



<u>Decision Ref:</u>	2018-0046
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Multiple Products/Services
<u>Conduct(s) complained of:</u>	Application of interest rate Failure to provide product/service information
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainant's accounts held with the Provider.

The complaint has been brought to this Office on behalf of the Complainant by the Complainant's spouse (hereinafter referred to as "*the Complainant's representative*").

The complaint is that the Provider incorrectly advised the Complainant to lodge €35,000 into a deposit account instead of a current account which could have been used to offset interest owed on a second current account, resulting in the Complainant paying excess interest on that current account since 2010.

The Complainant's Case

The Complainant's representative submits that the Provider held 2,000 shares against an overdraft facility on the Complainant's two current accounts. The Complainant's representative states that when the shares "*were returned to us worthless the bank looked for €35,000 to be released from an investment elsewhere to hold against the O/D a/c, which we provided*". The Complainant's representative submits that she was wrongly advised to put the sum of €35,000 on deposit.

The Complainant's representative states that "*I was more than surprised when speaking with a branch official regarding the due annual discussion on renewal of our €35,000 deposit A/C [ending in '5937] against the O/D facility on the No. 1 Current A/c No. [ending in '5189] when she recommended in order for us to avoid continuing to pay huge interest payments*

quarterly every year since our deposit opened on 26/3/2010 with €65,000 and closed on 13/7/11 – opened with €35,000 on 13/7/11. She said it would be in our interest to transfer the deposit a/c to the current a/c as when transferred we would then be in a net credit and so avoid interest charges altogether. She said the deposit a/c was earning no worthwhile interest, plus the paying of dirt tax would be avoided too”.

The Complainant’s representative submits that the overcharged interest amounts to €11,353.68. The Complainant’s representative states that *“there is a “Duty of Care” and a moral obligation to refund the interest overpaid less the interest paid to us for the deposit of €35,000”.*

The Provider’s Case

The Provider, in its final response letter dated 28 July 2015, submits that the Complainant has availed of the benefits of set-off between his two current accounts for many years. The Provider submits that it clearly set out the advantages of the set-off arrangement in the letters of sanction over the years. The Provider states that *“It is also clear from the manner in which you operated your accounts over the years, that you fully appreciated the benefits of same”.*

The Provider submits that initially the overdraft facility was secured by shares. It states that *“When the value of the shares fell below what was acceptable in order to secure the Overdraft facility, you agreed to introduce deposits which you held with another financial institution. A lien was taken over these funds, but in real terms, the Bank relied on them only to the extent of the overdraft facility (€35,000) and allowed withdrawals from the surplus deposits, on request by you. It was always open to you to introduce whatever credit funds were available to you in order to increase the funding of the second current account. The Bank had clearly outlined the benefits in doing so in letters of sanction”.*

The Provider submits that as the €35,000 was placed on Fixed Term and not on Current Account no set-off balances could have been applied. The Provider states that *“if these funds were placed on Current Account, the Bank would have been unable to take a lien over these funds”.* The Provider submits that the Complainant received statements on his current account fortnightly and annually on his Fixed Term Deposit Account, which would have shown interest charged on the Current Account and also the interest which was earned on Deposit.

The Provider states that *“Unfortunately, it is not now open to you to say that the Bank should have told you to use your deposits differently. There was nothing to prevent you from asking the bank to review the manner in which the overdraft was secured. You did not do so”.*

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

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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 3 May 2018, 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.

A Submission dated 17 May 2018 from the Complainant's representative was received by this Office after the issue of a Preliminary Decision to the parties. This submission was exchanged with the Provider and an opportunity was made available to it for any additional observations arising from the said additional submission. The Provider confirmed that it had nothing further to add. While the Complainant's representative's submission does not fall under the category of an error of law or an error of fact, I have considered and addressed the contents of this additional submission and all previous submissions in this my Legally Binding Finding.

The issue to be determined is whether the Provider incorrectly advised the Complainant to lodge €35,000 into a deposit account instead of a current account which could have been used to offset interest owed on a second current account, resulting in the Complainant paying excess interest on that current account since 2010.

The Complainant's representative states that *"I am a person who would be very aware of my best interest in any business situation and certainly if I got the choice of a new Deposit Account or a 'set off' – like any right minded person I would of course have chosen the 'set off' situation but I believed the €35,000 on deposit was an account sealed against O/D and couldn't be touched"*.

The Provider submits that the Complainant operated two current accounts with it (accounts ending in '5189 and '5262), which were set-off against each other for the purpose of interest. The Provider submits that in February 2010 the overdraft facility on account ending '5189 was due for review. The Provider submits that it had been renewed on a temporary basis for 3 months prior to this due to the reduced value of the security held. The Provider submits that the Complainant had deposit funds maturing in another financial service provider and these were being offered to replace the existing shares.

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The Provider submits that its lenders report dated 30 November 2009 details the discussion that took place, which resulted in deposits being offered as security for the overdraft facility and the renewal of the overdraft for 3 months pending the maturing of funds which were held in other institutions. The Provider has submitted a copy of this report which I note states, among other things, the following:

“Proposal:

Extend of o/d facility of Eur35k on practice accounts for 3 mths...

Track Record:

also reduce hardcore by transf 10k from excl acc to group bal. Contra balances have been a feature on this acc and will be resolved at each y/e. Also has deps maruting in [another financial service provider] in Dec 09 & Jan 10 to be transferred here on dep to sup gtee.

...

Security:

EUR35k overdraft facility secured by Letter of Pledge over 4,000 [Provider] shares now only valued at EUR6.2k. Is going to transfer [other financial service provider] deps 90k in support of facilities on maturity ie. 50k 31/1/10 and 41k in 1 month.

Recommendation:

Recommended based on evidence of repayment capacity & long standing valued clients...

Business DCA/IDL:

Will agree Sanction, h/core being addressed but deemed low risk in reality... Security held for what it's worth... Mail to RM to attach the supporting security prior to decision 7/12

...

Additional Information:

Extension of facility.

Renewal is sought for 3 months only on the bases that our existing security is now practically worthless and client will be offering additional security on the maturity of deposit at the end of Jan hence only 3 months sought.

The contra balances on the accounts were raised as an issue in our recent QAV. This was discussed in detail with client at review.”

The Provider submits that in March 2010 the overdraft facility was renewed for 12 months and the lenders report details a discussion at this time around its suggestion to take the

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debit balance out onto a loan, however, the Complainant and his representative decided that they wanted to keep the overdraft limit and placed €65,000.00 on deposit as supporting security for the overdraft facility of €35,000 and to cover “hardcore debit balance take-out”. The Provider has submitted its Lenders Report dated 22 March 2010, which I note sets out, among other things, the following:

“Proposal:

Renew o/d facility of Eur35k on practice accounts...

...

Security:

Was secured by L/G35k, sup by L/Pledge over 4,000 [Provider] shares now only valued at EUR5.6k. Is going to transfer [other financial service provider] deps 90k to [Provider] with L/Lien of 65k in lieu of h/core extraction. They already lodged 10k in Oct 09 to reduce hardcore.

Recommendation:

Recommended based on evidence of repayment capacity & long standing valued clients...

Business DCA/IDL:

Agreed as sought. Renewal of existing facility and no increase in exposure. Add security to be obtained...

...

Additional Information:

Previous renewal was sought for 3 months only on the basis that our existing security is now practically worthless and client was offering add.sec. on the maturity of deposits at the end of March hence only 3 months sought.

...

As cust. is now due to retire in next year or two they would prefer to put dep. C90k with ourselves with 65k as supporting security rather than put h/c onto loan. In view of their age and [the Complainant] Retiring shortly, recommend taking lien over deposits...

CB REPORT:

...

[Provider] Exposure: €74.2k

Unsecured exposure: €74.2k

Security: To be obtained

[Provider] Personal Letter of Lien... for €65k from [the Complainant]

/Cont'd...

A/c perf: Limit €35k and balance €35.5k dr. (set-off in place)

...

Recommendation:

Approved.

- *Renewal of existing fac. At present level*
- *While h/c evident, cust. wishes to retain o/d at this level and not take-out h/c on loan. to ensure this, he is willing to give L/L over deposits €65k.*
- *Agreeable to this as fully cash-back on renewal and improvement in overall situation*
- *Full review in 12 months*
- *..."*

The Provider submits that an 8 month Fixed Term Deposit account on a rate of 2.5% was opened on 26 March 2010 and prior to opening same a number of suitability questions were asked, resulting in this deposit account being recommended. The Provider submits that the €65,000 was deposited in the Fixed Term Deposit account (account ending in '5932) on 29 March 2010 for a term of 8 months maturing on 29 November 2010.

I note that the Provider's letter dated 26 March 2010 to the Complainant sets out, among other things, the following:

*"Thank you for taking the time to discuss your financial needs with us.
In accordance with our obligations under the Consumer Protection Code, we wish to inform you that based on the information you have provided, the following product(s) are suitable for you:*

Deposit account access less than 1 year

These product(s) are suitable for you because:

- *You have considered your other financial commitments and are happy to proceed with investing or saving*
- *You wish to invest EUR 65,000*
- *You may need to access your funds within one year*

Deposit account access less than 1 year

These product(s) are suitable for you because:

- *You wish to invest EUR 25,000*
- *You may need to access your funds within one year*

...

You are not being advised which product to choose. You have been provided with information about the suitable product(s) to facilitate your decision in choosing a product. If you would like further information on the product(s) listed above, please contact your local [Provider] branch and we will be happy to assist you."

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The Provider submits that on 26 March 2010 an overdraft of €35,000 was sanctioned secured by a Letter of Lien over €65,000, which was held in the Fixed Term Deposit account. The Provider has submitted a copy of the sanction letter for the overdraft facility in the sum of €35,000 dated 26 March 2010. I note that this sets out, among other things, the following:

"I am pleased to inform you that the Bank has sanctioned the facility as set out below, in the following name:

[the Complainant]

The facility is subject to the terms and conditions set out in this letter and subject also to the Bank's General Terms and Conditions Governing Lending as set out in the enclosed Booklet. These are legal documents and should be read very carefully.

Overdraft

Amount: EUR35,000.00

Interest Rate: 7.950% - AA Rate at present 7.950% per annum compound interest, subject to change from time to time.

Review Date: Until further notice.

Borrowings on the account are repayable on demand. However, without prejudice to the Bank's right to demand repayment at any time it is the Bank's present intention that the overdraft arrangement will outstand until further notice or until you wish to have reviewed.

NET LIMIT FOR CURRENT ACCOUNTS

- (a) Clause 2.2.4 of the booklet applies. The amount of the facility will operate as a limit governing the net aggregate balance on business current account(s):
[account ending in '5189]
[account ending in '5262]
and may also apply to any future business current account(s) at this branch.*
- (b) Clause 5.10 of the booklet applies. A reduced variable rate of interest, currently 1% per annum applies to set-off balances.*

The Security/Special Conditions, which will extend to cover all your present and future obligations to the Bank including the facilities, will comprise the undernoted:

The Special Conditions for this credit facility are:

- 1. ALL SECURITY TO BE IN PLACE PRIOR TO DRAWDOWN OF THIS FACILITY.**
- 2. ACCOUNTANTS WRITTEN CONFIRMATION THAT ALL TAX AFFAIRS ARE UP TO DATE AND IN ORDER IS TO BE PROVIDED PRIOR TO DRAWDOWN OF THIS FACILITY.**
- 3. FULL REVIEW OF ALL FACILITIES TO TAKE PLACE BEFORE END OF FEBRUARY, 2011.**

/Cont'd...

The Security for this credit facility is:

1. [The Provider] PERSONAL LETTER OF LIEN FROM [the Complainant] OVER FUNDS IN [the Provider] FOR A MINIMUM AMOUNT OF EUR65000.00.

Security items 1 above must be in place before drawdown. The Bank's costs and outlay if any, in taking the security will be advised to you in advance and debited to your account.

Next Steps

For Overdraft facilities you must:

- (i) Where required, sign the Letter of Sanction by way of acceptance and return it to the Bank
- AND
- (ii) Comply with all pre-drawdown conditions including provision of security to the Bank's satisfaction.

I am pleased to have had this opportunity to be of assistance to you. If you have any further financial requirements, I would be happy to discuss those with you."

The Provider submits that €30,000 of the €65,000 in the Fixed Term Deposit account was transferred to clear a loan on 20 May 2010, and as the withdrawal was breaking the Fixed Term account, a fee of €63.50 was charged and subsequently refunded. The Provider submits that on the maturity date of the Fixed Term Deposit account of 29 November 2010 the account rolled over for a week, and on 12 December 2010 was placed on a term of 6 months to mature on 13 June 2011. The Provider submits that the account rolled over on a 2 week basis until 15 July 2011 when the balance of €35,830.43 was transferred to a new Fixed Term Deposit account (ending in '9009) to avail of a new rate of 4.2% and placed on a term of 2 years to mature. The Provider submits that suitability questions were gone through as part of these customer engagements and suitable products recommended based on the Complainant's answers.

I note that the Provider's letter dated 15 July 2011 to the Complainant sets out, among other things, the following:

"Thank you for taking the time to discuss your financial needs with us.

In accordance with our obligations under the Consumer Protection Code, we wish to inform you that based on the information you have provided, the following product(s) are suitable for you:

Deposit Account Access

...

Term Deposit More Than 1 Year

...

/Cont'd...

These product(s) are suitable for you because:

- *You have borrowings that you need to consider prior to investing or saving*
- *After consideration of your other financial commitments, you still have funds you wish to invest or save*
- *You wish to invest EUR 35,000*
- *You are happy to invest your money for a period of between 1 and 3 years*

...

You are not being advised which product to choose. You have been provided with information about the suitable product(s) to facilitate your decision in choosing a product. If you would like further information on the product(s) listed above, please contact your local [Provider] branch and we will be happy to assist you."

The Provider submits that the overdraft facility was renewed again in July 2011 for a further 12 months, supported by a Letter of Lien over €35,000 deposit. The Provider submits that despite an extensive search it has been unable to locate a copy of this sanction letter. While it is disappointing that the Provider has failed to maintain a record of this sanction letter, I note that the Provider has included a copy of its "Lenders Report" dated 5 July 2011, which states, among other things, the following:

"Proposal:

Renew o/d facility of Eur35k on practice accounts...

Track Record:

Contra balances had been a feature on this acc and was resolved on 31/12/09. Grade 2d. Hardcore a feature on account but in view of cash-back security, not an issue as there is no risk to the Bank.

...

Security:

Letter of lien over deposits 35k (customer wishes to avail of new 2 year fixed term deposit rate, which is expiring shortly) – so fully cash-backed – no risk.

Recommendation:

Recommended based on evidence of repayment capacity & long standing valued clients. Business Approved...

Business DCA/IDL:

While h/c on a/c we hold lien over E35k cash. Profitable business & clt long standing. Not ideal a/c performance however we have clear take out. Agree renew as sought..."

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The Provider submits that the overdraft facility was again renewed on 5 October 2012 “until further notice or until you wish to have it reviewed”, with security of lien on funds of €35,000.00. I note that the Provider’s “Lenders Report” dated 19 September 2012 states, among other things, the following:

“Proposal:

Renew o/d facility of Eur35k on practice accounts...

...

Security:

Letter of lien over deposits 35k (customer availed of 2 year fixed term deposit rate, which expires July ‘13 – so fully cash-backed – no risk.

Recommendation:

Recommended based on evidence of repayment capacity & long standing valued clients. Business Approved...

...

CU REPORT:

...

[Provider] Exposure: €46.5k

Security: Held –

[Provider] Personal Letter of Lien... for €35k

Recommendation:

Renewal of O/d facility of €35k sought... Hardcore solid and a concern, however limited risk here due to L/L held for €35k...

Agree renewal as sought. While not ideal a/c performance we have take out if necessary from Liened funds

...”

The sanction letter dated 5 October 2012 sets out the following:

“I am pleased to inform you that the Bank has sanctioned the facility as set out below, in the following name:

[the Complainant]

The facility is subject to the terms and conditions set out in this letter and subject also to the Bank’s General Terms and Conditions Governing Lending as set out in the enclosed Booklet. These are legal documents and should be read very carefully.

Overdraft

Amount: EUR35,000.00

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Interest Rate: 7.850% - AA Rate at present 7.850% per annum compound interest, subject to change from time to time.

Review Date: Until further notice.

Borrowings on the account are repayable on demand. However, without prejudice to the Bank's right to demand repayment at any time it is the Bank's present intention that the overdraft arrangement will outstanding until further notice or until you wish to have it reviewed.

NET LIMIT FOR CURRENT ACCOUNTS

- (c) *Clause 2.2.4 of the booklet applies. The amount of the facility will operate as a limit governing the net aggregate balance on business current account(s):
[account ending in '5189]
[account ending in '5262]
and may also apply to any future business current account(s) at this branch.*
- (d) *Clause 5.10 of the booklet applies. A reduced variable rate of interest, currently 1% per annum applies to set-off balances.*

The Security/Special Conditions, which will extend to cover all your present and future obligations to the Bank including the facilities, will comprise the undernoted:

The Special Conditions for this credit facility are:

- 1. **CONFIRMATION THAT TAX AFFAIRS ARE UP TO DATE AND IN ORDER IS TO BE PROVIDED PRIOR TO RENEWAL OF THIS FACILITY.**

The Security for this credit facility is:

- 1. **[The Provider] PERSONAL LETTER OF LIEN FROM [the Complainant] OVER FUNDS IN [the Provider] FOR A MINIMUM AMOUNT OF EUR35000.00**

Next Steps

For Overdraft facilities you must:

- (iii) *Where required, sign the Letter of Sanction by way of acceptance and return it to the Bank*
- AND**
- (iv) *Comply with all pre-drawdown conditions including provision of security to the Bank's satisfaction.*

I am pleased to have had this opportunity to be of assistance to you. If you have any further financial requirements, I would be happy to discuss those with you."

I note that Clause 2.2.4 of the "General Terms and Conditions governing Business Lending" provides:

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“Where a Borrower maintains more than one business current account at the same branch (other than excluded current accounts) then the Bank may agree that the limit will operate as a limit governing the new aggregate balance on those current accounts. In such circumstances, the Borrower must at all times maintain the net position within the limit. If a net access would otherwise occur, cheques may be returned unpaid notwithstanding that the particular account on which the cheque is drawn shows a credit balance.”

I note that Clause 5.10, underneath the heading *“Interest Set-Off on Current Account”*, of the *“General Terms and Conditions governing Business Lending”* provides:

“Where a Borrower has an overdraft and at the same time maintains a credit current account with the same branch and the Bank has a right to set-off the balances in those accounts, the Bank may agree to charge a reduced rate of interest (subject to a minimum of 1% per annum, but this may change) on that portion of the overdrawn balance covered by the credit balance. No set-off for interest purposes is allowed for any facility other than overdraft.”

I note that the Provider issued a letter to the Complainant dated 18 February 2013 regarding changes to his business current account ending in ‘5189. This letter states, among other things, the following:

“I am writing to advise that following a review of our product offerings, changes will be made to Set-off arrangements on Business Current Accounts with effect from 07/05/2013.

These changes may impact the future operation of your above Business Current Account as follows:

- *A Set-off Advice will be issued following specific changes to the accounts in a Set-off arrangement.*
- *This advice, containing account information of the master Account and the associated linked accounts, will be provided by post to the Master Account holder only.*
- *All debit and all credit interest accruing on the grouped accounts will be debited or credited to the Master Account.*
- *Set-off for Funds and/or Set-off for Interest will not be automatically applied to any new Business Current Account opened by you, but may be approved upon request.*
- *Transaction Fees will be calculated and charged on each Business Current Account separately.*

When additional Business Current Accounts are added to your Set-off arrangement during this notification period, the changes outlined above will apply. This letter is deemed to serve as notification of these changes.

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Enclosed are Questions and Answers to explain the impact and to assist you with queries in relation to this change, together with a copy of the 'Terms and Conditions for Set-off'. A separate letter of notification will be issued to you in relation to each of your Business Current Accounts that currently avail of a Set-off arrangement.

If you continue to maintain your accounts with [the Provider] after 07/05/2013, the changes will automatically apply to them. This does not affect your right to close your accounts at any time without charge, subject to payment of any outstanding overdrawn balance, interest and fees/charges.

If you have any queries, or if you wish to review your banking requirements, please contact your Relationship Manager or branch any time between 9am and 5pm, Monday to Friday."

The Provider submits that on 15 July 2013 the funds were placed on a term of 9 months to mature on 15 April 2014. The Provider submits that a maturity notice was sent to the Complainant and his representative on 26 March 2014.

The Provider submits that its Deposit official contacted the Complainant's representative by telephone on 9 April 2014 with regard to maturity of the funds. The Provider states that its "Deposit official spoke with the Third Party Authority advising her that interest rates on deposits were falling and interest was being charged on the current account and she might consider lodging the deposit funds to the current account. The Third Party Authority spoke with her accountant about this and requested reinvestment of the funds on deposit for a further 12 months at 1.85%. Again, reinvestment was for up to 1 year and no suitability questions were required, and following this conversation, the €35,000 was placed on a 1 year term to mature on 15 April 2015".

In response, the Complainant's representative states that "This conversation did not happen. I asked [the Provider's representative] if it would be feasible for me to [transfer] Dep. To No 2 Current a/c – My enquiry as we [were] paying huge quarterly int - & THEN she said yes – otherwise it would be still in Dep".

The Provider submits that its Deposit official again contacted the Complainant's representative on 9 April 2015 with regard to the maturity of the deposit account, and a conversation took place regarding falling interest rates and the suggestion made to cancel the overdraft facility and lodge the €35,000 to the current account.

The Provider submits that the Complainant's representative met with the Branch's Relationship Manager on 17 April 2015 and all funds, that is, €35,703.62 were transferred to current account ending in '5262 and the overdraft facility was cancelled on the account on 18 April 2015. The Provider submits that there is no record of a request from the Complainant to review the overdraft facility prior to meeting with the Branch's Relationship Manager on 17 April 2015.

The Provider submits that the balance in the Fixed Term Deposit account could not have been set-off against the overdrawn balances in the current account as the Complainant wanted to retain the overdraft facility. The Provider submits that the conditions of it sanctioning the overdraft facility was security in the form of the lien on funds and if these funds were placed on the current account this would not have been possible.

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The Provider submits that the Complainant was given the option to lodge funds to reduce the overdrawn balance, however *“The lodgement of the funds to the current [account] was not feasible at this time given [the] Complainant’s request to retain the overdraft facility and the Bank’s requirement for security for the overdraft”*. In response, the Complainant’s representative submits that this statement by the Provider is *“Not true”*.

The Provider submits that the account could have been reviewed at any stage. The Provider submits that in 2014 one of its representatives suggested that the Complainant cancel his overdraft facility and transfer the funds to the current account which would have reduced charges. In response, the Complainant’s representative states that she asked the Provider’s representative could she transfer the funds to current account No. 2, and she was advised that she could.

The Complainant’s representative states that *“When [the Provider’s representative] contacted me in April 2014 to discuss how I wanted the €35,000 invested for the year 2015 I complained about the huge interest we were paying. She suggested I transfer the €35,000 to the No. 1 Current A/C to avoid paying huge interest. During our conversation, I felt the €35,000 would be swallowed up in the No. 1 Current A/C and so I said no to leave it on deposit but the following year the same conversation took place and once again she suggested I transfer it to the No. 1 Current A/C and on that occasion, I thankfully asked would it be allowed to go to the No. 2 Current A/C as a set off and she confirmed yes – I was shocked beyond belief – [the Provider] would have allowed the situation continue to this day.”*

The Provider has submitted a copy of its representatives’ Statements dated 28 April 2017 and 2 May 2017 entitled *“FILE NOTE”*. I note that the Provider’s representative’s *“File Note”* dated 28 April 2017 states the following:

“The above fixed term deposit account matured on 15th April 2014, following a 1 year term at a rate of 1.85%.

On the 9th April 2014 I note that I spoke with [the Complainant’s representative] in relation to options for Deposits. I mentioned that [the] interest rates were falling and that maybe funds could be lodged to the current account to avoid interest being charged. [The Complainant’s representative] advised me that she had discussed the deposit with her Accountant and that she wished to reinvest the fund for one year – the rate was advised at 1.85%. The account was then reinvested for one year at [the Complainant’s representative’s] request and a statement sent out to customer following reinvestment on 15/4/2014.

Prior to the Fixed term deposit maturing on 15th April 2015 I spoke with [the Complainant’s representative] and again went through options with her, including transferring the funds to the Current account, I went through the interest being charged on the current account against the interest being earned on deposit account a long discussion took place.

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On 17/4/2015 the Fixed term deposit account was closed and balance transferred to [account ending in '5262] I did not meet with [the Complainant or his representative] when this transaction was completed.

The above statement is my recollection of events on the above account"

The Complainant's representative states that the Provider's representative "stated... I had allowed the deposit funds remain from 15/4/14 to 15/4/15 after a discussion with my accountant – not true – I did not have any discussion on same with my accountant but was under the impression from my conversation with [the Provider's representative] I could only transfer it to the No. 1 Current Account, the No. 2 Current Account was never mentioned by either of us".

In response, the Provider submits that the file note dated 28 April 2017 was taken from its representative's recollection and from the contact recorded by her of her conversation with the Complainant's representative on its system at the time of the engagements.

The Complainant's representative submits that following her conversation with the Provider's representative she immediately contacted another of the Provider's representatives, who had initially opened the deposit account, and attended a meeting with her two days later on 17 April 2015. The Complainant's representative states that "I was very angry with her as I felt she had duped me by deliberately and consciously opening an unnecessary Deposit Account in the bank's favour". The Complainant's representative goes on to state that during that meeting "I queried from her regarding the transfer from deposit to current and when she confirmed I could, I deliberately asked her to close the account she opened and do the transfer to the No. 2 Current Account, which she did".

The Complainant's representative also states that:

"[The Provider's representative who opened the deposit account] never replied to my letter dated 6/5/15. It was immediately taken over from her to [two other of the Provider's representatives] – neither of whom were involved in the opening of the Deposit Account or had any previous dealings with me except [one of the Provider's representatives] re funds reinvestment. [One of the Provider's representatives] did say on the phone "I wonder why she deemed it necessary to open a new Deposit Account, I'll enquire and get back to you" – but never at any time did either of them defend or refer to [the Provider's representative who opened the deposit account] at all –very odd".

I note that the Provider's representative who opened the deposit account "File Note" dated 2 May 2017 states, among other things, the following:

"My recollection at the review in 2010, was the discussion around persistent hardcore of approx. EUR30k-35k dr (as explained above) and our weakened security. The Manager discussed options of either extracting the persistent hardcore onto loan as it would be cost saving in the longterm re lower interest rate for loan or taking letter of lien over deposits to replace [the Provider] shares as

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supporting security. [The Complainant's representative] said she would prefer to keep the overdraft of Eur35k as didn't like [the] idea of taking out a loan with [the Complainant] nearing retirement etc. She advised that they had addressed the contra problem ie lodgements transferred to clear debit on second current account. Customer wasn't happy with value of [Provider] shares falling and as mentioned in previous meeting was willing to transfer matured deposits from [another financial service provider] to replace [Provider] shares. [The Complainant] was due to retire in next couple of years, and... they would_rather introduce deposits as security in the short term rather than extract the hardcore onto loan. We agreed then that they would sign letter of lien over deposits Eur65k to cover both overdraft and existing loan balance of approx. Eur30k at the time and customer was satisfied with this. Deposit options were then discussed and as term deposit rates were more competitive at the time than demand deposits, they were happy to open term deposit and also agreed that the term/maturity should tie in with overdraft review date so that both interest rate and overdraft could be looked at together.

The next review was in 2011. Customer was sent review letter looking for up to date accounts and confirmation of tax position, which they then posted to branch. Accounts showed both turnover and profits up on previous year, hardcore & contra balances were still an issue, but had decreased somewhat compared to previous year. There was still an over-reliance on the overdraft, ie constant high debit balance and not reaching credit days, which [the Complainant's Third Party Authority] said they would try to address. This review was done over the phone as accounts and tax were both received and [the Complainant's representative] was happy to answer queries herself, ie had good relationship with staff to openly discuss any issues etc. She also explained that [the Complainant] had semi-retired and just had 1 part-time locum now... It was easy to get queries answered over the phone and customer didn't have to call in to us. Security held was adequate so overdraft was sanctioned for a year with customer advising that they would concentrate on reducing hardcore on the accounts.

Review in 2012 – again customer sent in accounts and tax confirmation in response to our review letter looking for same. Accounts showed losses of approx Eur9.3k and turnover down from previous year, with hardcore/contra also featuring. [The Complainant's representative] said [the Complainant] had reduced his workload as he was semi-retired, they had reduced staff... and hence wages and also expenses reduced, so accounts for 2012 would show the benefits. As there was no risk to the bank re security held and reduced hardcore, the overdraft of Eur35k was again renewed for another year.

From 2012-2015 the overdraft of Eur35k renewed automatically, so was no longer looked after by branch.

In 2015, they were contacted by [a named representative of the Provider], Deposit Official, who had discussed falling deposit rates and suggested that they look to cancel the overdraft and lodge the deposits to the current account. I then met with [the Complainant's representative] on 17/4/15, following [a named representative

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of the Provider's] call, and she requested cancellation of the overdraft and transfer of deposit account to the current account, which I carried out."

In response, the Complainant's representative states that she *"NEVER mentioned retirement not even once – [the Provider] never offered a loan – I was quite happy with O/D except paying high interest until I PERSONALLY queried in desperation if I could have the Dep closed & transferred as a set off by lodging the money into No. 2 Current [Account] – Interest dropped hugely"*.

The Complainant's representative states *"My gripe with the whole happening on the 29/3/10 is [the Provider's representative] NEVER explained what options were open to me – if I had been advised "You will gain interest by opening a Deposit A/C but then you are leaving yourself open to an O/D situation which will mean paying quarterly interest of between €500/€600 – but if you choose to lodge into A/C [ending in '5026] you will be in a 'set off' situation and approx. quarterly interest charges of €70/78, then naturally my decision would have been different"*.

The Provider submits that the Complainant and his representative would have received statements on their current account fortnightly and on the Fixed Term Deposit account annually and so would have been aware of the interest being charged on the current account and earned on the deposit account. The Provider submits that maturity advises were issued centrally on Fixed Term account (ending in '9009) on 25 June 2013, 26 March 2014 and 24 March 2015. The Provider states that *"A copy of these advices is no longer available but the dates on which they issued are noted on [the Provider's] customer contact screen"*.

Having carefully considered all of the evidence before me, it is clear from the details of the overdraft facilities submitted in evidence that the Complainant availed of a set-off between his two current accounts. The overdraft sanction letters confirmed that *"Clause 5.10 of the booklet applies. A reduced variable rate of interest, currently 1% per annum applies to set-off balances"*.

While there is no stipulation in the overdraft sanction letters that the security must be held in a term deposit account, I note that a letter of lien from the Complainant over funds in the Provider for a minimum amount of €65,000 (26 March 2010 facility letter) and €35,000 (5 October 2012) was required. I must, therefore, accept the Provider's submission that the conditions of it sanctioning the overdraft facility was security in the form of a lien on the funds and if these funds were placed in either of the current accounts this would not have been possible.

I note that the Complainant's representative states that *"There would never have been a letter of lien requested or an O/D situation if [the Provider's representative] on 29/3/10 gave me my options"*, I must point out that the security requirements for the overdraft facility was at the commercial discretion of the Provider. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant.

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I note that the Provider has furnished evidence that it gathered and recorded sufficient information from the Complainant to enable it to provide a recommendation and issued letters of suitability to the Complainant in compliance with its obligations under the Consumer Protection Code.

Provisions 24, 25, 30 and 31 of the Consumer Protection Code 2006 provide the following:

“KNOWING THE CONSUMER

24 Before providing a product or service to a consumer, a regulated entity must gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or service appropriate to that consumer. The level of information gathered should be appropriate to the nature and complexity of the product or service being sought by the consumer, but must be to a level that allows the regulated entity to provide a professional service.

25 A regulated entity must gather and record details of any material changes to a consumer's circumstances before providing that consumer with a subsequent product or service.

SUITABILITY

30 A regulated entity must ensure that, having regard to the facts disclosed by the consumer and other relevant facts about that consumer of which the regulated entity is aware:

- a) any product or service offered to a consumer is suitable to that consumer;*
- b) where it offers a selection of product options to the consumer, the product options contained in the selection represent the most suitable from the range available to the regulated entity; or*
- c) where it recommends a product to a consumer, the recommended product is the most suitable product for that consumer.*

31 Before providing a product or service to a consumer, a regulated entity must prepare a written statement setting out:

- a) the reasons why a product or service offered to a consumer is considered to be suitable to that consumer;*
- b) the reasons why each of a selection of product options offered to a consumer are considered to be suitable to that consumer; or*
- c) the reasons why a recommended product is considered to be the most suitable product for that consumer.*

The regulated entity must give a copy of this written statement to the consumer and retain a copy.”

The Provider has submitted a copy of the account statements, which I note, set out any interest applied to the Current Accounts and interest earned on the Deposit Accounts. While I note that the Complainant would have reduced the interest payable on the overdraft if the funds in the deposit account had been applied to the current account, I must accept that the documentation highlighted an off-set account between the two current accounts and it was always open to the Complainant not to open a term deposit account, discontinue with

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the overdraft facility or query whether the funds could be applied to the current account which the Complainant's representative did in 2015. Based on the evidence before me, I can find no wrongdoing on the Provider's part.

Consequently, this 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**

7 June 2018

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) in accordance with the Data Protection Acts 1988 and 2003.