**“Mr A case”**

**(Fraudulent withdrawals after a bank card is retained by an ATM - April 2019)**

**KEYWORDS:**

*PSD2 — Payment services — Cash machine fraud — Lebanese loop — Undue delay in reporting the loss of the card — Gross negligence in using the payment instrument — Gross negligence in keeping the personalized security credentials safe — Real-time payments alerts.*

**FACTS:**

Mr A, the holder of a bank account with respondent-intermediary, after having made a Euro 250 withdrawal from an ATM owned by the same intermediary, at 6 p.m. on 28/10/2017, was unable to access his card, which was retained by the ATM. Plaintiff asserts he timely attempted to contact the toll-free customer number to cancel the bank card, but as he was unable to reach an operator, “*he gave up, with the intention to try again later*”.

A few days after the incident, he discovered that at 7:39 p.m. and 9:25 p.m. on that same day, 28/10/2017, two withdrawals were made, for Euro 950 and Euro 700.00, respectively. Furthermore, at 2:15 a.m. on 29/10/2017, an additional Euro 50.00 was withdrawn from the ATM.   
Mr A asserts that he stayed at the ATM (he advises he only left for a few minutes) for approximately 10 minutes while he attempted, unsuccessfully, to block the card retained by the ATM. During that timeframe, he did not see anyone take the card.

*He thinks the bank should refund the money that was taken as part of the scam.*

**LEGAL ANALYSIS:**

* **Legal provisions with specific reference to EU directive when applying:**

Artt. 69, par. 1, lett a) and b); and 70, par. 1, lett c), Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (PSD2); artt. 7, par. 1, lett. a) and par. 2, and 8 Legislative decree, 15 December 2017, n. 218, implementing Directive (EU) 2015/2366 on payment services in the internal market; artt. 1176 and 2050 Italian Civil Code.

**LEGAL SOLUTION:**

After examining all the facts, we came to the conclusion that Mr A was victim of a Lebanese loop, which is a quite common card fraud scheme: after having typed the PIN and requested the funds, the ATM machine looked like to “swallow” the card. As he believed the machine had genuinely retained his card for a malfunction, he tried to notify the payment service provider of the loss of the payment instrument, but then he gave up. While we did not find any negligence in his conduct in the care of the card and the use his personal identification number (PIN), we found he had been negligent for not promptly notify the card loss. As he admitted, in fact, he just tried to reach the intermediary, and, after a few minutes, gave up.

As the PSD2 provides that the cardholder can be held liable for unauthorized transfers as long as he promptly notified of the loss, the circumstance that he didn’t act fast does not limit his liability for charges he didn’t authorize before the notify.

At the same time, we found the financial intermediary’s behavior grossly negligent, for not having provided a system of text message notification, in order to have its client’s up-to-date mobile telephone number.

According to the Dir. 2366/2015, the national Italian rules implementing PSD2 and also to the general provisions of the Italian legislation (artt. 1176 and 2050 Civil Code), banks must activate the SMS alert service on clients’ mobile phone, so that they can receive all updates for their bank account on the phone itself.

**SUGGESTED SOLUTION:**

The use of a payment instrument is not in itself sufficient to prove either that the payment transaction was authorized or that the customer acted with intent or gross negligence.

Submit a claim to the ABF, not expecting to get the entire amount refund, since the client is guilty of contributory negligence.

**SPECIFIC REMARKS:**

Questions of loss allocation are mainly regulated by the national rules implementing this liability regime. Notification of card loss is crucial in payments systems risk allocation.