



<b><u>Decision Ref:</u></b>	2020-0262
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Banking Online Facility
<b><u>Conduct(s) complained of:</u></b>	Dissatisfaction with customer service
<b><u>Outcome:</u></b>	Upheld

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainant held an account with the Provider. On **14 November 2018**, the Complainant attempted to log into his account online. The Complainant encountered legal text which required him to accept certain terms and conditions before he could gain access to his account online. The Complainant did not agree to the terms and conditions and did not agree to the manner in which they were presented to him.

The Complainant was unable to access his account online until **15 August 2019** when the Provider removed the requirement to accept the terms and conditions before gaining access to the his account online.

The Complaint complained that he should be allowed to gain access to his account without having to agree to certain terms and conditions.

#### **The Complainants' Case**

The Complainant's case is set out in his complaint form and also his correspondence prior to sending in the complaint form and in his correspondence in response to the Provider's evidence and submissions.

On **14 November 2018**, the Complainant tried to sign into his online banking. The Complainant notes that he was presented with legal text which was 884 words long. The Complainant said that he did not understand the text and that he did not want to accept the terms and conditions.

The Complainant asserts that there is nothing in his agreement with the Provider that allows it to prevent him accessing his online banking unless he signs up to the new terms and conditions. The Complainant says that, provided that he has his sign in details and credentials, then he should be permitted access to his online banking.

On **18 November 2018**, the Complainant wrote a letter of complaint to the Provider asking the Provider to allow him access to his online banking. On **26 November 2018**, the Provider responded indicating that the Complainant was not allowed to access his online banking until he accepted the proposed terms and conditions. The Provider said that these changes were made pursuant to a new legal regime that had been introduced.

On **10 December 2018**, the Complainant's complaint was received. The primary relief sought by the Complainant was that he should be granted access again to his online account without being required to accept the proposed terms and conditions.

By letter dated **29 August 2019**, the Provider wrote indicating that it had removed the requirement for the Complainant to accept the terms and conditions before accessing his account online. On **8 September 2019**, the Complainant responded stating that a different legal text appeared when he tried to sign in. While the Complainant had less of an issue with this particular legal text, he disagreed with the principle of requiring him to accept terms and conditions in order to gain access to his account online.

On **23 September 2019**, the Provider wrote indicating that, in relation to the new legal text that appeared, there was no obligation on the customer to acknowledge that it has been read, understood or agreed to. Rather it was simply to bring the document to the customer's attention. The Provider said that it would remove the requirement for this other legal text to appear when the Complainant attempted to access his online account.

On **14 October 2019**, the Complainant wrote stating that he did not have any particular problem with the legal texts, but rather his issue is with the manner in which they are presented to the customer and the fact that any consent given is not real consent. The Complainant said that he wanted a legally binding solution rather than promises and reassurances by the Provider that he would not be blocked from accessing his online account again.

### **The Provider's Case**

The Provider's case is set out in its formal response to the Complainant's complaint and in the associated documents that it has submitted. The Provider also made additional submissions in response to the supplemental submissions made by the Complainant.

The Provider notes that the terms and conditions that the Complainant was asked to agree to before accessing his account were brought about by the regulatory changes. The Provider indicates that the Complainant's account was previously governed by the **European Communities (Payment Services) Regulations 2009** ('PSD1') and subsequently by the **European Communities (Payment Services) Regulations 2018** ('PSD2').

Regulation 55 of PSD1 provided that the Provider had to notify its customers of any changes to their banking agreements within 2 months before the proposed change. PSD2 was due to come into force on **13 January 2018** and was due to change the terms and conditions of the Complainant's agreement with the Provider. In order to ensure that it complied with the 2 months' notification requirement, on **13 November 2017** the Provider placed an advertisement in two national newspapers informing its customers of the new changes to be brought in on **13 January 2018**. The advertisement indicated that if the Provider's customers continued to operate their accounts after that date, they would be deemed to have agreed to the changes in their terms and conditions. The Provider also says that the new terms were available on its website and in branches.

The Provider notes that this was the industry standard intended to comply with Regulation 55 and that there was no obligation to inform customers individually of the proposed changes.

On **13 January 2018**, the Provider included the legal text that the Complainant complains about, prior to customers signing in to their online accounts. The Provider indicates that this was another means by which it could inform its customers of the changes. The Provider acknowledges that it did not have to do this, because it had already indicated that customers would be deemed to have accepted the terms and conditions by continuing to use the account. The Provider asserts that this was done, however, in order to try to ensure awareness of these important changes, and that it was not done to prevent anyone from accessing their account online. The Provider does accept, however, that it had the practical effect of preventing the Complainant from access to his online bank account unless he accepted the terms and conditions expressly and declared that he understood and agreed to them.

The Provider accepts that there is an inconsistency between deeming customers to have accepted the terms by continuing to operate the account, and then expressly requiring them to accept the terms and conditions before gaining access to their online account. Due to the inconsistency, the Provider removed the requirement to expressly agree to the terms and conditions before accessing the account. The Provider agrees that the Complainant should have been able to access his online account pursuant to the terms of their agreement without having to agree to the new terms and conditions.

In that context, the Provider acknowledges that pursuant to the *European Union (Payment Accounts) Regulations 2016* the Complainant did not have access to his account online until **15 August 2019**. The Provider does note, however, that the Complainant only tried to log in online on **14 November 2018**, which was 11 months after the changes were brought into effect. Prior to that, the last time when he had logged in was **3 March 2017**. As a result, while the Complainant was practically locked out of his account for approximately 9 months, it does not seem that he was frequently trying to access it online either before or after the changes were made.

The Provider indicates that it is renewing its policies going forwards but that it cannot agree to the legally binding solution which the Complainant seeks.

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## The Complaint for Adjudication

The complaint is that the Provider acted unlawfully or otherwise unreasonably or unfairly by blocking the Complainant from having access to his online account, unless he agreed to certain terms and conditions or other declarations.

## 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 **9 July 2020**, 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 any substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

It is necessary to first set out the standard terms and conditions of the agreement that the parties entered into.

On page 6 of the agreement, it says that

*'you may access your account in the following ways...by visiting our website at www.\*\*\*.ie (registration required) or www.\*\*\*.ie.'*

On page 7 of the agreement under the heading 'Securing Your Account' it says that:

*'The combination of your card (or your card number, PIN, internet password, card password, or other security code is the key to your account.'*

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On page 21 of the agreement under the heading **‘Amendment of These Terms and Conditions (including interest, fees and charges)’** and only insofar as is relevant to this dispute it says that:

- a) These Conditions shall continue to apply unless and until altered by us in accordance with this Condition 21...
- c) We may notify you of any changes to these Conditions by giving you at least 2 months’ notice, unless we are permitted by law to give you a shorter period of notice and by communicating the change to you in a durable medium or such other manner as may be permitted by applicable law or regulation...
- e) If you receive notice of any alteration to these Conditions, you may close your Account (or switch to another financial institution) and simultaneously cancel all other facilities granted to you in connection with your Account without having to pay any extra charges or interest. However any early termination charges to which you agreed when you opened your Account will continue to apply. Unless and until you close your Account, your consent to the alteration is implied.

**Regulation 17(4)** of the **European Union (Payment Accounts) Regulations 2016** states that

*A relevant credit institution shall allow a consumer to manage and initiate payment transactions from his or her payment account with basic features:*

- a) *At its publicly accessible premises and*
- b) *By using its online facilities where available’*

Regulation 17(1)(a) provides that a payment account with basic features

*‘shall enable customers to avail of the following services:*

- a) *Services enabling all of the operations required for the opening, operating and closing of the account...’*

Regulation 17(3) provides that a credit institution

*‘shall not place any limit the number of operations that a consumer may execute in relation to a service referred to in paragraph (1) that is provided as part of a payment account with basic features’*

Independent of the issue relating to the amendment of the terms and conditions brought about by PSD2 and the notification requirements set out in PSD1, I am satisfied that the Complainant was entitled to access his account online, in accordance with the terms and conditions of his agreement with the Provider unless otherwise amended and taking account of the terms of Regulation 17(4) of the Regulations quoted above.

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All of these provisions are written in plain English and are readily understandable. In light of the terms and conditions quoted above, the Complainant is correct when he says that all he required to access his account online at that time was his password and relevant account name or other identifier.

The requirement by the Provider to have the Complainant accept new terms and conditions (whether imposed by Regulation or otherwise) before gaining access to his online banking services, was a breach of the portions of the agreement quoted above and of Regulation 17(4).

It was a breach of the agreement because it required the Complainant to agree to additional terms and conditions before he could access his account online. While the Provider is entitled to make unilateral amendments pursuant to condition 21, which are deemed to be accepted by the Complainant after the passing of time, this is not what happened in this instance. The Provider did not seek to unilaterally amend the terms and conditions which are contained at pages 6 and 7 of the agreement, insofar as they relate to the Complainant accessing his account online.

Rather the Provider was seeking to inform the Complainant that there were other terms and conditions of the agreement that had been amended. At that time the Complainant tried to access his account however, the terms and conditions of the agreement were clear: the Complainant ought to have been permitted to access his account online with his username and password. The Provider acted in breach of its own terms and conditions by not allowing him to access his account online once he had supplied his username and password.

This was also a breach of Regulation 17(4) because it precluded the Complainant from accessing his account and, therefore, from *'managing and initiating payment transactions using online facilities'* unless he agreed to additional terms and conditions. Regulation 17(4) is drafted in unqualified terms and grants a customer a right to manage their account by using a Provider's online facilities.

It should be noted, however, that I also accept the Provider's explanation for including the terms and conditions on its website before a customer logged in. The Provider was obliged to make certain changes to the terms and conditions brought about by PSD2. At the point in time when the Provider was informing its customers, the provisions of PSD1 applied which required that 2 months' notice be given, albeit not written notice directly to each customer. Regulation 55 of PSD1 expressly does not require that specific notice be given to each customer. By placing the advertisement 2 months in advance, I accept that the Provider acted in conformity with Regulation 55 of PSD1, which was the relevant legal principle at the time. On **13 November 2017** the advertisement was placed in two newspapers as the new terms were due to come into force on **13 January 2018**.

In light of the Provider's understandable concern that not all of its customers might become aware of the proposed changes as published in two national newspapers, it was a reasonable and fair proposition for the Provider to seek to inform its customers when they signed into their online banking account. This was in fact an ideal way of bringing important information to the attention of its customers.

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I accept however that the Provider should not have made acceptance of these terms and conditions a prerequisite, before the relevant customer was permitted to gain access to their account.

I accept that the Provider was attempting to legitimately inform its customers of new changes, rather than trying to prevent them from accessing their accounts. The Provider has more recently acknowledged that there was an inconsistency between (i) the national newspaper advertisements deeming the customers to have accepted the proposed terms and conditions by continuing to operate their accounts, and (ii) expressly requiring customers to agree to the new terms and conditions.

The Provider notes that the Complainant attempted to access his account on **14 November 2018** when he encountered the issue that he complains of. The Complainant had previously accessed his account on **3 March 2017** almost 18 months earlier. The changes giving rise to the obstacle met by the Complainant in accessing his account, were introduced on **13 January 2018**. While the Complainant is correct in that he should have been entitled to access his account without having to confirm his agreement to the new terms and conditions, it is notable that he appears to have accessed his account somewhat sporadically up to that point. Of course, it is possible that the Complainant intended to use his online account more regularly after November 2018, but at this remove, it is unclear to whether the Complainant sustained any significant loss as a result of the issues raised.

Even though the Complainant has since gained access to his account online without having to agree to the terms and conditions, or to acknowledge the second legal text that he encountered, he seeks agreement from the Provider that there will be no further obstacles put in place which might prevent him accessing his online bank account. The Provider has replied stating that it cannot agree to such a legally binding solution as it does not know what future regulatory changes might arise.

I am satisfied that it would not be appropriate to make a direction that the Provider be required to indefinitely make access to the Complainant's online account available to him in a way which is unhindered. The Provider may, at any point in the future, be required to comply with regulatory changes which may prevent it from doing so.

Nevertheless, this complaint by the Complainant draws attention to conduct on the part of the Provider which, however well intentioned, nevertheless inappropriately required him to accept changed terms and conditions in a manner which was not appropriate. I note that in more recent times the Provider has accepted that the action taken was not in fact appropriate. The issue raised by the Complainant has given rise to the Provider amending its process regarding the notification of changes to the terms and conditions online, which I am pleased to note.


It is disappointing however that in this instance, the Provider was slow to address the key elements of the Complainant's complaint in any way promptly; I am satisfied that it has a case to answer to the Complainant in that regard.

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## Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €500, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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.



MARYROSE MCGOVERN  
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

31 July 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
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.