



<u>Decision Ref:</u>	2020-0001
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Current Account
<u>Conduct(s) complained of:</u>	Fees & charges applied
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant is a customer of the Provider (a Bank). He holds a current account with the Bank and is dissatisfied over the manner in which charges have been applied to his account over the last number of years.

The Complainant's position is that on a number of occasions his account became overdrawn, apparently because of delayed demands for payment by some retailers. While there was enough in his account when purchases were made, there was on occasion not enough monies in his account when the retailer actually accessed the account for the monies. The Complainant submits that on the occasions when his account was overdrawn, charges were applied to his account, amounting to €4.44 each time he was overdrawn. The Complainant states that these charges amount to over €100 for the past 6 years.

The complaint is that the Bank wrongfully applied "Irregular Account Charges" to the Complainant's account when it became overdrawn.

The Complainant's Case

The Complainant states that every so often, the Provider (the Bank) debited his account by the sum of €4.44 which the Bank designate as "Irregular Account Charges ". The Complainant is seeking a refund of this amount plus the debits of these same amounts over the last 6 years.

The Complainant says that the Bank attempts to justify this charge by stating that it arises when his account goes into a debit/overdrawn situation. He accepts he does not have any agreed overdraft facility/arrangement with the Bank.

The Complainant submits however, in the vast number of instances/occasions with his dealings with the Bank, if he attempts to withdraw money from his account (believing he has funds available) the withdrawal will not happen and he will be advised that there are insufficient funds.

The Complainant states that he has a mobile phone App and on-line banking facilities with the Bank and, almost always, does a quick check to see if he has sufficient funds before attempting to make a laser purchase or ATM withdrawal.

The Complainant states that apparently, on some occasions, a laser purchase made on one day, may not be debited to his account straight away (although this is the exceptional case and not the normal - which is for the transaction to be debited immediately). The Complainant says that the Bank (in answer to his direct complaint to them) states that the reason for this is that: *"..some retailers authorise transactions without checking [his] account balance"*. When this occurs, and even in some cases where the result may cause a one or two euro 'overdrawing' of his account, the Bank charges him €4.44.

The Complainant's position is that consequently, the error which arises, apparently, is due to some retailers not 'checking' the balance of the person they are transacting with. The Complainant says he has also previously been told by the Bank, some retailers use equipment which is in-line with to 'up-to-date' standards.

The Complainant submits that his argument is, if the banking equipment or the failure of retailers checking creates the error, the Bank should provide the proper equipment (or insist that retailers install the correct equipment and/or insist that retailers follow the proper procedures/guidelines for checking balances before putting transactions through. The Complainant says that if the retailers have these arrangements with banks in general, but failed to adhere to the guidelines/procedures, the Bank should not penalise him. The Complainant states that he is aware from his credit card that other banks do not impose these charges in similar situations

By way of resolution the Complainant wants the Bank to refund him for all of the €4.44 charges over the past 6 years. The Complainant states that since he does not have statements going back this far he cannot give a precise total but, estimate that the total figure would be in excess of €100.

The Provider's Case

The Bank's position is that an Irregular Account Charge (€4.44) is a charge which the Bank applies to a Current Account whenever the account goes into unarranged borrowing, that is, if the account balance goes overdrawn without an arranged

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overdraft in place, or if the account balance exceeds a pre-arranged approved overdraft facility applicable to the account.

The Bank states that the charge is applied to the account with each transaction which results in the above situations occurring. The charge is applied to the account on the following business day of the applicable transactions.

The Bank's position is that the Irregular Account Charge is outlined to its customers in its brochure entitled "A Guide to Personal Accounts Fees and Interest" under the heading Interest and Charges on borrowing.

The Bank states furthermore, that in an effort to help its customers avoiding such Unarranged Borrowing charges (€4.44 per transaction on unarranged borrowings), it tells customers under the heading How to avoid paying fees and charges:

Specifically in relation to the Complainant's Current Account, the Bank states the following:

- The Complainant does not have any pre-approved arranged overdraft facility on his Current account, and has not had any overdraft facility arranged on his account for the timeframe under dispute in this case, being six years from July 2016.
- The Complainant's Current Account statements for the period July 2006 to date shows that the Irregular Account Charges were legitimately applied to the Complainant's Current Account on each occasion that his account balance went into unarranged borrowing. The Bank is satisfied that these charges were correctly applied in accordance with the Bank's Guide to Personal Accounts Fees and Interest and Personal Banking Terms and Conditions.
- The Complainant's Statement of Account shows the account transactions for the period in question, the debit balances on the occasions when the Complainant's account was overdrawn without prior approval by the Bank, and the resulting Irregular Account Charges applied as a result of transaction(s) processed on the Complainant's account which caused unarranged borrowing on the account.
- The Bank submitted a note setting out the history of fees and/or charges levied on the Complainant's account for the period complained of.
- It is the Bank's position that the evidence shows that the Complainant did not have sufficient available funds in his Current Account by close of business on the previous working day on which the transactions occurred, as per the Terms and Conditions, in order to meet the transactions which were applied to his account.
- The Bank explain that the transactions which caused the Irregular Account Charges to be applied to the Complainant's account were Card Transactions, on the various Service Cards which the Complainant had active on his account during the period in question, (as outlined in the applicable transaction notations on account statements).

- The Bank states that from reviewing the transaction history on the Complainant's Current account, it is clear that the Card Transactions under dispute, which were made on the Complainant's Current account were always applied to the account before the dates or times on which sufficient credits/lodgements were made to the account to honour the Card Transactions. The Bank states that this is evidenced by the notations of the transactions on the account statements of the Complainant's account.

The Bank states that while the Complainant may have been reviewing his account balance via the Bank's App (mobile phone App) or through his Online Banking login, it is vital for the purpose of this Investigation and for the understanding of the Complainant, that the difference between Account Balance and Available Balance in the context of the Card transactions, and the Merchant/Bank transaction process are clarified and understood.

In that regard, the Bank submits that when a retailer or supplier of services accepts payment by card, the use of the Complainant's card will have the effect of guaranteeing the payment and the Bank will be obliged to pay the sum due to the retailer or supplier. For purchases with the card and cash advances carried out through a third party, transactions carried out using the card will be applied to the account on the business day on which details of the transaction are received by the Bank. The Bank however, says that typically there will be a time delay from the time the transaction is made to the date on which the transaction is processed on the Complainant's account. This is because the Bank applies the transaction on the business day on which the transaction is received by the Bank from the merchant in question. The Bank submits that in this regard, the Complainant's Statements of Account highlights the transaction date (underlined) and the actual date on which said transaction(s) were applied to the account.

The Bank says that for the purpose of the Complainant's card transactions, it is important to note that the Bank acts as a facilitator between the Complainant and third parties. The Bank therefore, states that until such time as the Bank is requested for payment by a third party, it cannot provision the debit to the Complainant's account. The Bank's position is that under the terms and conditions of the Complainant's current account, the responsibility lies with the Complainant to ensure that his account has sufficient funds to cover any transactions made by him.

The Bank says that as explained in its brochure entitled "Current Accounts —All you need to make everyday banking easier", under the heading "[the .. Bank Visa Debit Cards", it is stated that not all merchants are connected to the Banks systems. However, with the Bank's Service Cards (which is the type of Card the Complainant has), these cards can be used at merchants who are unable to connect to the Bank's systems. The Bank states that Service Cards can check via the Bank's systems for available funds on the accounts, where the merchants are linked to the Bank's systems. The Bank however, says that in cases where the merchants are not connected to the Bank's systems (e.g. car parking meters as used by the Complainant) the transaction should still go through, even if there are insufficient funds in his account.

The Bank explain that when the merchants are connected to the Bank's systems, the amount of the pending transaction (i.e. pending meaning - from the time of the actual transaction to the time when the Bank is notified of the transaction) will be reflected in

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the Complainant's available balance — this is known as "earmarking". The Bank says therefore, that the available account balance will be updated, before the actual account balance is adjusted.

The Bank states that during this pending period the funds in question do not leave the Complainant's account, they are merely held awaiting processing from the retailer in question. The Bank says that when the Bank receives details of the Card transactions and applies it to the account, it is at that stage that the actual account balance is updated.

The Bank submits that this is why the available balance on an account should always be the balance which the Complainant takes into consideration when checking what funds are left on his account which is available to withdraw at any particular point in time.

The Complainant can view both the actual account balance and the available account balance, together with transactions which have been applied to his account via the Bank's Mobile App and via his online banking.

The Complainant's further correspondence

27 February 2017 - The Complainant's submission

The Complainant states that he believes that the Bank) charges, designated as "Irregular A/C CHG" (IAC), to his account over a long period of time - are unlawful, excessive, disproportionate and in breach of the Bank's fiduciary duty to him as their customer/account holder.

The Complainant states that the Irregular Account Charges occur frequently following purchases or withdrawals from his account notwithstanding the fact that, each purchase or withdrawal, is first checked by him, either through the Bank's on-line website or the Bank's phone App, confirming that funds are available. The Complainant says that the Bank places media advertisements recommending the use and reliability of its on-line facilities and/or the use of its App.

The Complainant says that it is the stated position of the Bank that some of its retail customers allow him to make purchases without seeking on-line approval. The Complainant says he has no knowledge – or indeed – no control of this. The Complainant submits that purchases or ATM withdrawals by him (using his Bank issued Visa Debit [formerly Laser] card) are all controlled/monitored by the appropriate Point of Sale mechanisms which, invariably, require a pin number to be inserted and, usually seconds later, receive an authorisation code, before the purchase can be made.

The Complainant submits that the Bank may also contend that he should monitor his own spending however, it is submitted that this is not reasonable considering the fact that he may lodge e.g. 1,000 euro one week and spend this over several weeks with purchases from as little as 4 euro. It is submitted by the Complainant that the Bank should ensure that Point of Sale mechanisms (which it is believed are controlled by the Bank, and banks

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generally) should be linked to on-line facilities to ensure that accidental unauthorised overdrawing does not occur. The Complainant says that in the event that it does occur, the Bank has the luxury of charging excessive interest and it is submitted that the additional imposition of an Irregular Account Charge is excessive and disproportionate. The Complainant's position is that the various actual Irregular Account Charges occur on relatively small transactions invariably involving very small 'debit' balance situations – and he asks "is it the Bank's contention that Point of Sale transactions (apparently unchecked by retailers) could allow him, or indeed other account holders, to purchase substantial goods or services without any control or checks or balances in place".

The Complainant says that if it is decided that he is solely responsible for ensuring moneys are available to make purchases and ATM withdrawals, despite the Bank's on-line facility and/or phone App indicating (incorrectly) that funds are available; it is submitted that the Irregular Account charge is disproportionate (there are instances where the withdrawal brought his account less than 4 euro in debit, yet the charge is 4.44 euro. The Irregular Account Charge is not incurred due to any Bank official manually checking his account, but merely arises from some built in computer programme. The Complainant submits that while the personal affect on him may amount to 200 euro or so over the six years involved, it is contended that the Bank's system/computer programme would and does profit the Bank with thousands and thousands of euro profit over it's customer base and, in terms of considering the 'proportionality' issue, the Bank should be asked to disclose it's level of profit from such transactions".

Evidence

Under the Bank's Personal Banking Terms and Conditions, Section E,3 Debit Card — Conditions Of Use, Transactions, it is stated that:

3.7 "If a retailer or supplier of services accepts payments by your card, the use of your card will have the effect of guaranteeing the payment and We will be obliged to pay the sum due to the retailer or supplier".

3.10 "For purchases with your card and cash advances carried out through a third party, transactions carried out using the card will be applied to the Account on the Business Day on which details of the transaction are received by us."

3.11 "On each Business Day, any available funds on the Account will be used first, in priority to paying any other debit to the Account, to pay any transaction notified to us since the previous Business Day."

Under the Personal Banking Terms and Conditions, Section C,5 Overdrafts, it is stated that:

5.11 "If your account becomes overdrawn without our agreement or You exceed any agreed overdraft limit, even if due to an Irregular Account Charge or surcharge or debit interest, then fees will be payable as detailed in our booklet "A Guide to Personal Accounts Fees and Interest" which is available

from our branches and may be varied from time to time in accordance with Condition 7 Section A above."

Under the Personal Banking Terms and Conditions, Section (3.2 Operations on the Account, it states:

2.1 "You must always ensure that there are sufficient cleared funds in your Account (plus, where applicable, any unused agreed overdraft facility) to complete a transaction, for example:

. . . .if you carry out a debit card transaction

...if you request us to make a payment by any electronic means or by telephone

...if any other transaction on the Account is due to take place, including the application of interest and charges."

The Complaint for Adjudication

The complaint is that the Bank wrongfully applied "Irregular Account Charges" to the Complainant's account when it became overdrawn.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **17 December 2019**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

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Analysis

An **irregular account charges** is a charge that is incurred when there is insufficient funds in an account for a particular payment. The Bank allows the payment to be made despite the lack of funds anyway, but it charges its customer for this aspect of its service. The amount of the charge as it relates to the Complainant is €4.44.

Details surrounding the Bank’s application of charges to accounts are outlined in the Bank’s brochure entitled ‘A Guide to Personal Accounts, Fees and Interest’. A copy of the Bank’s brochure, dated 14 March 2017, has been furnished in evidence. Section 7 of the brochure provides information about interest and charges in borrowing.

On page 11 under the heading “Unarranged borrowing — interest and charges you will pay”, the following is stated:

“Your debit balance should not exceed your arranged overdraft limit. If your account overruns without formally agreeing an overdraft or you exceed your arranged overdraft limit, this is called unarranged borrowing. When this happens you will incur Unarranged Borrowing charges. You will also pay Unarranged Borrowing Interest.

If you have not arranged a suitable arranged overdraft limit in advance and there is not enough money in your account we may not always be able to authorise unarranged borrowing. We may not be able to pay your cheques, standing orders, direct debits or future-dated payments, including those to an [...] Bank loan and we will charge a fixed amount for each item we do pay (see the table below). Unarranged borrowing will incur higher interest than arranged overdrafts and should be avoided.”

At page 11 of the brochure, Section 7 contains a table of charges a customer may have to pay, as follows:

	<i>Why it is charged</i>	<i>When it is charged</i>	<i>Charge</i>
<i>Irregular Account Charge</i>	<i>This is a charge we make whenever your account goes into unarranged borrowing or we have to extend an overdraft due to transactions you have carried out where you do not have enough available in your account.</i>	<i>It is charged each time you make a transaction and we add it the following business day.</i>	<i>€4.44</i>

Section 8 of the booklet addresses the issue of “How to avoid paying fees and charges” and states the following:

“If there are payments such as direct debits, standing orders, cheques, future-dated payments and so on due from your account, please make sure you have enough in your account to meet these payments by close of business on the working weekday before the amounts are due. If you do not, it will result in unauthorised borrowing and we will charge surcharge interest and fees.

If you have an overdraft, always make sure that you keep within your agreed overdraft limit. This will mean you avoid unnecessary charges on your account.

You can check your balance at any time online or by phone on [on line] Banking.

Please contact your branch if you would like to discuss your financial needs further, and for more information on managing your account.”

Given the content of the terms and conditions applicable to the Complainant’s account, and in light of the fact that the Complainant’s account was at times in an overdrawn state, it is clear that the Bank was entitled to impose the charges in the manner it did. Contrary to what is alleged, I accept that the Bank acted correctly, lawfully and within the parameters of the terms and conditions of the Complainant’s account when irregular account charges were levied, as described above. I accept that the Bank relies on the Complainant to ensure there are monies available in his account to cover any payments he wishes to make. The Complainant also in turn has to rely on retailers to authorise transactions in a timely manner and when there are monies available. I accept that the Bank cannot guarantee that all transactions will update on a statement immediately as it relies on the retailer letting it know that they have actioned the payment from the Complainant’s account.

I note that the Bank has suggested ways that the Complainant can alleviate what is happening with his account. The Bank states that upon application through a branch of the Bank, the Complainant could select to downgrade his Service card to a Debit card, that is, order a Debit card to replace his existing Service card.

The Bank states that as explained in its brochure entitled Current Accounts — All you need to make everyday banking easier, under the heading Bank Visa Debit Cards, Debit cards help customers budget because they ensure every transaction is checked with the Bank for available funds before the transaction is agreed. The Bank however, says that this does mean that the Debit card cannot be used at merchants who are unable to connect to the Bank's systems.

The Bank submits that it is important to bear in mind that using a Debit card (rather than a Service card) may result in some merchant transactions not being processed or being declined at point of sale. The Bank says that this option is something which the Complainant could consider based on his Card use and banking requirements. The Bank

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states that if the Complainant wishes to proceed with changing his Card to a Debit card, then staff in any of its branches would be happy to assist him in this regard.

The Bank submits that regardless of the Complainant's decision about the type of Card he wishes to use going forward, the Bank wishes to offer, as a gesture of goodwill, a once-off refund of all Irregular Account Charges which were correctly applied to the Complainant's account during the year 2016. The Bank says that this amounts to €48.84, which equates to 11 Irregular Account Charges at €4.44 each.

The Bank states that it should be noted that these charges were applied legitimately and that all future such charges will be payable by the Complainant without refund.

Having regard to all of the above it is my Legally Binding Decision that the complaint is not upheld.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

13 January 2020

Pursuant to Section 62 of the Financial Services and Pensions Ombudsman Act 2017, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,**
 - (ii) a provider shall not be identified by name or address,**
- and**

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.