



<u>Decision Ref:</u>	2020-0464
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer appropriate compensation or redress CBI Examination
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainant with the Provider and an overcharge of interest in the amount of €13,496.49 on that mortgage loan account. The mortgage loan account is secured on the Complainant's primary dwelling house.

The purpose of the loan was to refinance the Complainant's existing mortgage loan (account ending **1067**) and to refurbish her primary dwelling house.

The Complainant's mortgage loan account was considered by the Provider as part of the Central Bank directed Tracker Mortgage Examination ("the Examination"). The Provider identified that a failure had occurred on the Complainant's mortgage loan account and that mortgage loan account was deemed to be impacted under the Examination.

The Provider wrote to the Complainant on **06 December 2016** advising her of the failure. The Provider detailed "*the circumstances that caused this failure to happen*" as follows;

"You moved your rate from tracker to fixed. The version of the terms and conditions for your mortgage set out that when the fixed rate period ended

you could only opt to convert to the prevailing fixed, variable or tracker rates at that time, rather than the last tracker margin that applied to your account.

Now that we have reviewed your case, we believe that we may have incorrectly given you an expectation that you could go back to the last tracker margin that applied to your account, after your fixed rate period ended.”

With respect to the effect of the failure on the mortgage loan account, the Provider outlined as follows;

“What does this mean for you?

Now that we have completed the detailed review of your mortgage account and reduced your interest rate, we have been able to calculate the redress and compensation that is due from 30/09/2011, which was when your account was first impacted.”

The Provider restored a tracker interest rate of ECB + 0.75% to the Complainant’s mortgage loan account on **17 August 2016**.

The Provider made an offer of redress and compensation to the Complainant. The offer of €17,779.12 made by the Provider to the Complainant comprised the following;

1. Redress of €13,914.64 covering;
 - The amount overpaid while on the incorrect rate of €13,496.49
 - Interest to reflect Time Value of Money of €418.15
2. Compensation of €3,249.48 for the failure on the mortgage loan account.
3. Independent Professional Advice payment of €615.00.

The Complainant’s mortgage loan account balance was also reduced by €7,748.59.

In **June 2017**, an appeal was submitted to the Independent Appeals Panel by the Complainant. The basis for the appeal was the Complainant’s dissatisfaction with the Provider’s redress and compensation offering.

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The Appeals Panel decided on **4 September 2017** that the appeal was partially upheld and awarded additional compensation of €1,625.00 to the Complainant.

The key factors in determining the decision by the Appeals Panel in respect of the financial losses claimed, were as follows;

“The Panel decided, based on the information it had received from the Bank and the customer, that there was insufficient documentation to support the claims for financial losses contained in the Appeal in respect of the accumulation of overdraft and credit card interest, extending the car loan, the income protection and AVC pension contributions.

The Panel further agreed, based on the information it received from the customer in relation to financial losses that a contribution of €625 was warranted towards the medical expenses claimed.”

The key factors in determining the decision by the Appeals Panel in respect of the non-financial losses claimed, were as follows;

“...the Panel considered all information available to it and agreed that it was reasonable to conclude that part of the non-financial losses claimed by [the Complainant] could be attributable to the Bank’s failure on her account, and the Panel agreed to award compensation of €1,000.”

As the Complainant had been through the Provider’s internal appeals programme and did not accept the decision of the Appeals Panel, this office was in a position to progress the investigation and adjudication of the complaint.

The conduct complained of that is being adjudicated on by this office is that the Provider has not offered adequate compensation to the Complainant by consequence of the Provider’s failure in relation to her mortgage loan account.

The Complainant’s Case

The Complainant submits that the offer made by the Provider does not adequately take account of the “*enormous financial pressure*” placed on her as a result of the failure on her mortgage loan account. She states “*It is not sufficient for the Bank to say they repaid [me] the amounts [I] was overcharged together with a small payment in respect of compensation which is not proportionate with the damage suffered by [the Complainant]”.*

The Complainant submits that as a result of the overcharge on her mortgage loan account *"I was at the limit of my overdraft every month and exceeded the limit on many occasions."* She further details *"I was also using my credit card to fund day to day expenses. The rate of interest charged on the [Provider] credit card was 24.7%."*

The Complainant submits that during the period of the overcharge she exceeded her current account overdraft limit on 21 occasions and her credit card limit on 14 occasions. She states that this was *"a total of 35 occasions in 35 months between the 30 September 2011 and 2016. The excesses while not for long periods, were sometimes as high as €517."*

The Complainant asserts that *"The Bank are taking a very narrow approach here saying that they can find no record of [the Complainant] advising the Bank that [I] was under financial pressure."* She details that she had her mortgage, credit card, current account and car loan with the Provider and *"Effectively she did all her banking with [the Provider]."* The Complainant details that she contacted her local branch where she discussed her situation with a staff member and was advised to prioritise her mortgage. She states that arising out of this she wrote to the Provider on **12 April 2010** seeking to extend the term of her car loan and requested that her monthly payments would be reduced by half.

The Complainant is not satisfied with the manner in which the Provider has calculated the Time Value of Money. She states that *"It would seem to be significantly less than the rate charged ... on her return facilities e.g. the rate charged on her credit card of 11.85%".* She states *"Nor is this rate the same as the rate the Bank was charging for short term loans in this period."* She submits that this is *"particularly important"* to her because she had to use her credit card and overdraft when she *"did not have access to the money which was overpaid on her account. Interest rates on credit cards and overdrafts are high."*

The Complainant details that in **October 2011** she was overcharged €86.41 by the Provider and the time value of that money was €9.48. She states that in contrast, when she was overcharged €302.60 in **November 2014** the time value of that money was €5.63. She submits that in her view *"the Time Value of money for [the Complainant] was the rate of interest she was charged on her credit card or her overdraft which she had to dip into every month"*.

The Complainant outlines that she was *"diagnosed with reactive depression on a background of ongoing work and financial pressure."* She details that she also suffers from symptoms of an illness diagnosed in **April 2014**. She states that her medical report outlines that this illness *"is exacerbated when stressed by both financial and work commitments."*

The Complainant submits that *"The eggshell skull principle applies here. The fact that [the Complainant] was already suffering from stress induced by financial pressures and work*

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pressures meant the Bank's failure to return her to the tracker rate on the 30th September 2011 impacted her more severely than it may have impacted other customers.

She should be compensated for the injuries she suffered. This is settled law. Please see Purcell v Long [2015] IEHC 385, Katarzyna Plonka v Ainara Norviss [2016] IEHC 137."

She further submits that *"the Bank state that the eggshell skull principle is of no application at all in this case. The cases cited by the Bank relate to professional negligence claims. The plaintiff in Phelan Holdings (Kilkenny) Limited v Poe Kiely Hogan is a Limited Company."*

The Complainant submits that she *"incurred medical expenses of €5,286.60"* during the period of the overcharge. She states that the fact that she first *"sought medical assistance"* on **23 March 2011**, which was before the Provider's failure on the account in **September 2011** *"means only that the Banks failure may have impacted [the Complainant] more than it might have impacted the average customer"*.

The Provider's Case

The Provider submits that in **December 2016** a sum of €17,779.12 was paid to the Complainant in redress and compensation. It states that the overcharge of interest of €13,496.49 has been refunded to the Complainant and a Time Value of Money ("TVM") payment of €418.15 was made so the Complainant was not "out of pocket". In addition a balance adjustment of €7,748.59 was undertaken on the Complainant's mortgage loan account. The Provider submits that the redress and compensation payment included a compensation payment of €3,249.48, to compensate for potential inconvenience, harm, personal suffering or hardship. It states that in this case, where the account relates to a home ("PDH") that is still in the customer's possession and is not in a legal process, the percentage of compensation applied is 15% of the interest overcharged plus the TVM amount. The Provider submits that a payment towards professional advice of €615 was also made so that the customer could have an advisor bring her through the detail of the Redress and Compensation letter dated **9 December 2016**.

The Provider submits that the criteria considered by the Provider align to the principles of redress outlined under the Central Bank's Tracker Mortgage Review guidelines, in particular that redress will result in impacted customers being returned to the position they should have been in if the issue had not occurred and compensation is to be reasonable and reflect the detriment involved. It submits that the process for calculating redress and compensation has been assured by an external independent third party in accordance with the Central Bank's guidelines.

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The Provider submits that it believes that the redress and compensation paid is “*fair and reasonable*” and it also provides an independent appeal process in which customers can appeal their case.

The Provider submits that following a review of the Provider’s systems and records, it can find no record of the Complainant advising the Provider of being under financial pressure. It states that it can also find no record from the Complainant requesting support or assistance in restructuring her overdraft or credit card facilities during the impacted period (**September 2011 – August 2016**). The Provider further states that the Independent Appeals Panel noted that there was insufficient documentation to support the Complainant’s claim for financial losses in respect of the accumulation of overdraft and credit card interest.

The Provider states in respect of the Complainant’s credit card, that “*While there were occasions when the Complainant’s credit card limit of €3,300 was exceeded, the account was generally kept within its limit. The account activity does not indicate that the Complainant was in financial difficulties or that assistance under regulatory requirements was required by the Bank.*”

It further states in respect of the operation of the Complainant’s current account during the impacted period, that “*while there were occasions when the balance exceeded the authorised overdraft limit, these excesses were infrequent and short term in duration. During the period when the mortgage account was impacted by the Tracker rate issue, the current account operated largely within the authorised limit and frequently went into credit. It is not evident from the current account operation that the Complainant was in financial difficulty.*”

The Provider submits that following receipt of the Complainant’s written request on **13 April 2010** it extended the Complainant’s car loan term as requested. The Provider submits that it can find no evidence on its records to indicate that this request was a result of the Complainant informing the Provider of being under financial pressure at the time in respect of the car loan term and no record of the Provider advising the Complainant to restructure her car loan in order to prioritise the mortgage loan.

The Provider submits that the Complainant’s request to extend the term of the car loan was carried out prior to the failures identified under the Tracker Mortgage Review impacting the Complainant’s mortgage account from **30 September 2011**. It further states that the Independent Appeals Panel noted that there was insufficient documentation to support the Complainant’s claim for financial loss in respect of extending the car loan.

The Provider submits that the Time Value of Money payment is intended to compensate the customer for not having the benefit of the money that they have overpaid and did not have access to. It states that this was calculated using the highest 1 year fixed savings rate across the Provider Group in each applicable year and applying it to the net monthly overpayment.

It details that this rate is applied to all impacted customers in accordance with the Provider's Compensation Model for rectification and redress of loans impacted by the tracker failure. The Provider has furnished a table of "*the best annual deposit rates*" in response to the Complainant's request for same.

The Provider submits that while it is fully satisfied that it has adequately compensated the Complainant for its failure in respect of her tracker mortgage, it is very sympathetic to the circumstances of the Complainant. However it states that it was only made aware of the financial pressures that the Complainant was under following her Appeal. The Provider submits that the Appeals Panel agreed that it was reasonable to conclude that part of the non-financial losses claimed could be attributable to the Provider's failure on her account and the Appeals Panel awarded additional compensation of €1,000, which the Provider states it accepts and is agreeable to pay this amount to the Complainant should the Complainant choose to accept it.

The Provider states that the cases of ***Purcell v Long* [2015] IEHC 385** and ***Plonka v Norviss* [2016] IEHC 137** are cited by the Complainant in support of a claim that the Complainant was suffering stress which was worsened by the Provider's failure in relation to her tracker mortgage and the Complainant has referred to the "Eggshell Skull" principle in this regard.

The Provider states that "*the cited cases and principle are of no application at all in the particular case*" for the following reasons;

- The Financial Services and Pensions Ombudsman is not the appropriate body to hear and adjudicate on a claim for "*worry and stress*"
- "*It is long settled by the Courts that damages are not recoverable in an action in negligence for worry and stress (Murray v Michael E Hanahoe (Unreported, Supreme Court, 2 February 2017))*"
- "*It is well settled that in the absence of a physical injury or the apprehension of a physical injury, no damages are recoverable (Phelan Holdings (Kilkenny) Limited v Poe Kiely Hogan (Unreported, High Court, 5 October 1996)."*
- "*There does not exist a claim for worry and stress (Kelly v Hennessy [1995] 3 I.R. 253)."*

The Provider states that notwithstanding that the FSPO *"is not the appropriate body to adjudicate on any claims concerning a personal injury claim"*, the cases cited are a relevant precedent for any claim where the Eggshell Skull Principle is raised.

The Provider submits that the Complainant submitted a medical report confirming initial attendance at her GP's office on **23 March 2011** in relation to her health issues. The Provider states that *"It is noted, the Complainant's account was not impacted by the failures identified under the Tracker Mortgage Examination until 30 September 2011 which was six months after the Complainant sought medical attention."*

The Provider further states that the Appeals Panel agreed to award the Complainant an additional €625.00 towards medical expenses claimed. It states that it accepts this additional award and is agreeable to pay this amount to the Complainant should the Complainant choose to accept it.

The Complaint for Adjudication

The complaint for adjudication is that the Provider has not offered adequate compensation to the Complainant in respect of the Provider's failure on her mortgage loan account.

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.

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A Preliminary Decision was issued to the parties on 24 November 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

A Loan Offer dated **11 March 2008** was issued to the Complainant which detailed as follows;

Term	Loan Type	Interest Rate Description	Rate	Margin	Net Rate	Amount of Each Instalment
30 Years	Variable Annuity	TrackerHome LTV>50% & <=80%	4%*	0.75%	4.75%**	€937.41

**ECB Rate is the European Central Bank's Main Refinancing Operations Minimum Bid Rate, and will change within 5 working days of an ECB rate change.*

***Tracker Rate (ECB Rate + Margin)*

...

Property Price/Estimated Value of Property €230,000.00"

The **Acceptance and Consent** was signed by the Complainant on **18 March 2008** on the following terms;

"I/We hereby confirm, that I/We have read the within Terms and Conditions attaching to this Letter of Offer, and acknowledge that I/We have received a copy thereof."

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I have not been provided with a copy of the terms and conditions attaching to the Loan Offer. However in its letter to the Complainants dated **6 December 2016**, the Provider detailed that *“The version of the terms and conditions for your mortgage set out that when the fixed rate period ended you could only opt to convert to the prevailing fixed, variable or tracker rates at that time, rather than the last tracker margin that applied to your account.”* However the Provider accepted that it *“may have incorrectly given [the Complainant] an expectation that you could go back to the last tracker margin that applied to your account, after your fixed rate period had ended.”*

The tracker interest rate of ECB + 0.75% has been restored to the Complainants' mortgage loan as of **August 2016**.

I note that the Provider has detailed that the total amount of interest overcharged, €21,663.23, has been repaid in full (refund of €13,914.64 interest overpaid + mortgage adjustment of €7,748.59).

The Provider has detailed that the purpose of the compensation payment of €3,249.48 is to compensate for potential inconvenience, harm, personal suffering or hardship and that this amount was calculated based on the Bank's Approved Compensation Model for customers who were impacted by the tracker issue.

I will now consider if this compensation is sufficient given the individual circumstances of the Complainant.

I note that on **30 January 2007** the Complainant signed a **Credit Agreement** dated **29 January 2007** which provided for a loan amount of €16,000 over a term of 60 months. The loan repayments were detailed as €323.20 monthly.

The Complainant wrote to the Provider by letter dated **12 April 2010** which detailed as follows;

“I am writing to [the Provider] to request an extension of the timeframe of payment of my car loan to a period of 4 years. My account number is [ending] 015. The current payment is approximately €312.20 per month. There is €7436.74 left on the loan payment.

I have calculated that if the balance left on the loan payment was extended to four years then this would enable me to repay a sum of approximately €154.93 per month. I appreciate your assistance with the above matter and look forward to hearing from you in due course.”

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The Provider wrote to the Complainant by letter dated **11 May 2010** as follows;

"If you wish to proceed with this request, please confirm your acceptance of the terms of this letter by signing below and returning it to the above address.

...

We wish to inform you that your request for an extension on the above agreement has been approved for 24 months. This change, which will reduce your repayments, will take effect when you sign and return this acceptance to us.

...

In all other respects the terms and conditions of the loan agreement continue to apply."

I note that the copy letter furnished in evidence is signed by the Complainant.

The Provider wrote to the Complainant by letter dated **24 May 2010** as follows;

"We write to advise you of the revised instalment schedule on the above account. The new schedule is set out below:

<i>Repayment Amount</i>	<i>Number of Repayments</i>	<i>First Repayment Due</i>	<i>Repayment Frequency</i>
<i>EUR</i>			
<i>151.93</i>	<i>45</i>	<i>2nd June 2010</i>	<i>monthly"</i>

The Complainant has submitted that she requested to extend the car loan in **April 2010** because she was advised by the Provider to prioritise payment of her mortgage loan. Whilst I accept that this is the Complainant's recollection I have not been furnished with any evidence which supports her submission that she received such advice from the Provider at that time.

The term extension on the Complainant's car loan was implemented some 17 months prior to the overcharging on her mortgage account which commenced in **September 2011**. Based on the evidence before me I cannot accept that there is any link between the Provider's failure on the mortgage loan account and the Complainant's request for an extension of the car loan term in **April 2010**. Rather I am of the view that the Complainant would have made this request in any event owing to her pre-existing financial circumstances.

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In the period between **October 2011** and **August 2016**, the mortgage account was on the Provider's standard variable rate which fluctuated between 3.00% and 4.40%. The tracker interest rate that would have been applied was ECB + 0.75%. Between **October 2011** and **August 2016**, the overall tracker rate (ECB + margin) fluctuated between a rate of 0.75% and 2.25%. The difference in the interest rate actually charged to the mortgage loan and the interest rate that would have been charged on the tracker interest rate is demonstrated in column 3 of the table below.

The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 0.75%) had been applied to the mortgage account between **October 2011** and **August 2016**, is also represented in the table below at column 4:

Date Range (inclusive)	Difference in Interest rate charged vs the tracker interest rate	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month
Oct 2011 – Nov 2011	1.00%	€799.97	€713.56	€86.41
Dec 2011	1.25%	€777.49	€692.04	€85.45
Jan 2012 – Jul 2012	1.25%	€777.49	€671.23	€106.26
Aug 2012 – Sept 2012	1.50% - 2.00%	€777.49	€651.28	€126.21
Oct 2012 – Nov 2012	2.00% - 2.50%	€821.50	€651.15	€170.35
Dec 2012 – May 2013	2.50% - 2.75%	€866.47	€651.26	€215.21
Jun 2013	3.15%	€866.47	€632.29	€234.18
Jul 2013 – Nov 2013	3.15% - 3.40%	€902.74	€632.24	€270.50
Dec 2013 – Jun 2014	3.40% - 3.50%	€902.74	€614.10	€288.64
Jul 2014 – Sept 2014	3.50% - 3.60%	€902.74	€607.04	€295.70
Oct 2014 – Nov 2014	3.60%	€902.74	€600.14	€302.60

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Dec 2014 – May 2015	3.35%	€881.17	€600.42	€280.75
Jun 2015	3.10%	€881.17	€600.42	€280.745
Jul 2015 – Oct 2015	2.85% - 3.10%	€860.13	€600.09	€260.04
Nov 2015 – Mar 2016	2.85% - 2.90%	€839.61	€600.08	€239.53
Apr 2016 – Jul 2016	2.65% - 2.90%	€839.61	€597.03	€242.58
Aug 2016	-	€819.93	€592.07	€227.86

I note that over the impacted period the monthly overpayments on the mortgage loan continued to increase significantly from **October 2011** when the overpayment per month was €86.41, to **May 2011** when the overpayment per month was €157.60, to **January 2012** when the overpayment per month was €106.26, to **July 2013** when the overpayment per month was €270.50 up to **October 2014** when the overpayment per month was €302.60.

Thereafter the monthly overpayment decreased slightly to €227.86 in **August 2016**. I accept that these are significant overpayments for the Complainant to have had to bear on a monthly basis. I have no doubt that the Complainant suffered inconvenience as a result of the Provider's overcharging owing to the unavailability of the sums which the Provider overcharged her.

I have considered the Complainant's **current account statements**. I note that the overdraft limit of €800.00 was first exceeded in **March 2012**, some six months after the overcharging commenced in **October 2011**. I have set out below the occasions on which the Complainant exceeded the overdraft limit and the amount that she was overdrawn on those occasions:

Date	Debit Balance	Amount in excess of limit
7 Mar 2012	€958.52 Dr	€158.52
13 June 2012	€808.24 Dr	€8.24
7 Aug 2013	€838.69 Dr	€38.69
8 Jan 2014	€845.58 Dr	€45.58
9 Jan 2014	€874.68 Dr	€74.68
7 Jul 2014	€813.53 Dr	€13.53
8 Jul 2014	€1101.04 Dr	€301.04
9 Jul 2014	€1111.34 Dr	€311.34
15 Sept 2014	€811.74 Dr	€11.74

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13 Oct 2014	€806.83 Dr	€6.83
7 Nov 2014	€828.81 Dr	€28.81
13 Mar 2015	€855.52 Dr	€55.52
16 Mar 2015	€900.62 Dr	€100.62
18 Mar 2015	€905.77 Dr	€105.77
13 Apr 2015	€809.10 Dr	€9.10
28 Apr 2015	€915.41 Dr	€15.41
29 Apr 2015	€920.56 Dr	€120.56
7 May 2015	€1292.00 Dr	€492.00
8 May 2015	€1297.15 Dr	€497.15
13 May 2015	€1317.18 Dr	€517.18
8 Jun 2015	€906.96 Dr	€106.96
9 Jun 2015	€912.11 Dr	€112.11
7 Jul 2015	€1073.89 Dr	€273.89
8 Jul 2015	€1079.04 Dr	€279.04
9 Nov 2015	€875.76 Dr	€75.76
10 Nov 2015	€880.91 Dr	€80.91
7 Dec 2015	€823.37 Dr	€23.37
6 Jan 2016	€843.62 Dr	€43.62
14 Mar 2016	€982.65 Dr	€182.65
15 Mar 2016	€987.80 Dr	€187.80
11 Apr 2016	€881.93 Dr	€81.93
12 Apr 2016	€887.08 Dr	€87.08
13 Apr 2016	€907.11 Dr	€107.11
9 May 2016	€989.44 Dr	€189.44
10 May 2016	€994.59 Dr	€194.59

I have also considered the Complainant's **credit card account statements** provided in evidence. I note that the credit limit on the account (ending **899**) was €3,300. I note from the evidence that the Complainant exceeded the credit card limit of €3,300 on 17 occasions between **February 2014** and **December 2016**. The evidence shows 14 of these 17 instances occurred during the impacted period (**September 2011 - August 2016**), as follows;

Date	Debit Balance	Amount in excess of limit
11 Feb 2014	€3,387.11 Dr	€87.11
4 March 2014	€3,340.08 Dr	€40.08
17 Sep 2014	€3,320.36 Dr	€20.36
13 Nov 2014	€3,327.62 Dr	€27.62

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7 July 2015	€3,420.00 Dr	€120.00
4 Aug 2015	€3,342.11 Dr	€42.11
10 Nov 2015	€3,339.55 Dr	€39.55
8 Dec 2015	€3,532.41 Dr	€232.41
18 Feb 2016	€3,328.85 Dr	€28.85
4 Mar 2016	€3,330.05 Dr	€30.05
8 Apr 2016	€3,326.39 Dr	€26.39
4 May 2016	€3,327.29 Dr	€27.29
6 June 2016	€3,336.30 Dr	€36.30
15 July 2016	€3,308.30 Dr	€8.30
13 Sept 2016	€3,383.95 Dr	€83.95
1 Nov 2016	€3,345.01 Dr	€45.01
8 Dec 2016	€3,343.01 Dr	€43.01

The evidence before me shows that the Provider wrote to the Complainant on each of the dates set out in the table above. Each of these letters detailed as follows;

“We note that your balance is over your credit limit.

As credit card systems are highly automated, if you use the card(s) while your balance exceeds the limit, the transaction(s) may be declined.

Please make a payment in order to reduce your balance to below the credit limit.”

The following table compares the evidence in terms of the overcharging on the mortgage loan with the amount over the limit on the credit card and the amount overdrawn on the current account. **Column 1** of the table below sets out the months within which the Complainant exceeded her credit card limit and/or her current account overdraft limit. **Columns 2 and 3** show the amounts by which the Complainant exceeded the credit card limit/current account overdraft limit. **Column 5** shows the overcharge on the Complainant’s mortgage loan account in the corresponding months.

Date	Amount overdrawn on credit card	Amount overdrawn on current account	Total amount overdrawn	Amount overcharged on mortgage loan account
Mar 2012	-	€158.52	€158.52	€106.26
Jun 2012	-	€8.24	€8.24	€106.26
Aug 2013	-	€38.69	€38.69	€270.50
Jan 2014	-	€74.68	€74.68	€288.64

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Feb 2014	€87.11	-	€87.11	€288.64
Mar 2014	€40.08	-	€40.08	€288.64
Jul 2014	-	€311.34	€311.34	€295.70
Sept 2014	€20.36	€11.74	€11.74	€295.70
Oct 2014	-	€6.83	€6.83	€302.60
Nov 2014	€27.62	€28.81	€56.43	€302.60
Mar 2015	-	€105.77	€105.77	€280.75
Apr 2015	-	€120.56	€120.56	€280.75
May 2015	-	€517.18	€517.18	€280.75
Jun 2015	-	€112.11	€112.11	€280.75
Jul 2015	€120.00	€279.89	€399.89	€260.04
Aug 2015	€42.11	-	€42.11	€295.70
Nov 2015	€39.55	€80.91	€120.46	€239.53
Dec 2015	€232.41	€23.37	€255.78	€239.53
Jan 2016	-	€43.62	€43.62	€239.53
Feb 2016	€28.85	-	€28.85	€239.53
Mar 2016	€30.05	€187.80	€217.85	€239.53
Apr 2016	€26.39	€107.11	€133.50	€242.58
May 2016	€27.29	€194.59	€221.88	€242.58
Jun 2016	€36.30	-	€36.30	€242.58
Jul 2016	€8.30	-	€8.30	€242.58
Sept 2016	€83.95	-	€83.95	€36.44

It is clear to me from the table above that the overpayments on the Complainant's mortgage loan accounts had a direct impact on the funds that the Complainant had available to her to service her day-to-day and other expenses, during this time period. I have no doubt that an overpayment of interest on average of €232.69 per month for a period of 58 months is significant. Throughout the 58 month period, the Complainant was denied the opportunity of making informed decisions about her finances as she did not know the true position with respect to the repayments that were actually due and owing on the mortgage loan account. It cannot but be the case that the unavailability of the sums of money overcharged on a monthly basis caused additional hardship and inconvenience to the Complainant during this period. I accept that the evidence supports the Complainant's position that the overcharge on the Complainants' mortgage loan account impacted her financial position.

It does not appear to me from the documentation that has been furnished in evidence, that the Complainant ever raised any concerns with the Provider in respect of any cash flow difficulties or concerns she may have had in meeting the mortgage repayments during the period of the overcharge. However, that is not to say that the Complainant did not

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experience cash flow problems during this five year period. I think it is important to observe that the evidence supports the Complainant's position that she did prioritise her mortgage loan payments at all times during the impacted period.

Furthermore, there was no obligation on the Complainant to discuss her financial difficulty with the Provider. The fact that she did not is no indication that she was not suffering financial difficulty.

The Complainant has received a payment to reflect *"the time value of money"* on the interest of €13,496.49 overpaid of €418.15. The Complainant has submitted that *"the rate of interest that the Provider is offering to customers who were 'out of pocket' is a lot less than the rate of interest the Bank was charging on short term facilities such as credit cards."* She of the view that she is entitled to a higher time value of money payment reflective of *"the interest she was charged on her credit card or her overdraft which she had to dip into every month"*.

In considering this complaint I have had regard to the fact that the Complainant was paying interest on her credit card and current account overdraft, in circumstances where she was overpaying on her mortgage loan account by approximately €232.69 per month during the impacted period. She was paying these higher rates of interest to the same Provider that was overcharging her on her mortgage account. I note the Provider has calculated the Time Value of Money based on its deposit interest rates. I do not believe this is a reasonable approach in relation to the circumstances of this complaint. In addition to her mortgage account the Complainant also had a current account and credit card with the Provider. Given the interest, charges and penalties that the Provider applied to the Complainant's accounts, I believe it ought to be patently obvious to the Provider what the Time Value of Money was to the Complainant.

It appears from the evidence that the Complainant was dealing with illness from **March 2011** which was some six months prior to the commencement of the overcharge on the mortgage loan account. I note the Provider's statement that *"the FSPO is not the appropriate Body to adjudicate on any claims concerning a personal injury claim."* It is not a matter for this office to adjudicate on personal injury claims, nor is it a matter for this office to determine whether the overcharging on the Complainants' mortgage loan had an impact on the Complainant's illness.

However, in the interests of clarity and for the avoidance of any doubt, I have the power under **s60(4)(d)** of the **Financial Services and Pensions Ombudsman Act 2017** to direct compensation for any loss, expense and inconvenience sustained by the Complainant as a result of the conduct complained of. To me, there is clear evidence of very considerable inconvenience caused to the Complainant in the circumstances of this complaint. From

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October 2011 to August 2016 the Complainant was overpaying between €86.41 and €302.60 per month.

In the circumstances of the Complainant's situation, I accept that an overpayment every month caused a level of inconvenience to the Complainant. The evidence shows that the Complainant was not in good financial circumstances in advance of the period of overcharging. However, it cannot but be the case that the unavailability of the sums of money overcharged on a monthly basis caused considerable additional hardship and inconvenience to the Complainant.

Taking into consideration all of the evidence before me in terms of the level of overcharging and the extended period over which the overcharging occurred, and the impact such overcharging had on the Complainant, I am of the view that the level of compensation offered and paid of €3,249.48 is not sufficient or reasonable to compensate the Complainant for the inconvenience suffered by her during the impacted period.

I note that the Provider has indicated that it accepts the Appeal Panel's award of €1,625.00 and is agreeable to pay this amount to the Complainant should she choose to accept it. I am of the view that total compensation of €4,874.48 is not sufficient.

Therefore, I substantially uphold this complaint and direct that pursuant to **Section 60(4)** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Provider do the following;

- i. Pay a sum of €8,000 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainant has suffered. For the avoidance of doubt, the total sum of compensation of €8,000 is inclusive of the €4,874.48 compensation already offered to the Complainant for the Provider's failure.
- ii. Refund any interest or penalties applied to the Complainant's credit card account and current account in respect of any sums that these accounts incurred due to being in excess of their respective limits.

For the reasons outlined in this Decision, I substantially uphold this complaint.

Conclusion

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

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I direct pursuant to **Section 60(4)** of the *Financial Services and Pensions Ombudsman Act 2017*, that the Provider do the following;

- i. Pay a sum of €8,000 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainants have suffered. For the avoidance of doubt, the total sum of compensation of €8,000 is inclusive of the €4,874.48 compensation already offered to the Complainant for the Provider's failure.
- ii. Refund any interest or penalties applied to the Complainant's credit card account and current account in respect of any sums that these accounts incurred due to being in excess of their respective limits.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the *Courts Act 1981*, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the *Financial Services and Pensions Ombudsman Act 2017*.

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



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

16 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—

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(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.

