complaint

I issued a provisional decision in this complaint about HSBC UK Bank plc (trading as First Direct) on 6 July 2021. It contains the relevant background information and sets out my provisional findings. For completeness, a copy is annexed to this final decision.

background

In brief summary, I was minded to partly uphold this complaint about disputed transactions (for the purchase of binary options) on the basis that they constituted unusual or uncharacteristic activity for Mr L and/or his account, so ought reasonably to have triggered HSBC's potential fraud alerts. If—in line with various regulatory duties (and good industry practice)—HSBC had contacted Mr L before executing his payment instructions, most of his losses would probably have been prevented. For example, a warning about the high-risk of scams associated with binary-options trading would probably have caused Mr L to investigate such unlicensed, unregulated investments and/or the purported trader more closely — and stopped him from making further payments.

However, I also concluded that Mr L did share 20% responsibility for what happened, so my proposed compensation award was reduced accordingly. I did not think HSBC could reasonably have been triggered until the third scammed payment, so Mr L would also have to forgo his first two losses totalling £10,000. The total award I had in mind (net of interest and/or tax deductions) was £120,600.

The above is not a substitute for my full reasons, so I would urge the parties to re-read my provisional decision (below) before proceeding.

responses

Mr L has not added anything further, so I assume he is happy with my proposed outcome for resolving his complaint. Our investigator has phoned him three times to check whether he wishes to comment on the provisional decision — but has received no reply. Accordingly, in line with rules and guidance in DISP 3.5.8 to 3.5.15 of the *Financial Conduct Authority Handbook*, I will proceed to the next stage on the basis of the information I already have.

HSBC disagrees with my provisional decision and has made further submissions. I have carefully read and digested those submissions in full — but HSBC has helpfully summarised its key points, which, in the interest of conciseness, I now repeat (making only essential grammatical changes):

- The provisional decision as to HSBC's conduct is inconsistent with recently clarified legal standards. There is no explanation for the preference of guidance over legal and regulatory standards;
- The provisional decision retrospectively creates and imposes on HSBC obligations which it could not possibly have been aware of at the time. This is neither fair nor reasonable;
- There is a striking lack of detail as regards the background of this complaint and only limited information on key issues has been provided in support, which raises further concerns. It is worrying that the provisional decision does not address that Mr L was apparently concerned from an early stage that transactions were being processed without his consent but did nothing to address this;

- The provisional findings in respect of HSBC's actions are unrealistic and unfair. It is also unclear from where the ombudsman derived the information which forms the basis for his conclusions; and
- Mr L should bear at least 50% responsibility for the loss that he has suffered, and it is fair and reasonable that he should do so. As noted in the HSBC Response, Mr L does not appear to have carried out even cursory research, and that was despite having concerns as noted in the provisional decision.

findings

I have reconsidered all the evidence and arguments in light of HSBC's response in order to decide what is fair and reasonable in all the circumstances of this complaint. Having done so, I remain of the view that this complaint should largely be upheld — for the reasons that follow:

1. I was mindful of the High Court judgment referred to by HSBC—*Philipp v Barclays Bank plc* [2021] EWHC 10 (Comm)—even though I did not cite it. But we have previously explained to HSBC that we are aware the judge took a different view about the *Quincecare* duty on a bank in that case. However, I am not suggesting the *Quincecare* duty applies to this case. And notwithstanding what the judge said, we have a duty to resolve complaints based on what we think is fair and reasonable in all the circumstances of the case, taking into account not just the law, but also regulators' rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time.

2. Indeed, DISP Rule 3.6.1 of the *Financial Conduct Authority Handbook* states that, "*The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.*" This wide remit is further clarified in DISP Rule 3.6.4:

    > In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
    >
    > (1) relevant:
    > (a) law and regulations;
    > (b) regulators' rules, guidance and standards;
    > (c) codes of practice; and
    > (2) (where appropriate) what he considers to have been good industry practice at the relevant time.

3. The judges in the *Philipp* and *Quincecare* cases were restricted to deciding the issues before them as pleaded by the parties in an adversarial process with strict evidential rules. It is unclear from those judgments whether they were invited to consider, in detail or at all, the overall regulatory landscape or general principles of good industry practice. Our wider investigatory remit permits us to take account of such matters irrespective of whether they are expressly raised by the parties; and to depart from the law if needs be (albeit with an explanation as to why, for the reasons set out in a judicial-review case brought by Aviva, now mentioned by HSBC).

4. However, we have explained to HSBC on numerous occasions why our approach to fraud and scams is not inconsistent with the strict legal position; and why it is fair and reasonable for a bank or Payment Services Provider ("PSP") to take reasonable, limited steps to safeguard its customers in line with the prevailing regulatory and industry

standards at the relevant time (see, for example, paragraph 15 of my provisional decision, below). That includes taking reasonable steps to guard against the risks of money-laundering and terrorism, which have been legal requirements for many years now, and long before the events that are the subject-matter of this dispute. HSBC ought to take account of and follow our approach in line with its complaint-handling obligations in DISP 1.4. If it vehemently disagrees with our approach or an individual decision, it has the option of bringing a judicial review. What it should not do is challenge each and every case, as this hinders our statutory obligation to resolve disputes “quickly and with minimum formality”.

5. In order to uphold this case, it is not necessary to conclude that HSBC breached its obligations in law — and I made no finding that it did. I am mindful of the strict legal position; but it is still fair and reasonable to conclude that a regulated bank or PSP has wider obligations—such as those which I and other ombudsmen have set out before—in order to protect customers from the risk of fraud and financial harm.

6. I do not accept that I created or held HSBC to retrospective standards of which it could not reasonably have been aware at the time of the disputed transactions. HSBC has mentioned a BSI Code — but it has conceded that I did not cite that in my provisional decision nor allude to it. I accept that that Code was not published at the relevant time, which is why it formed no part of my rationale.

7. HSBC also takes issue with my comments on regulatory alerts published by the FCA and/or the International Organization of Securities Commissions (“IOSCO”):

> This effectively creates a retrospective obligation on us, as a PSP, not to process any payments to a merchant that has been the subject of a FCA warning or IOSCO alert one month or more prior to the date of the payment without first conducting an investigation into that payment. This is deeply concerning because no such obligation exists and there would have been no way for us to have known at the time that we would be held responsible on the basis of such a duty imposed by your service several years after the event. You seek to do this in reliance on general comments as to what constituted ‘good industry practice’ in 2012 FSA guidance (which did not create any legal or regulatory standards requiring us to flag transactions based on IOSCO alerts). It is neither fair nor reasonable to hold us liable on the basis of such *ex post facto* obligations.

8. This is a specious argument. There is no retrospective application of obligations here. A regulated firm has always been obliged, if only as a matter of good practice, to take account of alerts published by the regulators — for the reasons set out in the 2012 FSA guidance that I previously cited. It is neither onerous nor unfair for an international bank to maintain a watchlist of potentially fraudulent or illegally-operating payees; nor to pause any payments directed to such persons rather than simply execute the instructions of lay clients with less knowledge and expertise. It is true I concluded that a one-month grace period from publication might be fair and reasonable in all the circumstances — but that merely operates in favour of firms to give them time to update their systems. Within the spectrum of reasonable conclusions, I could equally have concluded that, in this day and age, electronic alerts should be acted upon more quickly. I am satisfied that it is fair and reasonable for a large corporate body to update its fraud alerts and watchlists within a month of a regulator publishing an alert. HSBC has given no good reason why this is not the case. I still think it would be unreasonable to expect a firm to act *immediately* on an alert because that would not take account of the commercial realities and logistics faced by bodies corporate.

9. On the specific facts of this case, I was satisfied that Mr L would probably have acted differently if HSBC had intervened or given a warning (in line with its duty to act fairly and reasonably) — and that he was only 20% to blame for what happened. HSBC has not specified what further detail it seeks, but it has had many months to investigate this case and submit its defence. It has access to all the information before me. There is no evidence before me which HSBC has not seen or itself presented. The background circumstances were also set out in some detail in our investigator's initial assessment of 24 July 2020, which HSBC did not materially contradict.

10. In summary, Mr L said (and here I largely repeat the investigator's summary): He invested his money with 23Traders as he was about to retire and wanted to increase his pension income. To do so, he used the money he had saved for his pension. He does not remember how he entered into contact with 23Traders. His 23Traders account first built up steadily over a few months, to reach an apparent peak of about £460,000. Then, following a particular dealing, the whole sum was apparently lost. Around the same time, he was diagnosed with cancer and had to go to hospital. He was in and out of hospital for two years. The trades followed a pattern of building up and then losing it over a period of a month. All the transactions were made over the phone. 23Traders' brokers would call him before a transaction and send him an email with an authorisation form to sign and return. They would only inform Mr L afterwards of how much it had cost. He did not realise there would be so many transactions and it would amount to as much as it did. Trading decisions were made by the trader not by him. The performance varied hugely.

11. Mr L said he only used the platform to follow the success/failure of the trades entered by the 'traders'. He could never reach 23Traders by phone. They had kept his card details (long card number and CVV) and continued to make transactions. In order to take the investment to the next level and to get a better percentage, they encouraged him to invest more. Mr L explained: "*It's like getting into a lane which you can't get off, it goes on and on and on, they always make excuses for you to invest again*." He wanted to put in place monthly withdrawals of £5,000 or £10,000 but they never replied positively to that request. He felt he did not have control on the withdrawals. The withdrawals were minimal compared with the amount deposited. The merchant presented themselves on the internet as a brokerage firm but (he later discovered) they are not a registered brokerage/investment firm and, therefore, were not authorised to provide the service he had paid for. He never received the terms and conditions as they only appeared on 23Traders' website. He only realised it was a scam after speaking to his financial adviser who warned him about it. He believes he spoke to HSBC before to mention his concerns, but it never warned him about 23Traders or mentioned any concerns. The bank did not tell him 23Traders were unregulated. He also invested £43,143 with another merchant (53Capital) in March 2017 and June 2017. When he tried to withdraw money, that merchant did not allow it either. But Mr L did not raise a chargeback claim for that investment as, at the time, his energy was focused on 23Traders and on his health.

12. I accept that Mr L probably could and should have done more to protect himself and/or act on his concerns (e.g. when he was apparently losing a lot of money and not in control of or receiving responses to withdrawal requests) — but that is why I made a deduction for contributory negligence. Given the relative knowledge and expertise of the two parties, Mr L's own failings do not wipe out HSBC's responsibilities as the financial professional in the relationship. I also appreciate there are gaps in Mr L's account. But this is unsurprising given the passage of time, Mr L's age and vulnerability, and the intangible nature of the online product in which he was trying to invest, which he was

unfamiliar with. There is nothing to indicate that Mr L has not tried his best to give a full and frank account of his dealings — and he has made concessions as to his conduct which simultaneously undermine his case but bolster his credibility as an honest and reliable witness.

13. For the reasons explained above and before (and by other ombudsmen in other cases), it is not unrealistic to expect a bank to intervene when a customer's authorised payments suddenly change pattern and become unusual or uncharacteristic when compared with the way the account has been run in recent times. Such activity is a clear indicator of potential fraud, so triggers the bank's obligations to monitor and undertake due diligence, which are independent of any duties the customer may also owe. I accept HSBC's point that an unusual transaction is not necessarily suspicious. But I never suggested that. I set out all the disputed transactions; and it was clear from those that there was a pattern which, viewed in context and in light of the regulatory alert about 23Traders, merited closer investigation by a responsible bank. For example, on his first two days of trading—the 1st and 6th of February 2017—Mr L made eight payments to the same new international payee of £5,000 each, totalling £40,000. This was certainly suspicious, as it could have been an attempt to get around the anti-money-laundering threshold of £10,000 (which banks should monitor). If HSBC had investigated at the time, it would or should have realised the payments were going to a trader who had, at that time, been the subject-matter of an IOSCO alert just a week before. I cannot accept HSBC's assertion that there was nothing to be suspicious about. And of course, HSBC was triggered enough to contact Mr L on 28 February 2017 (after further payments) — but only to confirm his ID. This implies a failure in its protocols or processes for guarding against fraud. There was something potentially suspicious and serious going on but HSBC was only concerned to check the payments were authorised.

14. HSBC has questioned the relevance and logic of my citing its call to Mr L of 11 April 2017, given that this was long after most of the disputed transactions. However, it is wrong to suggest that I found this call to be determinative of liability. This is a misrepresentation of my findings. In fact, I said (under the heading 'causation'):

> If HSBC had asked Mr L what the payments were for and the basic surrounding context, it is likely he would have fully explained what he was doing and that everything had been done over the phone and online with his 'broker'. Whilst HSBC may not have known for certain whether Mr L was dealing with a fraudulent binary-options trader or investing in a legitimate (albeit highly speculative) product, it ought reasonably to have provided a scam warning in light of all the information then known to financial professionals about the risks associated with unregulated, overseas binary options. **Indeed, HSBC and Mr L spoke by phone on 11 April 2017 about his application for a £30,000 bridging loan or overdraft, and he volunteered lots of information about his binary-options "dabbling"—and expressed some misgivings about 23Traders' responsiveness (see 'contributory negligence' below)—which was a perfect opportunity for HSBC to give a potential scam warning, especially as its representative declined the application (after reviewing his transactions and referring to a manager), saying that the bank did not understand nor cover that type of investment.**

15. The purpose of discussing that call was simply to show that, if Mr L had been called, he would have told the truth about what he was doing thereby giving HSBC a fair chance to warn him or intervene. In other words, it goes not to HSBC's *liability* or breach of duty but to the question of *causation*. It did not take much probing for the bank to be told about the binary-options trading, so had similar questioning taken place at the outset (when I think it should have been), the bank would have been in a position to warn and prevent

further losses. In other words, but for the failure to question, and then *potentially* the failure to act on answers (‘we do not understand or cover that type of investment’), Mr L would probably not have suffered the losses he did.

16. Apportioning liability for contributory negligence is not an exact science. There will be cases where a 50% deduction is warranted. I fully accepted that Mr L could have done more to protect himself; that consumers have to take responsibility for their own decisions; and that Mr L must bear some blameworthiness for what happened because, as HSBC points out, he was investing large sums in a high-risk, unregulated product and had neglected to consult his financial adviser until too late. Mr L is having his compensation reduced because I am satisfied he foresaw some risk of this type of harm but proceeded nevertheless. However, it would be unfair to reduce compensation too much, as Mr L was elderly and vulnerable at the time. He was a consumer unfamiliar with such matters. HSBC may have in mind another recent decision of mine in which I made a 50% deduction. But that was entirely different as the duped customer was not a consumer but a body corporate which had delegated the handling of its account to a professional third party. In the case of *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50—interestingly applying *Quincecare* in favour of the commercial customer (“*a case bristling with simplicity*”, as Lady Hale said)—the Supreme Court only made a deduction of 25% for contributory negligence. So it seems to me a deduction of 20% in this particular consumer case is fair and reasonable. Each case must be decided on its individual facts and circumstances.

17. In my judgment, a 20% deduction is appropriate, and I have seen nothing to persuade me to the contrary. Mr L was not, as HSBC asserts, “*incredibly reckless*”; he was just less careful than he ought reasonably to have been — for the reasons set out previously.

final decision

For the reasons set out above and before, I have decided to uphold this complaint. I therefore require HSBC UK Bank plc to refund to Mr L all of his stolen payments save the first two (totalling £10,000) — but subject to a 20% deduction for contributory negligence.

As Mr L also received £14,250 in ‘pay-out’ inducements from 23Traders, the losses outstanding total £150,750, so 80% of that would amount to an award of **£120,600**.

This was a savings account, so HSBC should add interest to that sum (less any tax properly deductible) at the relevant account rate(s) from the respective dates of loss to the date of refund. For the avoidance of doubt (in case it becomes relevant despite my reduction for contributory negligence), our statutory cap of £150,000 does not include interest or costs, which can be awarded over and above that sum.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr L (or those authorised by him or in law to represent him) to accept or reject my decision before 11 September 2021.

Mark Sceeny
Ombudsman

—copy of provisional decision dated 6 July 2021—

complaint

Mr L complains about his bank, HSBC UK Bank plc (trading as First Direct). He says the bank failed to protect him from financial harm caused by a company called 23Traders.com. He alleges they were scammers posing as binary-options traders, as a result of which he lost around £160,000. He is unhappy with how a chargeback claim was handled and communicated; and with HSBC's ultimate closure of his account after 20 years' custom.

HSBC denies responsibility for the loss. Its position, broadly, is that Mr L authorised all the payments to 23Traders and reassured the bank of his intentions when it phoned him on three occasions to check. So, HSBC says it was obliged to process the transactions without undue delay in line with the Payment Services Regulations 2009 (which were in force at the material time).

There were 41 disputed transactions between 1 February 2017 and 23 October 2017 (see Appendix 1 below for details). These totalled £175,000. Many of the payments were for £5,000, though some were for greater or lesser sums. Mr L believed he was trading in binary options—essentially a win-or-lose bet on the performance of commodities (etc)—and that he was making very good profits based on the information shown on his 23Traders online platform. Early on, in February and March 2017, he did receive £14,250 back from 23Traders in five tranches — but he now thinks these payments were simply more bait to hook him firmly onto the scam and carry on 'investing' (which he did). Mr L now believes the platform was nothing more than manipulated software or a 'video game' and not linked to real-life trades. Deducting the £14,250 'returns', Mr L's total loss with 23Traders is therefore **£160,750**. He is aware that this is higher than our £150,000 statutory cap on awards for acts or omissions that occurred—and were referred to us—before 1 April 2019 (see DISP Rule 3.7.4 of the *Financial Conduct Authority Handbook*).

my provisional findings

Upon reading all the available evidence and arguments from both parties, I have concluded that it would be fair and reasonable partly to uphold this complaint for the following reasons:

1. Not every complaint referred to us and categorised as a binary-options scam is in fact a scam. Some cases simply involve high-risk investment 'bets' on the performance of (e.g.) commodities or stocks that resulted in very disappointing returns or losses. Some binary-options traders promoted these products—which were not regulated by the Financial Conduct Authority ("FCA") or its predecessor at the time—using sales methods that were arguably unethical and/or misleading. However, whilst customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud, i.e. *dishonestly* making a false representation and/or failing to disclose information with the intention of making a gain for himself or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

2. Banks and other Payment Services Providers ("PSPs") have duties to protect customers against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering (see below). But when simply executing authorised payments, they do not have to protect customers against the risk of bad bargains or give investment advice — and the FCA has confirmed that a fraud warning

would not constitute unauthorised investment advice (see its predecessor's 2012 consultation paper on investment fraud, below). So, the first question to resolve is whether this particular retailer/trader was actually a fraudster.

3. I am satisfied that 23Traders were not carrying out legitimate binary-options trades but were instead dishonestly defrauding customers, e.g. by not actually making trades/bets with the money received from clients but simply manipulating their online 'trading platform' to show purported gains—with initial token pay-outs—in order to induce further 'investments' from victims such as Mr L. In the absence of evidence to the contrary, I have concluded this because:

    a. Before January 2018 (i.e. at the time of these disputed transactions), and reflecting the risky nature of such products, binary-options traders operating in the UK were required to be regulated by the Gambling Commission — whereas 23Traders were not. Nor were they regulated in any other jurisdiction so far as I am reasonably aware. This indicates they were operating illegally, probably with dishonest intentions. Legitimate firms tend to comply with regulatory requirements.
    b. On 23 January 2017, a warning about 23Traders was placed on the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"). The Danish Financial Supervisory Authority reported that they were offering financial services in its jurisdiction without authorisation. This is another potential indicator of dishonest intentions.
    c. There are several reports in the public domain—e.g. foreign press and online forums—stating that 23Traders were scammers. This hearsay is not in itself sufficient evidence of fraud. But in the context of known regulatory facts, it may fairly and reasonably be regarded as circumstantial evidence that helps build an overall picture of scammers dishonestly seeking gains at the expense of others.

4. Having concluded that this was a scam rather than just a bad bargain or poor investment advice, I must now go on to consider four more issues in order to determine the outcome of the complaint:

    a. Did HSBC deal with Mr L's chargeback claims fairly?
    b. If so, were any of the disputed transactions still so unusual or uncharacteristic for Mr L and/or his account that HSBC's fraud alerts ought reasonably to have triggered some sort of intervention?
    c. If triggered, would HSBC's intervention have made a difference and prevented or reduced the loss?
    d. And if so, was Mr L partly to blame for what happened such that it would be fair and reasonable to reduce compensation proportionately?

chargeback

5. Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa's arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. HSBC) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.

6. Mr L is upset because HSBC refused to take his chargeback claim to Visa for arbitration after the second presentment under Reason Code 53—'not as described or defective merchandise'—was defended by the 'merchant acquirer' on behalf of 23Traders. (It may seem odd that a scammer would actively engage in a chargeback process, e.g. by supplying screenshots of transactions, payments out, terms of business, etc. However, I understand this is not uncommon for this type of investment scam, whose business model is often predicated on using payment services such as Visa.)

7. In my judgment, it was not unreasonable of HSBC to drop the chargeback claim after the second presentment failed. First, taking the matter to arbitration is not without a costs risk; and in any event, it is strictly a matter of discretion for the card issuer. In this case, HSBC would have been mindful, in exercising its discretion in a fair and non-arbitrary manner, that the Visa chargeback rules did not cover binary-options trading at that time. *Binary Securities Trading Disputes* were only included within the scope of Reason Code 53 from 14 October 2017, i.e. after all but one of the disputed transactions in question: see *Visa Business News*, 26 October 2017:

   > Effective 14 October 2017, issuers may use Reason Code 53 to address cases whereby a binary options (or forex) merchant has imposed obstacles to prevent cardholders from withdrawing funds. This chargeback right is limited to the amount available in the binary option account at the time funds are requested. Issuers cannot charge back more than the original transaction amount, so capital gains from binary options trades cannot be paid out via the chargeback process.

8. Though not material to the circumstances of this case, it is worth adding for completeness that, from 1 December 2018, Visa's rules changed again to require binary-options merchants (and other "*high-brand risk merchants*") to be coded under Merchant Category Code ("MCC") 7995—Betting, including Lottery Tickets, Casino Gaming Chips, Off-Track Betting, and Wagers at Race Tracks. *Visa Business News* dated 6 September 2018 stated:

   > Visa has discovered that certain binary options, rolling spot forex trading, financial spread betting and contracts for difference merchants are being acquired in markets that do not require licensing or regulate merchant trading platforms. In addition, some of these merchants are selling into countries where local laws prohibit such transactions or require licensing by the relevant financial services authority.

9. Given that the disputed transactions in this case occurred between 1 February 2017 and 23 October 2017, before the changes to Reason Code 53 were published, HSBC could only have successfully presented a chargeback claim if 23Traders had expressly promised Mr L a guaranteed return contrary to the realities of such high-risk trading. And there was no evidence they had; on the contrary, the terms of business provided by 23Traders in their defence made no such claims. Mr L did not provide persuasive evidence showing otherwise. So, declining to forward the case to Visa arbitration in circumstances where there were no reasonable prospects of success was neither an unfair nor unreasonable exercise of HSBC's discretion.

10. Having said that, the last payment of £5,000 was on 23 October 2017, after the Visa rule change. However, that was not included in Mr L's chargeback claim. HSBC says—and I accept—that a number of payments were missed or not listed for inclusion due to the Claims Management Company ("CMC") employed by Mr L at the time. So I cannot reasonably hold HSBC liable for that omission. As the chargeback rules include time limits for presenting claims, it is now far too late to present a claim for that.

11. Mr L has also expressed concerns that it was not made clear to him that the money recredited to his account pending the outcome of the chargeback would be debited once again if the claim failed (as of course happened). Whilst it is true that HSBC did not make this clear to Mr L at the time, this was because the process was carried out via a CMC, so its standard declaration form containing such information was not used. I agree with HSBC that Mr L could and should have been made aware by his CMC of how the chargeback process generally operates. In any event, HSBC paid him £300 compensation for any distress or inconvenience caused by this communication error, which did not in itself cause any other financial loss.

12. For the reasons set out above, I am not persuaded that HSBC acted unfairly or unreasonably in connection with the chargeback claim, so I cannot uphold this complaint on that ground.

unusual or uncharacteristic activity

13. HSBC is aware of our general position on a PSPs' safeguarding and due-diligence duties to protect customers from the risk of financial harm due to fraud. We have published many decisions on our website setting out these principles and quoting the relevant rules and regulations. It is unnecessary to rehearse them again here in detail.

14. It is common ground that the disputed payments were 'authorised' by Mr L for the purposes of the Payment Services Regulations 2009 ('the Regulations'), in force at the time. This is because they were made by Mr L using the legitimate security credentials provided to him by HSBC. These must be regarded as 'authorised payments' even though Mr L was the victim of a sophisticated scam. So, although he did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, Mr L is presumed liable for the loss in the first instance.

15. However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider HSBC should fairly and reasonably:

    - Have been monitoring accounts—and any payments made or received—to counter various risks, including anti-money-laundering, countering the financing of terrorism, and preventing fraud and scams;
    - Have had systems in place to look out for unusual transactions or other signs that might indicate its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer; and
    - In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

16. I am satisfied there were enough 'triggers' in this case to have alerted a responsible regulated bank such as HSBC that Mr L's account was being subjected to unusual and uncharacteristic activity. There were reasonable grounds to suspect a fraud or scam, and therefore justify an intervention (such as phoning him in order to ask discreet questions about the nature and purpose of the payments).

17. First, regulated firms ought reasonably to take notice of alerts about traders published by the FCA and/or IOSCO. As long ago as June 2012, the FCA's predecessor indicated—in its consultation paper entitled *Banks' Defences Against Investment Fraud: detecting perpetrators and protecting victims*—that it was good industry practice for firms to build up an updated watch-list of types of scams and potential perpetrators; and regularly to share "*timely and detailed intelligence*" with other banks, UK and overseas regulators, the police, etc. Whilst the regulator gave no specific timings, it is not unreasonable in my view to expect an international bank to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA or IOSCO. In my judgment, such alerts should automatically trigger alarm-bells—and lead to the payment being paused—pending further enquiries (and a possible scam warning) to the payer.

18. In Mr L's case, there was a warning about 23Traders on IOSCO's Investor Alerts Portal from 23 January 2017, which was before the first payment on 1 February 2017 — but only by just over a week. It is not unreasonable to expect a large international bank that regularly updates its internal alerts to include information about payees who had tried to carry out regulated activities without permission. I accept that the warning did not specifically relate to binary-options trading; and it did not necessarily follow from the nature of the warning in isolation that these were fraudsters. And given the timing of the alert relative to the first payment, I do not think HSBC ought to have automatically blocked it; and may not yet have had a fair chance to update and communicate its watch-list. However, in light of the odd pattern of payments that followed, I do think this was a trigger for potential fraud, particularly given that this was also a *new* payee; also an *international* payee; and a payee trading in binary options without being registered with the Gambling Commission (as required at the time). The bank had constructive if not actual notice that the payee might not be a legitimate merchant — therefore, it would have been reasonable for it to have properly questioned Mr L before processing all the payments in order to satisfy itself that all was well.

19. But even if I were to give HSBC the benefit of doubt and conclude that the first payments were too close to the IOSCO alert to trigger internal alarms, the frequency of the payments and sums involved should in themselves have alerted HSBC to the risk of harm and prompted discreet queries almost from the outset.

20. The payments on the first two days of Mr L's 'trading' were as follows:

date	**payment**	**total**
01/02/2017	£5,000	£5,000
01/02/2017	£5,000	£10,000
01/02/2017	£5,000	£15,000
01/02/2017	£5,000	£20,000
06/02/2017	£5,000	£25,000
06/02/2017	£5,000	£30,000
06/02/2017	£5,000	£35,000
06/02/2017	£5,000	**£40,000**

21. This was a highly unusual and uncharacteristic pattern of spending for Mr L compared with his recent history on the account — and was an indicator that something untoward might be happening (including, for example, an attempt to circumvent the anti-money laundering requirements by making a number of smaller payments in short succession to

the same payee). Certainly by the time Mr L attempted to make the third payment on the same day, a pattern was emerging that ought reasonably to have caused HSBC to make further enquiries of him about what was going on. Indeed, HSBC did in fact contact Mr L but not until 28 February 2017 (after he had paid £64,000 over the course of 17 payments); and again on 6 and 7 March 2017. HSBC said the purpose of these calls was simply to confirm that it was in fact Mr L making the payments. But this reinforces my view that there were reasonable grounds for suspicions that could and should have been properly acted on — and acted on much sooner.

22. If, instead of merely confirming Mr L's identity and intention to pay, HSBC had fulfilled its duties and carried out due diligence by asking suitably probing questions, there is no reason to doubt that he would have explained what he was doing. In such circumstances, whilst the bank had no duty to protect him from a bad bargain or give investment advice, it could have checked its watch-list and/or IOSCO and warned Mr L that the payee was subject to an international alert and/or invited him to check whether the payee was registered with the Gambling Commission. After all, at that time, there was information in the public domain—which a bank ought to have known even if a lay consumer ought not—about the very high risks associated with binary options, including many warnings of potential fraud (e.g. Action Fraud's June 2016 warning; the European Securities and Markets Authority's July 2016 warning; the Financial Conduct Authority's consultation paper of December 2016; and the Gambling Commission's December 2016 scam warning that "*an unlicensed operator is likely operating illegally*", and so forth).

23. There is no evidence that HSBC provided Mr L with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he was making. It was a missed opportunity to intervene.

causation

24. If HSBC had asked Mr L what the payments were for and the basic surrounding context, it is likely he would have fully explained what he was doing and that everything had been done over the phone and online with his 'broker'. Whilst HSBC may not have known for certain whether Mr L was dealing with a fraudulent binary-options trader or investing in a legitimate (albeit highly speculative) product, it ought reasonably to have provided a scam warning in light of all the information then known to financial professionals about the risks associated with unregulated, overseas binary options. Indeed, HSBC and Mr L spoke by phone on 11 April 2017 about his application for a £30,000 bridging loan or overdraft, and he volunteered lots of information about his binary-options "*dabbling*"—and expressed some misgivings about 23Traders' responsiveness (see 'contributory negligence' below)—which was a perfect opportunity for HSBC to give a potential scam warning, especially as its representative declined the application (after reviewing his transactions and referring to a manager), saying that the bank did not understand nor cover that type of investment.

25. If HSBC had given a warning, I believe that Mr L would have paused and looked more closely into 23Traders before proceeding. There is no evidence that he was willing to take high risks or had a history of speculative investments or gambling; these were his pension monies after all. It seems more probable that he would have made further enquiries into binary-options scams and whether or not 23Traders were regulated in the UK or abroad. He could have discovered the IOSCO alert and the various regulatory warnings about the risk of binary-options scams (see above). In other words, I am satisfied that a warning from his trusted bank of 20 years would probably have exposed

23Traders' smoke and mirrors, causing him to stop 'trading' and preventing further losses.

26. Even if he had not worked out that this was a scam, it is likely that a warning would have prompted greater research into binary options, which in turn would have revealed the truth behind his supposed broker's (mis)representations — i.e. that they were not really regulated UK investments but highly-risky international bets more akin to a wager in which the broker must lose if he is to win. This would probably have stopped him in his tracks. But for HSBC's failure to act on clear triggers of potential fraud or financial harm, Mr L would probably have lost no more than the first two payments totalling £10,000. I think it would be expecting too much of HSBC to have intervened and made a difference from the first or second payments, which were only just over a week after the IOSCO alert about 23Traders.

contributory negligence

27. Notwithstanding the above, I do think that Mr L was partly to blame for what happened; that he did foresee the risk of some sort of harm of this nature but nevertheless proceeded to take it by deploying inadequate or no measures to avert it. At the time of his 'trading', there was information in the public domain about this particular trader — plus general information about the risks of binary options. Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000). I do not place too much weight on general but arcane information in the public domain for reasons previously alluded to about the information imbalance between financial professionals and ordinary consumers.

28. Rather, Mr L's own comments indicate that he did entertain some misgivings at the time. As well as the pause in his trading with 23Traders between April and August 2017 (he carried on with other binary-options trades elsewhere), which arguably indicates a period of hesitation and reflection with regard to that particular company, he remarked to our investigator that "*It's like getting into a lane which you can't get off, it goes on and on and on, they always make excuses for you to invest again*." He mentioned difficulties trying to get pay-outs despite apparently significant profits/leverage. And in one of the phone calls from the bank checking his ID, he seemed surprised at how much had been taken from his account that day by 23Traders: £20,000 in four payments on 7 March 2017. I also reiterate my comments above about his slight misgivings in the overdraft call of 11 April 2017. It is *possible* that he simply did not recognise any danger — but I think it more *probable* that he had some misgivings by then as there was a pause with this particular company, and his future trades with them were more sporadic and sometimes of lower value (e.g. £1,000 or £500).

29. In the circumstances, I think it would be fair to reduce compensation by 20% on the basis that Mr L should share some blame for what happened.

30. Finally, whilst I appreciate Mr L is also unhappy that HSBC closed his account, I am satisfied that it was entitled to do this with notice under the contractual terms and conditions. This was a legitimate exercise of its commercial judgment.

provisional decision

For the reasons set out above, I am minded mainly to uphold this complaint and propose asking HSBC UK Bank plc to refund to Mr L all his stolen payments save the first two (totalling £10,000) — but subject to a 20% deduction for contributory negligence.

As Mr L also received £14,250 in ‘pay-out’ inducements from 23Traders, the losses outstanding total £150,750, so 80% of that would amount to an award of **£120,600**.

This was a savings account, so HSBC should add interest to that sum (less any tax properly deductible) at the relevant account rate(s) from the respective dates of loss to the date of refund. For the avoidance of doubt (in case it becomes relevant despite my reduction for contributory negligence), our statutory cap of £150,000 does not include interest or costs, which can be awarded over and above that sum.

Mark Sceeny
Ombudsman

Appendix 1 — disputed transactions

No.	Date	Amount	Running total	Chargeback date	Pre-arbitration
1	01/02/2017	£5,000	£5,000	No attempt	-
2	01/02/2017	£5,000	£10,000	No attempt	-
3	01/02/2017	£5,000	£15,000	No attempt	-
4	01/02/2017	£5,000	£20,000	No attempt	-
5	06/02/2017	£5,000	£25,000	27/12/2017	Yes
6	06/02/2017	£5,000	£30,000	27/12/2017	Yes
7	06/02/2017	£5,000	£35,000	27/12/2017	Yes
8	06/02/2017	£5,000	£40,000	27/12/2017	Yes
9	20/02/2017	£5,000	£45,000	27/12/2017	Yes
10	20/02/2017	£5,000	£50,000	27/12/2017	Yes
11	20/02/2017	£5,000	£55,000	27/12/2017	No
12	21/02/2017	£5,000	£60,000	27/12/2017	No
13	21/02/2017	£1,000	£61,000	27/12/2017	No
14	22/02/2017	£1,000	£62,000	27/12/2017	Yes
15	22/02/2017	£1,000	£63,000	27/12/2017	Yes
16	22/02/2017	£1,000	£64,000	27/12/2017	Yes
17	02/03/2017	£4,500	£68,500	No attempt	-
18	06/03/2017	£5,000	£73,500	27/12/2017	Yes
19	06/03/2017	£5,000	£78,500	27/12/2017	Yes
20	06/03/2017	£5,000	£83,500	27/12/2017	Yes
21	06/03/2017	£5,000	£88,500	27/12/2017	Yes
22	06/03/2017	£5,000	£93,500	27/12/2017	Yes
23	06/03/2017	£5,000	£98,500	27/12/2017	Yes
24	06/03/2017	£5,000	£103,500	27/12/2017	Yes
25	06/03/2017	£5,000	£108,500	27/12/2017	Yes
26	06/03/2017	£5,000	£113,500	27/12/2017	Yes
27	06/03/2017	£5,000	£118,500	27/12/2017	Yes
28	06/03/2017	£5,000	£123,500	27/12/2017	Yes
29	06/03/2017	£3,000	£126,500	Missed	-
30	07/03/2017	£5,000	£131,500	27/12/2017	Yes
31	07/03/2017	£5,000	£136,500	27/12/2017	Yes
32	07/03/2017	£5,000	£141,500	27/12/2017	Yes
33	07/03/2017	£5,000	£146,500	27/12/2017	Yes
34	30/03/2017	£5,000	£151,500	27/12/2017	No
35	18/04/2017	£1,000	£152,500	27/12/2017	Yes
36	18/04/2017	£1,000	£153,500	27/12/2017	Yes
37	18/04/2017	£1,000	£154,500	27/12/2017	Yes
38	18/04/2017	£500	£155,000	27/12/2017	Yes
39	09/08/2017	£10,000	£165,000	27/12/2017	No
40	09/08/2017	£5,000	£170,000	27/12/2017	No
41	23/10/2017	£5,000	£175,000	Missed	-