An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0097
Sector:	Banking
Product / Service:	Accounts
Conduct(s) complained of:	Failure to provide notification /reason for closure
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainant Company's two accounts held with the Provider. The Complainants are the directors of the Complainant Company, and take the complaint on the Complainant Company's behalf.

The Complainants' Case

The Complainants submit that the Provider sent the Complainant Company a letter to inform the Company that it was closing its business accounts. The Complainants submit that this decision was made without grounds, justification or explanation. The Complainants submit that the Provider unilaterally and inexplicably closed all the Complainant Company's bank accounts.

The Complainants submit that at no stage did the Company get an explanation why the decision was taken to terminate the relationship the Provider had with the Company since it commenced trading in 2009. The Complainants also submit that at no stage were the Provider's terms and conditions ever referred to or sent to the Company.

The Complainants submit that the Company had no loans, overdrafts or any liabilities with the Provider, and the "*directors of the company behaved with courtesy & probity at all times*".

The Complainants, in their submission to this Office dated 11 November 2016, state "*At this stage, despite a considerable amount of time & effort dispended trying to get the decision overruled by the bank's senior management, we think financial compensation should be rewarded to the company & its directors. Considerable reputational damage has been inflicted by the bank for no justifiable reason".*

The Provider's Case

The Provider submits that it has the right to terminate its relationship with a customer. It states "*This is a legal and contractual right of the Bank. There is no requirement of the Bank to give a reason to terminate its relationship with customers upon 2 months prior notice being given and we are exercising our right in this case*". The Provider submits that it has acted in a fair and professional manner and in accordance with its obligations.

The Provider submits that its contractual right to close the account is contained in Clause 13.3 of the Terms and Conditions for Current, Demand Deposit and Masterplan Accounts.

The Provider submits that following receipt of the complaint, it agreed to extend the closure date from 7 December 2015 to 30 January 2016. The Provider submits that it agreed to extend the closure date on four further occasions in order to facilitate a smooth transition of the accounts to another institution, and to try and resolve the complaint. The Provider submits that it also offered the Complainants a number of opportunities to meet a senior member of management and provided contact details to support the Complainants with any difficulties that may have occurred. The Provider submits that the accounts were finally closed on 9 September 2016, some 11 months after the initial notice, thereby extending the closure date by 9 months in total.

The Complaint for Adjudication

The complaint is that the Provider wrongfully closed the Complainant Company's accounts "*without grounds, justification or explanation*".

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 Complainants were 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.

/Cont'd…

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 19 February 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.

Submissions dated 26 February 2019 and 29 March 2019 from the Complainants and submission dated 11 March 2019 from the Provider were received by this Office after the issue of a Preliminary Decision to the parties. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the said additional submissions. I have considered the contents of these additional submissions for the purpose of setting out the final determination of this office below.

I note that the Complainants, in their submission dated 26 February 2019, state, among other things, that:

> *"You blindly accept that the bank is not obliged to provide the rationale for closing all the company's bank accounts. Do you think this is fair & appropriate? What would your position be if, for example, the bank's decision was taken because the company employed a member of the traveller community or employed a Jewish or indeed a Coloured member of staff? How do you know the rationale for the bank to make such a decision? How would you know, one way or another, as the bank is not obliged to provide the reason to anyone for its decision. If the scenario outlined above were the circumstances would your decision remain the same? We suspect not."*

I note that the Complainants have not submitted any evidence that the Provider has discriminated against the Complainant Company on any of these grounds.

I note that the Provider, in its submission dated 11 March 2019, states, among other things, that:

> *"The Bank notes that while no finding was made in favour of the Complainant pursuant to the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (the 1995 Regulations), the FSO has failed to address the jurisdictional matters raised by the Bank in its letters to the FSPO dated the 2 February and 22 October 2018. The Bank restates its position that the FSPO does not have jurisdiction to hear and adjudicate complaints pursuant to the 1995*

/Cont'd…

Regulations. The Bank also restates its position that the FSPO does not have jurisdiction to refer such matters to a Court of competent jurisdiction to determine. The Bank requests that these are now comprehensively addressed prior to issuing a final decision and continues to reserve its rights in this regard."

The Provider, in its submission dated 2 February 2018, states, among other things, the following:

"In the first instance, it is the Bank's opinion that the Office of the Financial Services and Pensions Ombudsman (the FSPO) does not have jurisdiction to consider complaints pursuant to the Regulations.
…
Regulation 8(9) provides that Regulation 8(1) is without prejudice to the right of a consumer to rely on the Regulations in any case before a 'court of competent jurisdiction'
…
It is the Bank's opinion that the FSPO cannot consider complaints from the Complainant pursuant to the Regulations…"

The Provider, in its submission dated 22 October 2018, states, among other things, the following:

"The position of the Bank in relation to jurisdiction remains as set out in previous correspondence.

It is the Bank's view that its letter of 2 February 2018 raised valid jurisdictional concerns which have not been addressed by the Financial Services and Pensions Ombudsman (the FSPO). The Bank does not believe that FSPO has jurisdiction to hear and adjudicate complaints pursuant to the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (the Regulations), nor does it have jurisdiction to refer such matters to a Court of competent jurisdiction for determination."

This office, in a letter to the Provider dated 14 December 2017, set out, among other things, the following:

"The Financial Services Ombudsman's Bureau has reconsidered the question of its jurisdiction to consider complaints pursuant to the ***European Communities (Unfair Terms in Consumer Contracts) Regulations 1995****, as amended, (the "Regulations").*

This office has now decided on the basis of extensive legal advice received, that it is not necessary to make a referral to the High Court under s57CK of the ***Central Bank Act 1942****, as amended (the "Act"). In that regard, this office has formed the unequivocal opinion that the Financial Services Ombudsman is entitled to consider and take into account the provisions of the Regulations in the context of its*

/Cont'd…

> *adjudications, both generally and also specifically in relation to this complaint in circumstances where the Regulations represent a central tenet of the issues raised.*
>
> *This office has formed this view on the basis of legal advice received, and taking into account its statutory functions and remit under the Act, together with relevant case law interpreting the Act."*

I remain firmly of the view that I am entitled to take into account the provisions of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.

Another matter I wish to deal with before turning to the issue at hand, is that I would point out the following:

The Complainants, in their submission to this Office dated 17 July 2016, state that:

> *"We have requested the bank to provide all pertinent information concerning [the first Complainant] & this company that the bank has under the Data Protection Act 1988 & 2003 &, if relevant, the Freedom of Information Act 2014. We have yet to receive any information in this regard."*

I would point out that any complaint regarding breaches of data protection legislation is a matter for the Data Protection Commissioner, and will not therefore be addressed in this Decision.

The Complainants submit that on 8 October 2015 the Complainant Company received a letter from the Provider notifying of its decision to close the Company business accounts as of 7 December 2015.

The Complainants submit that at no stage did the Provider explain why an amicable business relationship was being unilaterally terminated by it, contrary to natural justice. The Complainants, in their submission to this Office dated 17 July 2016, state that "*we were recently advised by a member of staff at [the Provider] that 'I assure you that your parents accounts are a priority to ourselves and our team here and that [the Provider] very much value yours and your parents longstanding business relationship with ourselves'*". The Complainants state that the Provider "*refuse[s] to clarify, justify or even discuss the decision & that all the accounts are being terminated on the 28th August 2016*". The Complainants submit that the Provider extended the closure date for the accounts due to the death of one of the Company directors in early 2015.

The Complainants state that "*It needs to be placed on record that the bank's bizarre decision will have detrimental consequences for the companies selected, the staff employed by them & the various company's shareholders. It appears the [redacted] bank is now imbued with a typical, yet distasteful, Civil servant entrenched mind set & appears no longer has the ability to think commercially, consistently & rationally*".

The Provider submits that on 7 October 2015 it exercised its contractual right to exit the Customer/Client relationship as set out in its terms and conditions. The Provider states that

/Cont'd…

"*The Complainant was advised that the Bank had exercised its right to contractually end the relationship as set out in paragraph 13.3 of the general terms and conditions governing current and deposit accounts*".

Clause 13 of the Terms and Conditions for Current, Demand Deposit and Masterplan Accounts provides the following:

> *"13 Closure of your Account*
>
> *13.1 We can suspend or close your Account immediately in any of the following circumstances:*
> *…*
> *13.3 We may close your Account for any other reason by giving you at least two months prior notice in writing".*

The Provider submits that the terms and conditions require that it has a reason for closing a customer's account, but does not require or oblige it to provide that reason to the customer. The Provider submits that it is unwilling to continue the contractual relationship in this instance, and therefore took the decision to close the Complainant Company's accounts and gave them the required notice.

The Complainants submit that at no stage were the Provider's terms and conditions ever referred to or sent to the Complainant Company. The Complainants submit that the first time the terms and conditions of the account were received was when the Provider included a copy in its correspondence after the decision to terminate the account was already taken. The Complainants submit that one of the directors of the Company has since opened three deposit accounts in three separate branches of the Provider, and on each occasion, the terms and conditions were not given to him or even referred to.

The Complainants state that "*The bank tacitly refers to its Terms & Conditions on its standard form when a new signing mandate was implemented on the 18th October 2013 & the 20th December 2011. This could be construed as sharp practice & unreasonable*".

The Provider submits that the terms and conditions are available online and in every branch and have been approved by the Central Bank of Ireland. The Provider submits that a copy of the terms and conditions were provided to the Complainant Company at account opening, and by proceeding with opening the accounts, it agreed to be bound by those terms and conditions. The Provider submits that a copy of the terms and conditions was also sent to the Complainant Company with the closure notice on 7 October 2015.

The Provider submits that in the account opening mandate *"the Complainant acknowledged receipt of the terms and conditions applicable to the accounts and requested the Bank to open accounts and that they be "subject to the appropriate terms and conditions (copies of which are acknowledged)*". The Provider has submitted a copy of the "*COMPANY SUPPLEMENTAL MANDATE*" dated 18 October 2013 and 20 December 2011 signed by the directors of the Complainant Company to confirm this.

/Cont'd…

Provision 4.22 of the Consumer Protection Code 2012 provides the following:

> *"A **regulated entity** must provide each **consumer** with the terms and conditions attaching to a product or service, on paper or on another **durable medium**, before the **consumer** enters into a contract for that product or service. To the extent that the contract for the provision of the product is a distance contract for the supply of a financial service under the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004, the Regulations apply in place of the requirement set out in the first sentence of this provision."*

While I cannot say with certainty whether the Complainant Company received the terms and conditions of the account at account opening stage, the Complainant Company signed the account opening form confirming that it did receive these. By signing the account opening form the Complainant Company was on notice that the accounts were subject to terms and conditions. The Provider submits that a copy of the terms and conditions were available online and in its branches. Both the Provider and the Complainant Company were bound by the terms and conditions of the account, and these terms and conditions were accessible by the Complainant Company.

The Complainants submit that Clause 13.3 of the terms and conditions the Provider is relying on to justify its decision is unfair and in breach of the European Communities (Unfair Terms in Consumer Contracts) Regulations.

The Complainants state that "*There, regrettably, is a lack of integrity emanating from [the Provider's branch] which is being colluded with rather than been exposed in an honest & transparent manner. One wonders what information is the bank hiding. What is the basis for which the bank is activating clause 13.3. Surely I deserve & would be entitled to an explanation for this decision. It is not acceptable & raises a lot of probing questions concerning possible prejudice & human right abuses*".

The Provider submits that Regulation 3(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (the 1995 Regulations) apply to a term in a contract concluded between a seller of goods or supplier of services and a consumer, which has not been individually negotiated. The Provider submits that the 1995 Regulations are not applicable to the Complainant Company as it is not a natural person. The Provider also states that "*the Complainant… is a commercial enterprise and is acting in its business. The National Consumer Agency in its 2014 Unfair Terms in Consumer Contracts Guide (page 4) states – 'A person who is acting for a business purpose of any kind is not a consumer, even if the business in question is not his or her primary business'. In light of this, the Complainant is also not a consumer*".

The Provider goes on to state that "*Without prejudice to the Bank's position in relation to jurisdiction outlined above, the Bank does not accept that its right to terminate the relationship with a customer is in breach of the Regulations. The contractual right conferred on the Bank to close an account having given notice is reciprocated to its customers at clause 13.3*".

/Cont'd…

Regulation 2(2) of the 1995 Regulations defines "consumer" as "*a natural person who is acting for purposes which are outside his business*".

Regulation 3(1) of the 1995 Regulations provides:

> *"3. (1) Subject to the provisions of Schedule 1, these Regulations apply to any term in a contract concluded between a seller of goods or supplier of services and a consumer which has not been individually negotiated."*

Schedule 1 of the 1995 Regulations sets out a list of "*Contracts and Particular Terms Excluded from the Scope of these Regulations*".

Regulation 3 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000 (S.I. No. 307/2000) provides that:

> *"Regulation 2 of the Principal Regulations is amended by the insertion of the following definition after the definition of "consumer":*
>
> *" 'consumer organisation' means –*
>
> *(a) a company, the memorandum of association of which states the company's main object or objects to be the protection of consumer interests,*
> *or*
> *(b) a body corporate (other than a company) or an unincorporated body of persons in relation to which there exists a constitution or a deed of trust which states the body's main object or objects to be the protection of consumer interests;"."*

The Complainant Company does not fall within the definition of consumer under the 1995 Regulations. I must therefore accept the Provider's submission that the Complainant Company is not a consumer for the purposes of the 1995 Regulations, and these Regulations therefore do not apply.

The Provider however has obligations pursuant to the European Communities (Payment Services) Regulations 2009 (the 2009 Regulations).

The Provider submits that the two months' notice period is in compliance with Provision 56(3) of the 2009 Regulations, which provides that:

> *"Termination.*
> *56. ...*
> *(3) If agreed in the relevant framework contract, a payment service provider may terminate a framework contract concluded for an indefinite period by giving at least two months' notice."*

/Cont'd…

The Provider states that the 2009 Regulations are intended to and do give effect to provisions of European Law. The Provider states that "*The chapter of which [Regulation] 56(3) forms part, provides for a number of obligations which apply to "framework contracts" and which remove ambiguity as to the entitlements of parties by stipulating expressly the circumstances inter alia, under which determination can occur. Just as [Regulation 56(3)] provides for the entitlement to terminate the contract by giving two months' notice, where such is contained in the relevant framework contract, so also does [Regulation] 56 make other provision limiting the amount of notice which can be required from an account holder*".

The Complainants submit that one of the directors of the Company has personally dealt with the Provider for over 35 years and with his family for over 120 years. The Complainants state that "*During that time we have had a good blemish free relationship with the bank & find this unexpected decision to unilaterally close all our accounts to be in breach of Article 81 of the EC Treaty… Moreover, [the Provider] is regulated by the Central Bank of Ireland & as such has a responsibility to behave impartially, honestly & fairly. Any reasonable person would conclude that the decision of [the Company's relationship Manager] to be irrational & not worthy of a previously august institution that [the Provider] once was & could be again".*

Article 81 of the EC Treaty (ex Article 85) relates to competition law. Any complaints regarding breaches of competition law is a matter for the Competition and Consumer Protection Commissioner, and will not be considered in this Decision.

The Complainants submit that they sent a letter to the Provider's Regional Director on 29 October 2015 "*questioning whether it would not be better to meet before the completion of the investigation as it would give her a more impartial oversight*". The Complainants submit that a letter was received from the Provider's Regional Director on 5 November 2015 confirming that the investigation was complete and that this was the Provider's final response.

The Complainants submit that they were unhappy with the manner in which the Provider's representative dealt with the investigation into the complaint. The Complainants state that it "*did not in any way appear impartial, by merely rubberstamping [the Provider's representative's] original decision*".

The Complainants submit that they issued a letter to the Provider's Head of Distribution on 9 December 2015, highlighting the following:

> *"(a) The initial decision was made by [the Provider's representative] with no justifiable grounds*
> *(b) The investigation by [the Provider's Regional Director] could not have been impartial as she sought no information from our company & so could only have been biased in [the Provider's] favour*
> *(c) No explanation has ever been given for the decision to close business accounts which have been held with [the Provider] for almost 40 years*
> *(d) A request to extend the official date of the closure of the accounts beyond 31st January 2015 until such time as the investigation by [the Provider's*

/Cont'd…

> *Head of Distribution] & should it prove necessary, the Financial Ombudsman be completed".*

The Complainants submit that a letter was received from the Provider's Head of Distribution on 21 December 2015 confirming the Provider's decision to close the accounts in question. The Complainants state that "*Again the decision was made without any explanation to or consultation with ourselves*".

The Complainants submit that at no stage did the Provider try and resolve the complaint. The Complainants state that "*The company repeatedly requested that the bank reverse its unexpected unilateral decision. The bank repeatedly denied the request despite it being brought to the attention of the bank's chairman, its CEO & other senior managers. The bank's statement is patently untrue in this regard*".

The Complainants submit that the Provider claims that it '*offered the Complainant a number of opportunities to meet a senior member of management and provided contact details to support the complainant with any difficulties that may have occurred'.* The Complainants state that "*This is duplicitous & a prevarication…. The bank repeatedly denied the request to resolve the situation from the bank's chairman down to various senior managers in [the Provider]. The bank's statement is patently untrue in this regard*". The Complainants submit that the Provider only offered assistance in transferring all of the Company's bank accounts to another financial institution "*after the unilateral inexplicable decision was made by [the Provider] in the first place".*

In response, the Provider submits that it advised the Complainants repeatedly that it would not reverse its decision. The Provider states that "*However, [its representatives] repeatedly offered to meet the Complainant to make the process of relocating the accounts to another institution easier. We also offered him alternate contacts to assist in this process. These offers were made in a number of the letters… and also in emails*". The Provider references the following emails:

> *"Email dated the 12th July from [the Provider's representative]… [Two of the Provider's representatives] offered to meet the Complainant at any time on the 14th/15th or 18th of July at a location of his choosing. The Complainant responded that unless the Bank was reversing its decision, a meeting would be pointless.*
>
> *Email dated the 30th of June from [the Provider's representative]… [The Provider's representative] offer the support of members of Branch staff to facilitate the Complainant in moving the various accounts. The details of these contacts were conveyed in the letters already issued as part of the case evidence."*

While I note that the Provider only offered support to the Complainant Company after it made the decision to close all the Complainant Company accounts, I must accept that the Provider was entitled to make the decision to close the accounts by giving two months' notice. The Provider complied with its obligations under the 2009 Regulations with regard to the closure of the account, and was entitled to do so pursuant to the terms and conditions of the account.

/Cont'd…

This Office will not interfere with a financial service provider's commercial decisions, other than to ensure that it complies with relevant codes and regulations and does not treat customers unfairly or in a manner that is unreasonable, unjust, oppressive or improperly discriminatory. I can find no evidence that the Provider treated the Complainant Company in this manner.

Having carefully considered all of the evidence before me, I find no wrongdoing on the Provider's part.

Consequently, it is my Legally Binding Decision that 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

29 April 2019

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.