make, and that he authorised, all the payments. So the question is this; should HSBC – in these specific circumstances – have taken the possible further action (beyond its contractual obligations, and as I set out earlier) before it made some or all of Mr M's payments such that, had it done so, it might have prevented them from being made and the resultant loss he is facing.

Mr M, who lives in the Czech Republic and has a portfolio of accounts in four currencies with HSBC in Jersey, seeks a refund of some (or preferably all) of the following payments which he made:

Date	**Payment To**	**Amount**
24 March 2017	UPAYCARD LTD	EUR29,750.00
11 May 2017	TRANSFERWISE LTD	GBP16,897.86
6 June 2017	TRANSFERWISE LTD	GBP63,812.29
4 July 2017	UPAYCARD LTD	EUR52,506.43
4 August 2017	UPAYCARD LTD	EUR32,952.67
23 August 2017	UPAYCARD LTD	EUR33,305.30
25 August 2017	UPAYCARD LTD	EUR12,425.37
14 September 2017	UPAYCARD LTD	EUR34,903.03
2 October 2017	UPAYCARD LTD	EUR34,281.81
10 October 2017	UPAYCARD LTD	EUR94,784.42
8 November 2018	ETE Limited	USD10,000.00
9 November 2018	ETE Limited	USD35,000.00
15 November 2018	ETE Limited	USD20,000.00
26 November 2018	ETE Limited	USD25,000.00
13 December 2018	ETE Limited	USD30,000.00

8 January 2019	ETE Limited	USD22,029.11
15 January 2019	ETE Limited	USD81,426.18
15 January 2019	ETE Limited	USD8,838.03
25 January 2019	ETE Limited	USD25,228.55

The first point to note is that the payments were not made directly to either of the binary trading platforms. Instead, they were made to intermediary payment institutions for onward transmission to the ultimate beneficiaries' accounts. Also, Mr M made the payments himself using HSBC's online banking – meaning that he did not interact with anyone at HSBC about them. In addition, from the copies I have seen of his bank statements for the relevant period there was no clear reference to the ultimate beneficiaries, and the payments were variously described as being for 'personal investment', 'consulting of services', or 'payment per contract'.

Mr M's HSBC accounts did not appear to have been his primary (or day-to- day) bank accounts. They were generally relatively inactive, but when transactions did occur in the months prior to his starting to make his payments they tended to be for large – often five figure – amounts. Furthermore, he made other large payments during the two-year period, including some to TransferWise and to UPayCard, albeit presumably for other ultimate beneficiaries. So I understand the point HSBC makes about his binary options payments not having appeared to be out-of-line with his general account activity – in frequency, amount, and identified recipients.

I further take HSBC's point about why the larger payments were apparently not 'flagged'. The bank says this was because, by the time they were made, Mr M had already made smaller payments to the same beneficiaries – although I can also imagine that this may have been part of the binary options platforms' methodology of seeking to ensure that payments continued to be made – i.e., to start with smaller amounts but then seek increased payments (much as Mr M has himself described).

In addition, and to begin with at least, the payments Mr M made were well- spread over time. It was not until August 2017 that they became more frequent, with three being made that month – whereas the four prior payments were spread out over almost five months, with other large payments being made in between. Mr M then made a further three payments which concluded the sequence where the ultimate beneficiary was BinaryXChange, and he did not start again by making payments to ETE until more than a year later. This second sequence nevertheless happened much more rapidly; it was completed within less than three months.

HSBC has said that, at the material times, it did have procedures in place to seek to prevent fraud, but the way Mr M made his payments did not 'trigger' any alert. It explains this as being because of the combination of his making the payments himself using internet banking and because they did not appear to be 'out-of-line' with his prior account activity.

On the first of these, I recognise that it can be more difficult for a bank to identify a potentially fraudulent transaction if there is no human interaction with the customer. On the other hand, banks can – and do – program their systems to monitor customer activity and, as a result, to identify unusual or changed behaviour. So I am not persuaded that, simply by making his transactions online, Mr M might fairly have anticipated any lesser protection from HSBC than if he had made them in person.

However, for these systems to identify potentially fraudulent transactions there needs, for example, to have been a significant enough change in the customer's pattern of behaviour to 'trigger' an alert. In order to come to my conclusion about this I have given very careful thought to both the prior and parallel activity on Mr M's accounts. Having done so, I have concluded – on balance, and for the reasons I have already outlined – that the transactions Mr M has identified were not sufficiently different from his regular account activity, both in the months leading up to their starting and thereafter, such that I should fairly conclude that HSBC was under a duty to have contacted him about them before releasing the money. Whilst there are undoubtedly some circumstances where it would be appropriate for a bank to do so (and where banks do indeed do so – especially if there are obvious hallmarks of potential fraud in the payment instructions and/or the specified beneficiaries) I do not accept that there were enough indicators here for HSBC to have been obligated to identify and raise questions with Mr M about the payments he asked it to make. Indeed, the more he continued to make large payments to the same beneficiaries the more I consider it reasonable for the bank to have believed he was content to continue to do so.

I make these findings having also had regard to a recent development in the UK which has some relevance to my consideration of Mr M's complaint. In January of this year the UK High Court issued its summary judgment in the case of *Philipp -v- Barclays Bank Plc [2021] EWHC 10 (Comm)*. Very much in outline, Mrs Philipp claimed that Barclays should have identified a couple of large and unusual payment instructions as being potentially fraudulent and questioned her more about them than it did. The circumstances of the *Philipp* case are, in many respects, very different from Mr M's complaint, but the court found that the legal obligation on a bank to identify and question payments – which had, over time, been broadened, partly as a result of an earlier case which gave rise to what is known as the 'Quincecare duty' – should be viewed more narrowly. Whilst this judgment is not, in my view, necessarily directive of the conclusions I should reach (not least because of a bank's regulatory obligations in the Channel Islands), and bearing in mind that in coming to my decision I should have regard to but am not bound to follow this judgment of an English court, the outcome nevertheless aligns with the view I have already outlined – which is that, in the specific circumstances of this individual complaint, it is difficult to conclude that HSBC was reasonably under a duty to have identified and then contacted Mr M to question him about any of the payments he had asked it to make before it released the money.

I also referred earlier in this Provisional Decision to the UK CRM code which was introduced in the UK in May 2019, and under which – in certain circumstances – UK banks will make refunds if their customers have innocently and unwittingly made payments to fraudulent beneficiaries. Whilst the code does not apply in the Channel Islands, I nevertheless consider it relevant when assessing APP cases to have regard to its scope, provenance and development, especially where (as here) the bank in the Islands is part of a major UK retail bank. This is largely because HSBC in the UK took part in discussions about the formulation of the code and is now a party to it. But the UK CRM code only covers payments made to beneficiaries in the UK; it does not cover international transactions. Mr M has explained that the ultimate beneficiaries of his payments were in Denmark and Hungary – so, come what may, the limitations on the scope of the UK code mean it could never have been of assistance to him.

But even if I had been minded to come to a different conclusion on the central point of this complaint, and had found that HSBC should – at some stage in the sequence of transactions – have questioned Mr M about his payments, would that have made any difference? He has strongly suggested it would have done, and that he would – at that point – have stopped making the payments.

But such an outcome is contingent on what HSBC might reasonably have said to Mr M. His view is that it should not only have asked him about the payments but also advised him that the investments he was making were unregulated and what that meant. However, in my view, that is taking things too far. Even if HSBC had known or been apprised of who the ultimate beneficiaries were, it is for an investor to make their own 'due diligence' enquiries about any potential investment and to reach their own decisions about it. I do not accept that it is for a bank, as part of the process of making payments, to make the sort of detailed enquiries and then offer the level of advice Mr M suggests HSBC should have provided. Instead, and at best, it would simply have been for HSBC to have checked with Mr M that he was happy to make his payments and that he appeared to know what he was doing. On his own account, it is clear that Mr M *did* know what he was doing – for example, he has clearly set out his reasons for starting to make the payments, for continuing to do so, and – in particular – for starting the second sequence. Although it is apparent there were times when he did not feel comfortable with some aspects of how his dealings were going, he continued to make payments and to 'trade' with a view to trying to recover earlier losses. He has explained it was only at the very end did he come to realise that – to use his own words – he was 'dealing with criminals'. In other words, even if HSBC had contacted Mr M I consider it unlikely that – given the limitation on the extent of any enquiries and commentary the bank might reasonably have made – he would have taken any different action. Instead, I consider it more likely – on the balance of probabilities – that he would have continued to make his payments, not least in order to try to recover his earlier/ongoing losses.

There is one final point I need to address, which is Mr M's suggestion that HSBC should have – once the overall position had come to light – contacted the ultimate beneficiary banks in Denmark and Hungary to try to recover his money. I accept there are instances where such action can be appropriate, but I do not consider that it would have been the case here. Firstly, by the time Mr M contacted HSBC about this more than two years had passed since he had first started to make his payments, and several months had passed since the final payment had been made. It seems clear that the money had long been transferred (via TransferWise and UPayCard) to the Danish and Hungarian banks and had been used by the ultimate beneficiaries – so it is extremely unlikely that it would have been available to the overseas beneficiary banks or that they would have been in a position to have returned any of it. Such action is generally only successful where an approach is made by the remitting bank to the beneficiary bank within a very short time after a payment has been made such that the beneficiary bank can 'ring fence' the money. I do not accept that that is likely to have been possible here.

Bringing this all together, therefore, and having regard to all that I have set out above, my provisional findings are that:

- HSBC acted sufficiently in accordance with its obligations in Jersey such that I do not accept that – in these specific circumstances – the bank was under a duty to have identified and/or questioned Mr M about any of the payments he asked it to make before the money was released; but that
- even if HSBC had done so, and bearing in mind the limitation on the extent of any enquiries the bank might reasonably have made, I find it unlikely – on the balance of probabilities – that Mr M would not then have made his payments.

Provisional Decision

I am very much aware that there is a substantial amount at stake here, and that my provisional conclusions will come as a severe disappointment to Mr M. I doubt that anyone could feel anything other than acute sympathy for him, given that he has lost so much money in the way that he has. However, in light of all the evidence – which I have considered very carefully – and for the reasons I have set out and explained, my Provisional Decision is that I do not consider that this complaint should be upheld. However, if either party disagrees with this Provisional Decision the matter may be reviewed again, after which I will complete a formal determination.

If either party wishes me to undertake a further review and complete a formal determination, and considers they have additional evidence or observations which they have not already provided which might inform that further review, these should be sent to me at ombudsman@ci-fo.org to reach me within 30 days of the date of this

Provisional Decision – that is, by 29 April 2021 at the latest.

David Millington
Ombudsman
Date: 30 March 2021