An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0455
Sector:	Banking
Product / Service:	Commercial Mortgage
Conduct(s) complained of:	Maladministration Arrears handling - commercial lending Delayed or inadequate communication Dissatisfaction with customer service Miscellaneous Selling mortgage to t/p provider
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the Provider's administration of the Complainant's accounts, including the transfer of the Complainant's business loan account from the Provider to a third party provider, and the freezing of the Complainant's current account.

The Complainant's Case

The Complainant states that he took out a twenty-year loan with the Provider in **2006/2007** for the sum of €589,000. This loan was restructured in **2009** when the Complainant had *"difficulty repaying the loan for a short period of time"*. The Complainant contends that the Provider amended the original terms and conditions of the loan agreement at this time but failed to discuss these conditions with the Complainant or warn the Complainant of the consequences of accepting the restructuring agreement.

The Complainant further states that during **2011**, his loan account fell into arrears for a period of approximately four months but that all arrears were repaid by the end of **2011**. In his reply to the Provider's response dated **12 December 2018**, the Complainant objects to the Provider's assertion that there was a history of arrears on his loan account. In particular, he believes that the late payments that the Provider refers to were as a result of automation issues. For each instance referenced by the Provider from **January 2012** to **November 2013**, the Complainant gives details that the required funds were in place and available, in his current account, for drawdown several days before they were due in his loan account.

He points to clause 11.4 of the Provider's terms and conditions which states that *"all payments to be made by the Borrower under this Agreement shall be made to the Provider on the due date and if any payment should become due on a day which is not a business day, the due date for such payment shall be extended to the next business day"*.

The Complainant submits that the examples given by the Provider showing alleged late payments by him occurred on dates where his scheduled payment was to occur on a weekend or bank holiday and submits that was the reason for those transfers taking place a day or two later than was typical.

The Complainant asserts that the Provider wrote to him in **October 2015**, advising him that he had to repay the loan in full, or seek alternative arrangements within 60 days. He states that he replied to this letter querying its contents, but that he received no response. The Complainant submits that the Provider wrote to him again in **April 2016**, advising him that his loan was now with the Provider's *"Problem Debt"* division, and advising him that he was expected to submit a proposal to repay his loan in full by the end of **May 2016**. The Complainant contends that, during this time, he was also in contact with the Provider by email, advising that he was concerned about the letters he had received and the lack of response to the issues he had raised. The Complainant submits that his accountant telephoned the Provider and was told that the Complainant's loan was *"going through a process"* and would be *"returned to branch"*.

The Complainant contends that he was notified in a letter from the Provider dated **14 October 2016** that the loan was being transferred to a third party provider as it was now a *"problem debt"*. The Complainant submits that he wrote to the Provider, *"requesting an explanation [of] this letter as well as the ones dated **8 October 2015** and **29 April 2016** but [he] got no response"*.

The Complainant submits that he believes the Provider *"froze [his] current account in late **2016**/early **2017**"* which resulted in *"loan repayments and life assurance direct debits not coming out of [his] current account"*. He states that he received two letters from the Provider on **9 January 2017**, one advising that his life assurance payment had not been paid, and the other advising that his loan payment had not been paid. The Complainant contends that he visited a branch of the Provider that week and spoke with a member of staff who advised him that his current account *"had a note saying 'no activity allowed'"*. Another member of the Provider's staff advised him by telephone in the branch that his account was *"frozen but would not explain to [him] why"*. The Complainant submits that he received a number of letters from the Provider and a third party provider, some sent to his parents' home address rather than his own address, and that he made several attempts to ascertain *"what was going on"*, without success. The Complainant asserts that the instructions he received from the third party provider were that he was to continue to make payments through the Provider throughout the transitional period following the sale of his loan to the third party provider. The Complainant states that he was unable to do this because the Provider froze his current account.

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The Complainant states in his submissions that his business loan was transferred to a third party provider in **January 2017** without an explanation from the Provider. He states that it was not explained to him when he signed facility letters that his loan could be sold to another entity that was not a lending institution, was not governed and regulated by the Central Bank of Ireland and could be sold regardless of his loan being paid up to date. He submits that his requests for an explanation went unanswered, and that the Provider has failed to explain *"when, why or how [the Complainant's] loan became a problem debt"*. The Complainant further submits that *"[his] loan was and remained a performing loan"* and should not have been classed as a *"problem debt"*.

The Complainant also disputes the Provider's claim that he did not seek prior approval from the Provider with regards to sub-leasing part of the premises. He submits that the Provider was fully aware that a third party was actively seeking to sub-let part, if not all, of the premises. The Complainant states that the Provider's minutes of communications as far back as **2010** show that that the Provider was aware of this. The Complainant also states that when the Complainant ultimately found a tenant in **2012**, the Provider had full sight of the sub-lease and a copy of the lease was issued to it. The Complainant provided copies of the minutes of meetings with the Provider and a copy of a letter sent to the Provider dated **18 May 2012** in this regard. The Complainant further disputes that the Provider had concerns over his repayment capacity due to dependency on rental income from a third party. The Complainant says that the Provider was fully aware when sanctioning the loan in **2006** that payments were being made by a third party by way of rent from a 20-year lease and that this is detailed in item 3 of the Provider's *"conditions precedent"* within the facility letter dated **19 December 2006**.

The Complainant also raises issue with the Provider's response wherein it states that it is its policy to aggregate certain loans with *"familial connections"* so it may have an overview and *"exercise appropriate credit management"* on the borrowings of customers who are *"connected"*. The Complainant submits that his loan account and his father's loan account are two completely separate loans and contracts and nowhere does it state that they are connected.

Furthermore, the Complainant contends that the Provider's treatment of him since he became a customer in **2007** has been *"terrible"*. He submits that the Provider has caused him *"considerable stress and anxiety"* and that its communication with him has been *"appalling"*. The Complainant states that he does not believe the Provider is taking this complaint seriously, and that its handling of the issues he has raised has been *"nothing more than a shambles"*.

Finally, the Complainant states that the Provider breached general principles 1, 2, 3, 4, 6, 9 and 11 of the Consumer Protection Code ('CPC') in that it did not act honestly, fairly and professionally with due care and diligence in the best interests of the Complainant. The Complainant also specifically cites provisions 2.1, 2.2, 2.6, 2.8, 4.1, 4.2, 10.7, 10.9 and 10.10 of the CPC as having been breached by the Provider.

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Ultimately, the Complainant wants the Provider to put forward a proposal to resolve the matter that will satisfy both parties, reinstate his loan and restructure it to match the value at which it was sold taking into consideration the payments already made and compensate him for the *"mental anguish and trauma"* which he has suffered to the *"detriment of [his] health, wellbeing, personal, professional and family life"*. The Complainant also wants the Provider to acknowledge and apologise to him for the unanswered emails, letters and telephone calls, the freezing of his current account and the transfer of his *"performing loan"* to a third party Provider.

The Provider's Case

The Provider states that in a letter to the Complainant dated **8 October 2015**, it requested that the Complainant seek *"alternative Bank Arrangements within 60 days of the date of* [the] *letter"*, and stated that the Provider would facilitate operating the Complainant's current account until **8 December 2015** and that thereafter, *"any cheques or debits subsequently presented for payment will be returned account closed or refer to drawer as appropriate"*. The Provider states that it wrote to the Complainant on **29 April 2016** and gave the Complainant until the date of **31 May 2016** to furnish the Provider with written proposals on how to address his borrowings. The Provider accepts that it sent a third letter dated **14 October 2016** to an incorrect address for the Complainant.

The Provider further states that it *"reserves* [its] *right in respect of the sale of* [the Complainant's] *debt regardless of the payment position"* and submits that a clause in the Terms and Conditions referred to within the signed facility letter for the loan account, dated **26 March 2009**, allows the Provider to *"assign, transfer or sub-participate the benefits and/or obligations of all or any part of any Facility to another entity without the prior consent of the Borrower"*. By signing this facility letter, the Provider submits that the Complainant agreed to the terms and conditions of the debt in question. Furthermore, the Provider states that a loan does not need to be considered as non-performing in order for the Provider to make the decision to transfer the debt to another party.

The Provider states that the Complainant had a history of arrears on his loan account. It states that monthly repayments were received late on several occasions between **June 2012** and **November 2013**. The Provider states that it had concerns over the long-term viability of the Complainant's loan due to outlook on future repayment capacity. The Provider also submits that the Complainant had not sought prior approval from the Provider with regards to the lease agreement.

The Provider states that its policy is to aggregate certain loans to individual borrowers who may have familial or business relationships with *"connections"*. This is so that the Provider can have an overview and exercise appropriate credit management on all borrowings or customers who are thus *"connected"*. The Provider states that the facility letters signed by the Complainant on **12 February 2007** and **31 March 2009** show that the familial connection in relation to the Complainant's loan is clear.

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In relation to the letters the Complainant states he sent to the Provider dated **8 October 2015** and **29 April 2016**, the Provider contends it is unable to find a copy of either of these letters.

With respect to the Complainant's attempts to figure out why his account had been frozen in **January 2017**, the Provider states that once the final deadline for account closure of **16 December 2016** had elapsed, the Provider was not under any obligation to accept any further transactions on the Complainant's Current Account.

Furthermore, in response to the Complainant's submission that his accountant telephoned the Provider and was told that the Complainant's loan was *"going through a process"* and would be *"returned to branch"*, the Provider states that the employee of the Provider that made those comments no longer works for the Provider and therefore it is unable to obtain a response from this person on this matter. The Provider states that the decision to transfer the Complainant's loan to a third party provider was final and states that there is no identifiable reasons as to why the decision would be reversed resulting in the loan account being *"returned to branch"*.

In relation to the transfer of the Complainant's loan to the third party provider and the application of the Consumer Protection Code 2012 to the transfer, the Provider states that it complied with the Code and addresses the relevant provisions as follows:

- 2.1: the Provider states that it communicated openly and honestly to the Complainant advising of the transfer of the Complainant's debt to a third party provider.
- 2.2: the Provider states that the terms and conditions of the Complainant's borrowings and rights under consumer protection remain unchanged following the transfer of debt and that there are no detrimental effects to the Complainant or his borrowings as a result of the debt transfer.
- 2.6: The Provider states that it is satisfied that it complied fully with this provision, in that it submits that it provided in writing all relevant contact information for the Servicer and Purchaser of the debt, to the Complainant. It asserts that it provided information on the Transitional Period and the timelines involved. Furthermore, the Provider states that there were no changes to the Complainant's terms and conditions as a result of the debt transfer, and no charges were incurred by the Complainant as a result of the transfer.
- 4.1 & 4.2: The Provider states that its letter of **14 October 2016**, advising of the debt sale was sent to the Complainant at his full, correct correspondence address. The Provider further states that there is no dispute that the Complainant received this letter. The Provider submits that this letter suitably highlighted the importance of the content of the letter to the Complainant. The Provider advised the Complainant that it would write to him again after the date on which the legal ownership of the facility had transferred to the purchaser. The Provider advised that after the transfer, all of the rights of the Provider under the Complainant's facility together with the relevant facility letters, guarantees, security and all rights relating to his facility would transfer to the purchaser.

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The Provider submits that a subsequent letter sent to the Complainant on **6 January 2017** advised that the transfer of the Complainant's facility had completed on **19 December 2016**. Therefore, the Provider submits that the Complainant had been provided with two months' notice of the Provider's intention to transfer his debt to a Third Party, before the transfer actually concluded.

In relation to the freezing of the Complainant's current account and the application of the Consumer Protection Code 2012, the Provider states that it complied with the provisions of the Code and addresses the relevant provisions as follows:

- 2.1: The Provider submits that it communicated openly and honestly to the Complainant advising of the Provider's request that the Complainant close his current account held with the Provider. The Provider again concedes that the letter dated **14 October 2016** was sent to the wrong address for the Complainant and apologises for this.
- 2.2: The Provider asserts that the terms and conditions of the Complainant's current account and his rights under consumer protection remained unchanged during the period from when the Provider first requested current account closure in **October 2015** to the date on which the current account was actually closed in **May 2017**. The Provider asserts that it was within its rights under the terms and conditions of the current account to request account closure within the prescribed timeline.
- 2.6: The Provider submits that it communicated openly and clearly with the Complainant with regard to its request that the Complainant close his Current Account.
- 4.1: The Provider states that it communicated in writing to the Complainant using clear, concise language and in a timely manner with regard its request for account closure. It states that all key information was provided to the Complainant with regard to what was occurring with the Complainant's borrowings, timelines, contact details and whom to contact should the Complainant require further information.
- 4.2: The Provider states that it communicated its request in writing that the Complainant close his Current Account in a timely manner and clearly outlined the timelines in which this was to occur. Therefore, the Provider states that it is satisfied that it brought the urgency of the matter to the Complainant's attention and that it provided the Complainant with ample time to absorb the information and make alternative banking arrangements before the specified timelines expired.

In relation to the provisions of the Consumer Protection Code 2012 relating to complaints resolution, the Provider states that it tried to resolve the Complainant's various issues (pursuant to 10.7), and that it complied with 10.9 and 10.1 in relation to its investigation and response into the Complainant's concerns.

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Finally, the Provider states that as a result of acknowledged communication and customer service shortcomings, the Provider *"apologises for this fall down in service"* and offers the Complainant €500 as a *"gesture of goodwill"*. This offer of €500 was first made to the Complainant on **18 January 2018** and remains open to the Complainant.

The Complaint for Adjudication

The complaint is that the Provider wrongfully *"froze"* the Complainant's current account, without warning, in **December 2016**; wrongfully transferred his *"performing"* loan to a third party provider and proffered poor customer service and communication throughout, including wrongfully classifying the Complainant's loan as a *"problem debt"*.

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 **28 July 2020**, outlining MY preliminary determination 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.

The Complainant made further submissions on **17 August 2020**, **1 September 2020** and **25 November 2020**. The Provider also made further submissions, on **18 August 2020**, **28 August 2020**, **11 September 2020**, and **27 September 2020**. The submissions received were shared, so that each of the parties had sight of the submissions made.

Following the consideration of the additional submissions, together with all the submissions and evidence, my final determination is set out below.

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In the interests of completeness, it is important to note at this point that prior correspondence between this Office and the parties has established that a number of the complaints raised by the Complainant are outside the jurisdiction of this Office and do not form part of this investigation and adjudication. In relation to the complaint by the Complainant that his loan was mis-sold to him in 2006 and the complaint by the Complainant that the Provider did not communicate to the Complainant changes to the conditions of his business loan when it was restructured in 2009, I am mindful of the provisions of Section 51(1) of the Financial Services and Pensions Ombudsman Act 2017, which provides as follows:

> *"51. (1) A complaint in relation to conduct referred to in section 44 (1)(a) that does not relate to a long-term financial service shall be made to the Ombudsman not later than 6 years from the date of the conduct giving rise to the complaint."*

Furthermore, any issues to be determined relating to whether a data protection request from the Complainant has been complied with or whether the sending of information by the Provider to an incorrect address for the Complainant amounts to a breach of data protection legislation is more properly a matter for the Office of the Data Protection Commissioner to consider as the statutory body prescribed to deal with data protection issues.

In addition, the loan that is the subject of this complaint has been sold to a third party. The conduct of that third party does not form part of this investigation. Only the conduct of the Provider, against which this complaint is made, as it relates the Complainant's complaint, is being investigated and adjudicated.

Therefore, the complaints that form part of this investigation and adjudication are that the Provider:

- Wrongfully *"froze"* the Complainant's current account, without warning, in **December 2016**;
- Wrongfully transferred the Complainant's *"performing"* loan to a third party provider;
- Proffered poor customer service and communication throughout, including wrongfully classifying the Complainant's loan as a *"problem debt"*.

In relation to the Complainant's contention that the Provider wrongfully *"froze"* his current account in **December 2016**, I note that the Provider issued a 60 day notice of closure to the Complainant in **October 2015**. However, it is apparent that this account closure did not actually happen until **December 2016**, over a year later. Given the absence of contact from the Provider regarding either of his accounts in the interim, I am of the view that it was reasonable for the Complainant to assume that the notice had been given by the Provider in error or had been withdrawn.

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I note that when the Provider wrote to the Complainant in **April 2016**, it did not refer to his current account, nor make any reference to an account closure. The purpose of this letter was to outline to the Complainant his options with regard to his loan account, and I do not consider that the Complainant could reasonably be expected to apprehend from this correspondence that his current account would be closed some seven months later.

The Provider did issue a notice of closure to the Complainant regarding his current account in **October 2016**. However, this letter was issued to an incomplete address and I accept that it is highly unlikely that the Complainant received this letter from the Provider for that reason. Given that this was as a result of the letter being incompletely addressed by the Provider, I am of the view that the Provider did not give the Complainant valid notice of closure for his current account in **October 2016**. I do not accept the Provider's contention that the Complainant should have been on notice of closure since **October 2015**, when he did receive a valid notice, as this closure had not come to pass after the 60 days set out. The Complainant's account was *"frozen"* in **December 2016** due to the fact that the account was being closed, and it is my view that the *"freezing"* was wrongful in circumstances where the Complainant had not received a valid notice of closure from the Provider. While I note the Provider's submission that the Complainant's current account was not closed, but rather transferred to a third party entity, the *"freezing"* of the account was as a result of a notice of closure (*"Withdrawal of Banking Facilities"*, *"Termination of Facilities"*) that was issued to the Complainant with an incomplete address in **October 2016**.

The Complainant also contends that the Provider wrongfully transferred his *"performing loan"* to a third party entity. The Provider submits that the Complainant signed the Facility Letter from the Provider dated **26 March 2009**, which was subject to the Provider's Terms and Conditions, including that the Provider would:

> *"… have the right to assign, transfer or sub-participate the benefits and/or obligations of all or any part of any Facility to another entity without the prior consent of the Borrower and the [Provider] may disclose to a prospective assignee or to any other person who may propose entering into contractual relations with the [Provider] in relation to this Agreement such information about the Borrower as the [Provider] shall consider appropriate"*.

The Provider further submits that a loan does not need to be considered as non-performing in order for a decision to be taken to transfer the loan facility to another entity. The Provider states in this regard that it:

> *"… reserves the right in respect of the transfer of debts regardless of the repayment history or position of the borrowing in question".*

I also note that the Complainant accepts that he signed the Facility Letter in **March 2009**, and thereby agreed to be bound by the Provider's terms and conditions pertaining to the facility. I have examined the signed facility letter, and I accept the Provider's submission that the applicable terms and conditions are those dated January 2007.

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However, despite seeking to rely upon the terms and conditions agreed by the parties in **March 2009**, the Provider, in its original response to the complaint to this Office, submitted in evidence a copy of the terms and conditions dated **9 June 2009**; a date that was almost six months after the Facility Letter was signed. The Provider states that a copy of the applicable terms and conditions was not available due to the *"significant passage of time"*) and contends that the updated version submitted reflected "*changes which are not relevant to [the Complainant's] facility Terms and Conditions, such as branding, design or other cosmetic features of the brochure ware"*.

Following its receipt of my Preliminary Decision in July 2020, the Provider submitted in evidence copies of the Terms and Conditions of Business Lending to Individuals relating to the following dates:

- 01/2006
- 01/2007
- 04/2012

The Provider contends that though 'June 2009' is noted on the submitted Terms and Conditions of Business Lending to Individuals relating to 01/2007, the '2009' date refers to a reprint of the 01/2007 terms and conditions. I note that each of the above mentioned terms and conditions submitted contains an identical clause, which permits the Provider to transfer a facility without the consent of the borrower.

The Provider's reasoning that it does not hold a copy of the applicable terms and conditions due to the *significant passage of time* is wholly unacceptable.

Provision 49 of the Consumer Protection Code 2006 (which was fully effective from **1 July 2007**) outlines as follows;

> *"A regulated entity must maintain up-to-date consumer records containing at least the following*
> *a) a copy of all documents required for consumer identification and profile;*
> *b) the consumer's contact details;*
> *c) all information and documents prepared in compliance with this Code;*
> *d) details of products and services provided to the consumer;*
> *e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
> *f) all documents or applications completed or signed by the consumer;*
> *g) copies of all original documents submitted by the consumer in support of an application for the provision*
> *of a service or product; and*
> *h) all other relevant information [and documentation] concerning the consumer.*

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Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."

The Complainant's facility letter and terms and conditions relate to **March 2009** and the loan was transferred to a third party around **January 2017**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the Complainant ended. It is unclear to me why this documentation has not been retained by the Provider. This is most disappointing. Furthermore, the Provider is not in compliance with the CPC.

The Provider cannot seek to rely upon documentation that it cannot produce. The terms and conditions agreed by the Complainant were those dated **January 2007**, and as these have not been submitted in evidence, the Provider has not demonstrated the basis by which it was permitted under those terms and conditions to transfer the Complainant's loan to a third party.

The Complainant contends that the Provider proffered poor customer service and communication during the time it managed his accounts, stating that the Provider has frequently kept him *"in the dark"* regarding his accounts and failed to communicate with him despite his repeated efforts to clarify the position.

As submitted in evidence, the Provider's letter of **8 October 2015**, issued from its 'Relationship Management' unit, stated that the Provider had considered the Complainant's *"case"* and, as he had been *"unable to present acceptable proposals for repayment"* of his liabilities, the Provider requested that he make alternative banking arrangements within 60 days. The Complainant states that he subsequently wrote to his Relationship Manager seeking clarification, as he was not aware of any *"case"* regarding his loan and had not been asked to present *"acceptable proposals"* for repayment. He states that he *"never received a response"* from the Provider in this regard, and continued to make full repayments. Though the Provider contends that it could not find a copy of the Complainant's letter, I have no reason to doubt, given the Complainant's repeated attempts to engage with the Provider throughout this period, that he did write to the Provider at this time to try and clarify what the *"case"* was regarding his loan. I note that the Complainant's accounts continued to operate after the 60 days had passed following the notice of closure on **8 October 2015**.

I further note that the Provider, in its submission to this Office dated **13 November 2018**, stated that its 'Recoveries Department' attempted to telephone the Complainant on **15 February 2016** *"but the call was not connected and therefore unsuccessful"*. I consider that one *"unsuccessful"* telephone call, four months after the Complainant had sought clarity on an important issue, to be a wholly inadequate response to the Complainant's request, if indeed that was to be the purpose of the call.

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The Complainant contends that the next communication he received from the Provider was a letter dated **29 April 2016**, issued from the Provider's 'Problem Debt Management' division. This letter outlined that the Provider was reviewing its lending within the division, and set out three possible outcomes for the Complainant's liabilities:

1. Full repayment of the outstanding debt;
2. Full refinance of the debt with another financial institution'
3. *"Possible disposal"* of the debt to a third party entity.

It is important to note that there was no mention of the previous reference to account closure in the above letter, and no separate communication issued by the Provider regarding the Complainant's current account.

The Complainant submits that, as before, he contacted his Relationship Manager to advise that he was not aware of any *"problem debt"* regarding his loan, that his account was not in arrears, and that full repayments had been made up to date. The Complainant states that he asked his Relationship Manager to clarify why this letter had been sent to him, and to explain why his *"performing loan"* was being managed by a division dealing with *"problem debt"*. The Complainant contends that he *"got no response"* from the Provider. As before, the Provider contends that it was unable to find a copy of the Complainant's letter, however, I have no reason to doubt that the Complainant would have written to the Provider to try and establish why his liabilities had apparently been classified as *"problem debt"*.

The Complainant states that in or around **4 May 2016**, his accountant contacted the Provider on his behalf to try and clarify the treatment of his business loan by the Provider. He contends that his accountant was told that the loan had to *"go through a process"* but would likely be *"returned to branch"* from the *"debt management"* division as full repayments were being made. The Provider contends that the staff member who spoke with the Complainant's accountant no longer works for the Provider and that it has been *"unable to obtain a response from him on this matter"*. The Provider also contends that it was *"unclear"* as to why the alleged term of 'returned to branch' would have been provided to the Complainant's representative as once the decision was made to transfer the Complainant's loan to a third party, *"this decision was final"*. I would emphasise however, that the discussions with the Complainant's accountant happened several months before the Provider notified the Complainant of its decision to transfer the Complainant's loan to a third party entity, and therefore I would expect that the Provider would still have been considering all three options outlined in its letter of **29 April 2016**.

The Complainant submits that his accountant's discussions with the Provider in **May 2016** put him *"at ease"* and that he continued to make full repayments on his loan thereafter. The evidence would appear to support the Complainant's assertion in relation to him making full repayments.

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The Provider subsequently sent two letters to the Complainant on **14 October 2016**, one notifying him that his loan was being transferred to a third party entity and the other notifying him of the closure of his current account. It is important to note that the latter was sent using an incomplete address, and this has been acknowledged by the Provider. Having considered the form of address used, I accept that it was highly unlikely that this letter was received by the Complainant, and thus the contents were not communicated to him.

The Complainant submits that a further letter was sent to him dated **21 December 2017**, in response to his complaint to the Provider, and that his address was misspelled and the incorrect name included in the letter's salutation. Furthermore, the Provider has acknowledged that it incorrectly sent two letters to the Complainant at a relative's address. The Provider states that these letters were addressed to the Complainant *"in error"*. The Complainant has also submitted in evidence a letter issued to him by a credit servicing firm, servicing the Complainant's loan on behalf of the new loan owner. This letter was sent to the above mentioned relative's address, and, given that the Provider had previously issued letters to him at that address, the Complainant submits that this incorrect address was furnished to the credit servicing firm by the Provider.

I do not propose to exhaustively discuss the Provider's shortcomings in relation to its communications with the Complainant, in part because some of the errors would require discussion of a named third party whose correspondence was sent to the Complainant at another address. However, it is clear from the Provider's own timeline that the Provider communicated very little with the Complainant from **October 2015** to **December 2016** despite the Complainant's efforts to clarify what was happening with regard to both his loan and current account. From **December 2016** to F**ebruary 2017**, there were a number of letters sent to the Complainant by the Provider, not all of which were meant for him.

Regarding the standard of communication proffered by the Provider throughout, I will draw attention to the following:

- Following the first notification of account closure in **October 2015**, after which the account was not closed, the Provider failed to address the Complainant's query regarding the threatened closure. Furthermore, the Provider, following the expiry of the 60 day notice period, did not communicate with the Complainant to explain why the account had not been closed.

- The Provider failed to adequately address the Complainant's, and subsequently his accountant's, queries regarding the administration of his loan account. Due to the Provider's lack of meaningful engagement with the Complainant at this time, the Complainant believed that his loan was *"going through a process"* and that the matter would be resolved. I note that the Provider has been unable to furnish any recordings of calls between its staff member and the Complainant or his accountant, nor has it furnished any notes of conversations that took place during **May 2016**.

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- The Provider submits that it has been unable to *"obtain a response…. on this matter"* from the staff member concerned as he no longer works for the Provider. I consider this submission to be most unhelpful in circumstances where the Complainant was expected to submit proposals for resolving his account within a month and no record is available of any discussions between the Complainant and the Provider during this time.

- The Complainant wrote to and emailed the above mentioned staff member again after he received written notice in **October 2016** that his loan was being transferred to a third party entity. He received no response to these communications, nor to a voicemail that he left. The Complainant submits that he tried several times to contact the Provider at that time, and that his accountant also tried *"but to no avail"*. None of these communications, apart from the written notice of transfer, appears on the Provider's submitted timeline of communications, however given the seriousness of the contents, it seems reasonable to conclude that the Complainant would have made efforts at this time to clarify why his loan was being transferred.

- The Provider sent a notice of closure of the Complainant's current account in **October 2016** to an incomplete address, and in the circumstances I am of the view that it is reasonable to conclude that it was not received by the Complainant. The Provider has acknowledged its error in this regard, but maintained until a very late stage in this Office's investigation and adjudication of the complaint that *"the Complainant was provided with two other written notices (correctly addressed)"* of its *"intentions for the Current Account to be closed"*. Given that the first of these *"written notices"* was issued to the Complainant a year previously, and the second did not refer to the closure of the current account, I consider that the Provider failed to issue a valid notice of account closure to the Complainant.

- On realising in **December 2016** that his account had been *"frozen"*, as a result of both his insurer and the Provider contacting him in relation to missed payments from his current account, the Complainant contacted the Provider to ascertain why this had happened. He submits that he made contact by email, phone and in person but was only told that *"no activity allowed"* was recorded on his account. While the Provider may have assumed at this time that the Complainant had received the notice of closure issued in **October 2016**, he had not received the notice, and the information proffered by the Provider during this time was wholly inadequate in such circumstances.

- The Provider maintains that its letter of **6 January 2017** clearly advised the Complainant that his current account had been closed. I fail to understand how the Provider can stand over this assertion as its letter pertained to *"the loan facility or loan facilities and/or overdraft facilities if applicable"* and stated that these facilities had been transferred as of **19 December 2016**. The Complainant's current account is not referenced.

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I also consider that the lack of clarity proffered by the Provider regarding the classification of the Complainant's loan as 'non-performing' to be extremely unhelpful. The Provider was asked, by this office, in the course of the investigation of this complaint, when the Complainant's loan came under the management of the Provider's Problem Debt division. In response, to this question, the Provider submitted that *"There was no formal handover of this connection"* to the Provider's Problem Debt division. The Provider went on to detail that its division that dealt with *"distressed debt"* became its Relationship Management division, and, subsequently, *"Problem Debt"*.

The Provider went on to state that the Complainant's current account was also under management of this Problem Debt division, contending that it was not the Provider's policy to *"explicitly point this out"* and that it was *"considered as evident that the Complainant's accounts were within the management"* of this division. While it may have been evident (from the Provider's letters) that the accounts were within the management of this division, what was not clear or evident was why the accounts were within the management of the division. The Provider submits that *"Repayment difficulties with the overall borrowing connection emerged in 2008"*, however the Provider restructured the Complainant's loan in **2009** and the parties agree there was only one period of arrears which occurred during **2011** (lasting approximately four months) which were cleared in **January 2012**. In its formal response to this Office dated **6 November 2018**, the Provider submitted that there was *"a history of arrears on the loan account"*. The Provider further submitted that repayments were received late on several occasions. I consider these submissions from the Provider to be most disingenuous and unreasonable in circumstances where it describes a single four month arrears period (where partial repayments were made) as a *"history of arrears"* and where the Complainant's *"late"* payments were as a result of automation issues, as evidenced by the Complainant. I cannot accept that these circumstances alone resulted in the Complainant's accounts being managed by the Provider's Problem Debt division, and therefore I am of the view that it is reasonable to conclude that the reason for this was the overall *"connection"* with third party accounts, rather than the Complainant's accounts alone. The Provider submits that the Complainant's accounts were connected to a third party's (a relation) *"by way of common security"* and by way of intended rental income (*"repayment capacity"*) from a family business. It would appear from the submissions that this *"connection"* was first made by the Provider in **2006**. The Complainant made concerted efforts to establish why his loan account had been classed as a *"problem debt"* once he became aware it was being managed by the Provider's Problem Debt division. Rather than taking the opportunity to clarify the position with regard to the Provider's aggregation policy at this point, the Provider elected not do so. I also note that the Provider had not advised the Complainant of its aggregation policy at any time during the previous ten years.

In its post-Preliminary Decision submissions, the Provider contends that it cannot specify when the Complainant's accounts were placed within the management of its division dealing with 'Problem Debt', nor has it offered any explanation for its placement of the Complainant's accounts with the division. The Provider had not communicated to the Complainant that his loan was considered to be problematic in any way, though I as I have previously noted, there was a four month period during 2011 when arrears accrued.

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However, the arrears accrued during this period were resolved within a relatively short period, by the beginning of 2012. If this short period of arrears was the reason for the Provider's placement of the Complainant's accounts with the 'Problem Debt' unit, I would have expected this to have been communicated to the Complainant at that time, and I certainly would have expected the Provider to clarify this in the course of the investigation of this complaint by this office. In the absence of any further information or clarification in this regard, I am of the view that it is reasonable to apprehend that it was the aggregation of the Complainant's accounts with another, or others, that resulted in the accounts being placed under the management of the Provider's 'Problem Debt' division, along with the account(s) of the connected party or parties.

Having carefully examined the submissions, it is evident that the Complainant was not aware for many years of the fact that his accounts were part of a *"connection"* that comprised accounts other than his own. Furthermore, the impact of any such *"connection"* on the management of the Complainant's accounts was not explained, to him, by the Provider at any time.

While I accept that in a strict legal sense, the Complainant's loan account and his relative's loan account are two completely separate loans, I also accept that the Provider has a policy in place, to aggregate certain loans with *"familial connections"* so that it may have an overview and *"exercise appropriate credit management"* on the borrowings of customers who are *"connected"*.

I note that this policy appears to reflect situations wherein multiple loans are taken out by family members during similar time periods. However, I find it unacceptable that the Provider did not formally advise the Complainant of this policy at any time throughout the period that it managed his accounts. Furthermore, I find it unacceptable that the Provider also did not formally advise the Complainant of either its aggregation policy or that the Complainant's accounts were or could be part of a *"connection"*. The Provider contends that the *"Complainant's accounts were connected to a third party's (family relation) by way of common security"* and I note from the submissions that the facility letters, dated **19 December 2006** and **26 March 2009** stated that the security for the agreed facility included a letter of guarantee in the sum of €250,000 from a relative of the Complainant. Therefore, I am of the view that it is reasonable to conclude that such a guarantee, along with the Provider's requirement for a 20-year lease agreement between the Complainant and a family business (2006 facility letter only) would constitute an economic interdependency that might fall within the Provider's policy of aggregation. However, I would reiterate that the Complainant was not aware of this policy, nor the potential impact(s) of the policy. Had the Provider made him aware of it, he would have been in a position to make an informed choice as to whether he wished to proceed with the loan from the respondent Provider, in the circumstances.

Under the Lending to Small and Medium-Sized Enterprises Regulations 2015, and the Code of Conduct for Business Lending to Small and Medium Enterprises 2012, regulated entities must ensure that information provided to a borrower is clear and comprehensible and that information of key/material importance is specifically brought to the attention of the borrower.

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Furthermore, regulated entities must not present information in a way which disguises, diminishes or obscures information of material importance. While I accept that it is a commercial decision, by the Provider, as well as a requirement under prudential regulation, to aggregate accounts in the manner outlined above, I consider that the lack of transparency around this practice was not in the best interests of the Complainant. The Complainant's accounts were *"connected"* with another or others in or around **2006**, and this was never formally communicated to him by the Provider. I note that the Complainant was only formally made aware of this in **November 2019**, during the investigation of this complaint by this office, through a submission to this office by the Provider. The Complainant, in response, stated that the Provider failed to advise him of the *"connection"* upon inception of his loan, when revising the facility, and throughout their interactions up to that date. In keeping the Complainant *"in the dark"*, for a period of approximately twelve years, the Provider has repeatedly denied him material information about the management of his accounts which would have allowed him to fully consider his position regarding the loan inception in **2006** and its restructure in **2009**. Furthermore, had the Complainant been aware of the connection, he would have had the opportunity to be more prepared (and certainly better informed) when the Provider sought proposals for repayment of his loan in full in **2016**, and when the Provider subsequently advised him that the account was being transferred to a third party entity.

The Provider's submission that the Complainant was aware of the *"linkage"* by way of the original facility letter assumes that it was clear that the referenced accounts were being actively connected by the Provider. I do not accept that this was clear to the Complainant then, nor during the subsequent period of over twelve years until the connection was formally confirmed by the Provider during the investigation of the complaint by this Office.

Following on from my Preliminary Decision, issued **28 July 2020**, the parties made a number of further submissions. In its submission dated **18 August 2020**, the Provider acknowledged that the terms and conditions that governed the Complainant's loan did not contain an explicit clause that would alert borrowers to the fact that the Provider is required to adopt an aggregation policy under prudential regulations imposed by the Central Bank of Ireland and that this is also required by good banking practice.

The Provider contends that the practical applications of such a clause could be that a potential borrower would ask the Provider *"a question about whether their loans are aggregated with those of other borrowers and who they might be"*. The Provider states that it would be unable to answer these questions, as any answer would amount to either a potential or actual breach of confidence. The Provider submits that including an aggregation clause in the account terms and conditions would *"merely invite questions that we are unable to answer, resulting in a potentially damaging result for potential borrowers at the outset of the banking relationship, one that relies on a large degree of trust for both parties"*.

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The Provider makes the argument that a reference to aggregation in its terms and conditions would serve to potentially damage the banking relationship, as borrowers might regard the Provider as *"lacking in transparency due to our inability to answer the questions they might put to us"*.

I find this response from the Provider to be both bizarre and quite worrying. The Provider seems to believe it is acceptable to keep customers completely in the dark in relation to matters that can have, as in the case of this complaint, very serious implications for the operation of that person's relationship with the Provider. I find it ironic in the extreme that the Provider suggests that informing customers of this practice could lead to the Provider being regarded as *"lacking in transparency"* and damaging trust. The Provider's current practice is totally lacking in transparency and could hardly be considered as something that would contribute to building trust between a customer and the Provider. I fail to understand how not informing customers of this practice is somehow more transparent or less likely to negatively impact on trust. I believe the Provider's actions in refusing to inform customers of this practice or that their accounts have been aggregated totally lacks transparency and can only serve to erode trust. On the other hand, informing customers of this practice would give customers the knowledge they need to make informed choices and decisions.

The Provider sets out in its submissions a scenario in relation to the difficulties it believes it would experience regarding its duty of confidentiality in some distinct respects concerning *"the presence of conditions that required aggregation with other parties"*, such as the Complainant's relative. In this regard, the Provider suggests that if it had to inform the Complainant that his accounts were aggregated with his relative it would:

- Potentially inform the Complainant that his relative had dealings with the Provider;
- Potentially inform him that there were other persons with whom his relative held joint co-borrowings;
- Potentially inform him that his relative was providing security for other persons;
- Potentially inform him that other persons had guaranteed the Complainant's relative's obligations to the Provider.

I would emphasise that no evidence has been submitted that confirms any of the above potential scenarios as being applicable to the Complainant. However, it is clear from these scenarios that the Provider's aggregation policy could potentially have far-reaching consequences for borrowers whose accounts are subject to the Provider's aggregation policy. The Complainant had not been made aware of this policy at any time, prior to the investigation and adjudication of this complaint, by this office, and so would have had no reason to be aware of any possible reasons for the connection of his accounts with others.

The Provider has correctly pointed out, that aggregation is a requirement under prudential regulations imposed by the Central Bank. I accept the Provider's entitlement and indeed, duty, to aggregate accounts. I also accept the Provider's submission that *"the reasons for aggregation are not merely commercial but are also required by prudential regulation"*.

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My difficulty with the Provider's conduct is that this aggregation took place without the knowledge of the Complainant nor was he even made aware that it could potentially happen. Thus, it can be seen from the evidence in this complaint that the Complainant was at a complete loss to understand why his loan and his account were being managed in the manner in which they were.

The Complainant made repeated efforts, to no avail, in an effort to try to understand why his accounts were being managed in the manner in which they were. He was informed at one stage that his current account *"had a note stating "no activity allowed""*. No reason was given at the time or at any time during the approximately twelve years the aggregation was in place.

The reason only became clear during the investigation by this office. It was because his account was aggregated with the accounts of a relative. It would appear that it was the status of that other person's accounts that was having a profound impact on the Complainant's relationship with the Provider. The Complainant had no way of knowing this as the Provider either failed or refused to inform him of this important matter.

The Provider appears to be of the view that reviewing its practice of aggregating accounts without informing the customers that it has done so would require it to breach its *"duty of confidence of a third party by making a disclosure about their relationship with the bank or separate loans, in circumstances where there is no exemption for such disclosure"*. The Provider states that this would put the Provider *"in an invidious position where it cannot satisfy your direction without damaging its third party customer's privacy and indeed without damaging [the Provider's] own reputation"*. Let me be clear: I am not suggesting that the Provider operate in a way that would breach any of its customers' privacy.

I do, however, believe it is reasonable to expect the Provider to be open and transparent with its customers regarding the fact that it has an aggregation policy, to clearly inform customers that their accounts may be subject to this policy, and to set out for its customers the most common reasons for aggregation and the potential impacts of any such aggregation.

The Provider, in its post Preliminary Decision, states that *"to inform a customer in the manner you have suggested would be injurious to our business dealings across the commercial banking division of [the Provider]"*. I consider the Provider's current practices in relation to aggregation to be potentially injurious to borrowers, such as the Complainant, who do not know that their accounts may be connected with other customers, who might include a guarantor, a guarantor's co-borrower, or a person/entity unknown who was guaranteeing a guarantor's obligations.

Therefore, I propose to direct the Provider to review its approach to not informing customers of the existence of this policy. In the interest of clarity, I do not propose to direct what action the Provider should take on foot of that review. That will be a matter for the Provider to decide.

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Finally, I note that the Complainant, due to the withdrawal of his current account, experienced difficulties in making loan repayments and insurance payments from this account after **19 December 2016**. I note that lodgements to the account continued to be made until the account was transferred in **March 2017**. This happened despite the fact that there were more than sufficient funds in the account at the time to service his commitments. The Complainant was, however, required to make a manual lodgement to his loan account during this time, and to set up a new direct debit from another account to service his insurance premiums. While the Provider now acknowledges that the notice of closure issued to the Complainant with an incomplete address in **October 2016**, it maintains that the Provider's letter of **6 January 2017** clearly advised the Complainant that his current account had been closed.

Given that the above mentioned letter referenced the subject matter of the letter as *"the loan facility or loan facilities and/or overdraft facilities if applicable"* and stated that these facilities had been transferred as of **19 December 2016**, I do not consider that the closure of the Complainant's current account was clear from this letter. Furthermore, the lack of clarity from the Provider during the Complainant's interactions with it at this time was most unhelpful, and added to the Complainant's inconvenience, which was caused by the Provider's actions.

I note that the Provider, in its Final Response Letter dated **18 January 2018**, offered the Complainant €500 in acknowledgement of a *"fall down"* in service. Taking all of the above into account, I consider this offer from the Provider to be wholly inadequate in the circumstances.

Having regard to the particular circumstances of this complaint, in particular the failings that have been noted above, it is my decision to substantially uphold the complaint and I direct the Provider to make a compensatory payment of €15,000 (fifteen thousand euro) to the Complainant.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld on the grounds prescribed in ***Section 60(2)(b) and 60(2)(f)***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to review the transparency of its aggregation policy, and make a compensatory payment to the Complainant in the sum of €15,000 (fifteen thousand euro) 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.

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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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

11 December 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.