An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0326
Sector:	Banking
Product / Service:	Current Account
Conduct(s) complained of:	Dissatisfaction with customer service Delayed or inadequate communication Complaint handling (Consumer Protection Code)
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants hold a joint current account with the Provider, against which this complaint is made. The Complainants also hold a number of bank accounts in Northern Ireland with a UK financial services provider (the **UK Provider**). The Provider and the UK Provider are separate legal entities but are members of the same group of companies. By letter dated **1 November 2018**, the UK Provider issued a letter of demand in respect of an overdraft facility on the Complainants' joint account held with the Provider.

The Complainants' Case

The First Complainant explains that she had been a customer of the Provider for over 30 years and held four accounts with the UK Provider. The First Complainant says all accounts have been maintained within the terms agreed for each account. The First Complainant explains that the Second Complainant has separate personal and business accounts with the UK Provider but they hold a joint account at one of the Provider's Republic of Ireland branches. The First Complainant explains that the joint account was set up on **12 October 1984** as a current account with an overdraft facility of €10,000. The First Complainant says the overdraft facility has never been exceeded as confirmed by one of the UK Provider's agents during a telephone conversation on **6 November 2018**.

On **6 November 2018**, the First Complainant says she and the Second Complainant received a letter from the UK Provider dated **1 November 2018**.

In respect of the conduct the subject of this complaint, the First Complainant states:

> *"My complaint relates to the;*
>
> *a) content of the letter*
>
> *b) the tone of the letter*
>
> *c) false assertion of failure to maintain our joint account and threat to share this false allegation with Credit Reference Agencies 'which may impact on your ability to access credit from other lenders'. No particulars of the failure to maintain were provided."*

On receipt of this letter, the First Complainant says she immediately contacted one of the UK Provider's branches in Northern Ireland to speak with the manager but was told by a customer services representative that the Euro account was a stand alone account completely unrelated to the First Complainant's Sterling accounts and that the UK Provider's Northern Ireland branch had nothing to do with the management of the Euro account. The First Complainant advises that she did not get to speak with the branch manager.

The First Complainant explains that she then telephoned the number on the letter to speak to the signatory but was told that he was not available. The First Complainant says she spoke with one of the UK Provider's agents but this person was unable to give any satisfactory explanation regarding the letter.

Later in the afternoon of **6 November 2018**, the First Complainant says she took a call from one of the UK Provider's Collections staff who told the First Complainant that the letter was issued *"in line with* [the Second Complainant's] *account."* The First Complainant says she explained that the Euro account was separate from the individual accounts of the Complainants, as advised by the UK Provider's Northern Ireland branch. The First Complainant says it was confirmed by the UK Provider that the joint account had operated within the agreed terms with withdrawals and deposits over the years and that it had never exceeded the overdraft limit. The First Complainant says the UK Provider's agent did not give any example of how the Complainants failed to maintain the joint account as asserted. The First Complainant explains that she also complained about the tone, content and explicit threats in the letter but the UK Provider's agent maintained *"the letter was standard and properly sent."*

The First Complainant says she understands that the UK Provider's Collections staff member subsequently contacted the Second Complainant regarding his individual accounts but this was unrelated to the First Complainant and the joint account. The First Complainant advises that she requested a formal complaint be lodged.

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The First Complainant says she received a letter from the UK Provider's Customer Care Team dated **9 November 2018** stating: *'I understand that you are now satisfied that the issue has been resolved'*.

The First Complainant says this was not the case and that she wrote to the UK Provider advising it of this and subsequently received a letter from the UK Provider dated **17 December 2018** acknowledging that the UK Provider's letter of **9 November 2018** was sent in error: *'Unfortunately your complaint was recorded as resolved incorrectly'*.

In this letter, the First Complainant says it was maintained that the letter of **1 November 2018** was correctly sent: *'We have not made an error in sending you this letter or the contents within the letter'*. The First Complainant says no explanation or detail of the alleged failure to maintain the joint account was given nor any justification for sending the threatening letter to her. The First Complainant says that had the UK Provider wished to speak to or contact the Second Complainant in relation to the management of his individual accounts, it was free to do so. The First Complainant says she was never informed by the UK Provider that the joint account was linked in any way whatsoever to individual accounts.

The Complainant states that threats such as those contained in the letter of **1 November 2018** regarding Credit Referencing Agencies and the impact on access to credit is an unwarranted threat to someone in business and particularly in her role as a barrister. The First Complainant considers any such publication to a Credit Referencing Agency which is likely to damage her credit rating would possibly be grounds for libel.

The First Complainant says she asked that the UK Provider withdraw the letter and issue an apology for its content and tone. Instead, the First Complainant says she received a letter from the UK Provider confirming its assertion that it was correct to send the letter to her and no retraction or apology was made. The First Complainant says she finds it further insulting, in view of the gravity of the threats, that she has never had any contact with the signatory of the UK Provider's letter of **1 November 2018** even though the First Complainant specifically requested to speak with him.

The Provider's Case

In respect of the letter of **1 November 2018**, the Provider says this letter was clearly issued by a UK entity, the UK Provider, and this is a separate legal entity to the Provider, in a different State and under a different regulatory and supervisory jurisdiction. The Provider says while it can make certain general and legal submissions based on the material provided as part of the complaint as well as certain other information available, it can neither speak to nor answer for this letter substantively. The Provider says it accepts correspondence was exchanged between Financial Ombudsman Service of the UK, the UK Provider and this Office, and it was determined that the Provider was the appropriate respondent to the complaint. It is in this context the Provider says it acknowledged in its email to this Office dated **28 September 2020** that it bore some responsibility for the issue of the letter of **1 November 2018**. However, the Provider says it wishes to emphasise that, given the

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circumstances, it is severely limited in the manner in which it can appropriately respond to the complaint.

The Provider says that underlying the present complaint is a fundamental misapprehension of the contractual basis for overdrafts generally and for the overdraft facility in this case specifically. As a matter of law, the Provider says in circumstances where no express contractual terms apply to any particular overdraft, it is implied that it is repayable on demand. The Provider submits that an overdraft repayable on demand can be called in without the need to demonstrate an event of default, for example, the failure to make agreed payments. An overdraft limit is not an agreement to extend a borrower an indefinite loan as long as the liability is kept below a stated limit. It stated that such a system would be completely unworkable for obvious reasons. The Provider further states that where an overdraft limit does become legally relevant is where it is exceeded and in such a scenario, the Provider says, lenders will generally reserve to themselves the right to apply a higher interest rate than that applicable to sums overdrawn within the agreed limit.

In terms of the joint account, the Provider says the oldest transactional record that its systems can access is **18 February 2013**. The Provider sets out the following synopsis of the state of credit of the account since that date, as follows:

18 February 2013	Account overdrawn by €9,820.15
11 June 2015	Account in credit following lodgment of €6,747.64
12 August 2015	Account overdrawn by €9,189.61 following the withdrawal of €13,050
1 November 2018	Account overdrawn by €9,133.04 – letter of demand issued by UK Provider
14 December 2018	Account in credit following lodgment of €70,000

For the purposes of this complaint, the Provider says any activity on the account prior to **12 August 2015** ought to be considered outside of the scope of the complaint. The Provider says the essence of the complaint is that the Provider called in the overdraft facility prematurely and that the facility in question only came into being when it became overdrawn on **12 August 2015**. The Provider states that an overdraft is a species of loan, and monies were advanced on that date. The Provider says the terms and conditions applicable to the overdraft facility were, as follows:

i. those applicable to the Complainants' current account on that date, the Terms and Conditions of **July 2014** (the 'Current Account Terms and Conditions'); and

ii. those applicable to the Complainants' overdraft facility on that date, the Overdraft Terms and Conditions of **March 2014** (the 'Overdraft Terms and Conditions').

The Provider says that while the Current Account Terms and Conditions were updated in **November 2015**, **January 2016**, **November 2016**, **January 2018**, **March 2018** and **October 2018**, the clauses cited in its Complaint Response were not amended at any stage during the relevant period, the Provider refers to clause 17 in this respect. The Provider advises that

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the Overdraft Terms and Conditions were updated in **October 2018** and the clauses cited in its Complaint Response were not amended during the relevant period, the Provider refers to clause 11.1 in this respect.

The Provider says the effect of the overdraft limit is explained at clause 13.10.2 of the Current Account Terms and Conditions, as follows:

> *"If you go over the agreed overdraft limit on your Account if there is one, we will charge surcharge interest on the difference between the agreed overdraft limit and the amount by which your Account is overdrawn. Alternatively, if we write to tell you beforehand, we will charge surcharge interest on the entire amount by which your Account is overdrawn including any overdrawn balance within an agreed overdraft limit. In either case, we will charge surcharge interest until you reduce the overdraft to within the agreed overdraft limit."*

The Provider refers to clauses 7.1 and 7.2 of the Overdraft Terms and Conditions, as follows:

> *"7.1 Where (a) the Overdraft Limit is exceeded or (b) you do not pay the Bank an amount demanded by it under Clause 3, the Bank will charge you surcharge interest. The rate of surcharge interest is 0.60% per month or part of a month (which is 7.20% per annum).*
>
> *7.2 The Bank will apply the surcharge interest rate from the date on which you: (a) exceed the agreed Overdraft Limit until the date you repay the unauthorised overdraft by reducing the amount of the overdraft on the Account to the Overdraft Limit; or (b) fail to pay an amount demanded by the Bank under Clause 3 until the date on which you pay the Bank the amount it demanded; (as applicable)."*

The Provider states that the overdraft facility is repayable, irrespective of an agreed overdraft limit, and without the need to demonstrate an event of default. It states that this is set out at clause 3.1 of the Current Account Terms and Conditions, as follows:

> *"You must keep your Account in credit unless you already have an agreed overdraft limit. If your Account is overdrawn for any reason, you must repay the overdraft to us."*

The Provider also states that the fact that the overdraft facility is repayable on demand, is set out at clauses 13.15 to 13.18 of the Current Account Terms and Conditions, as follows:

> *"13.15 If your Account is overdrawn (whether within an agreed overdraft limit or not) you must repay the overdraft to us in full if we demand it in writing.*
>
> *13.16 If there is an agreed overdraft limit we can cancel our commitment (a) to provide all or part of the overdraft; or (b) to carry out an instruction from you that would cause the Account to be overdrawn or more*

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overdrawn; or (c) both by writing to you. For example, we could do that in the demand under clause 13.15.

13.17 We do not have to notify you before we exercise any of our rights under clauses 13.15 and 13.16 (except to the extent required under Consumer Credit Law).

13.18 Clauses 13.15 to 13.17 apply in full to any overdraft even where it is an agreed overdraft. If there is a conflict between a credit agreement concerning an agreed overdraft and clauses 13.15 to 13.17 clauses 13.15 to 13.17 prevail."

The Provider says it is also set out in clauses 3.1 and 3.4 of the Overdraft Terms and Conditions, as follows:

"3.1 The Bank has the right at any time in its discretion to cancel the Facility and the Overdraft Limit and to demand that you repay the Facility and interest accrued on it at any time. You agree to repay the Facility and any such interest and pay charges and other amounts owing by you in relation to the Facility on the Bank's demand at any time.

3.4 The Bank does not have to notify you before it exercises any of its rights under this Clause 3 except to the extent required by consumer credit law. …"

In summary, the Provider says the overdraft facility the subject of this complaint was advanced on **12 August 2015** and was subject, from inception, to the Current Account Terms and Conditions as well as the Overdraft Terms and Conditions. The Provider says these terms and conditions permitted the Provider to demand repayment of the facility at any time and without reason, and whether or not the agreed overdraft limit was exceeded is not relevant to the complaint.

The Provider says the overdraft facility was removed from the joint account on **27 September 2019** and was available for the period between **August 2015** and **September 2018**. The Provider submits that the removal of the overdraft was a matter within its commercial discretion. In this respect, the Provider refers to clauses 3.1, 3.3 and 3.4 of the Overdraft Terms and Conditions. While clauses 3.1 and 3.4 have been cited above, the Provider cites clause 3.3 as follows:

"3.3 You agree that the Bank can cancel its commitment to provide all or part of the Facility by writing to you (for example, the Bank could include that in the demand mentioned in Clause 3.1)."

The Provider also says the removal of the overdraft facility postdates the lodgement of the present complaint and ought not to be considered within the scope of this complaint.

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In response to the 10 day period within which to pay the overdraft amount and certain provisions of the ***Consumer Protection Code 2012*** (the **Code**), the Provider says, regarding provision 2.9 of the Code, it understands that *undue pressure* as stated in provision 2.9 is synonymous with the legal concept of duress, namely the overbearing of a person's will for the purposes of causing them to enter into a contract or to otherwise take such accounts as affect their legal rights. The Provider says it understands *undue influence* to be the legal concept whereby a person in a dominant position in relation to another causes that other person to enter into a contract or to otherwise take such actions as affect their legal rights. The Provider says both duress and undue influence are grounds for the setting aside of any contract or transfer of legal rights and the Provider cannot see how either of these concepts can be said to arise in the context of the present complaint.

Where a loan is repayable on demand, the Provider says no event of default is required before a demand is made and a lender has full commercial discretion to call in such a loan as long as the lender does not act in a capricious, arbitrary or unreasonable manner. In this jurisdiction, the Provider says once a demand is made, there is no requirement that a debtor be given a reasonable time to discharge the debt before the lender seeks to enforce security or take other measures; the only time required to be given to such a debtor is the amount of time necessary to implement *'reasonable mechanics of payment.'* e.g. instructing a financial institution to transfer funds, and the Provider refers to the High Court decision of ***O'Flynn v. Carbon Finance Ltd*** [2014] IEHC 458.

While this is the formal legal position, the Provider says it strives in its dealings with customers to also provide excellent customer service and not merely to stand on its contractual and legal rights. The Provider says it can neither speak to nor answer for the letter of demand of **1 November 2018** substantively; however, the Provider says it acknowledges that it has been fixed with a degree of responsibility for its issue. The Provider says it is satisfied that, while in the circumstances it would have been legally permissible for it to issue such a letter, to have done so in such a manner would have represented a failure to meet the high standard of customer service to which it holds itself.

Addressing the First Complainant's statements regarding the linking of her account to individual accounts, the Provider says it cannot provide any detail of accounts held with the UK Provider or any link between them and the account held with the Provider, as the Provider is a separate legal entity. The Provider says the Complainants have only one account with the Provider in this jurisdiction, the account the subject of this complaint.

In respect of the telephone call which took place on **6 November 2018**, the Provider says this was with a staff member of the UK Provider and was not an agent of the Provider. The Provider says it can neither speak to nor answer for this phone call.

The Provider says clauses 7.4 to 7.6 of the Overdraft Terms and Conditions state, as follows:

> *"7.4 The Bank requires you to ensure that the account reverts to credit for at least 30 days*

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(a) during the 12 month period that begins on the Date of Sanction shown in the Important Information and during each subsequent 12 month period; or

(b) where a previous Overdraft Limit on the Account existed on the date of the credit agreement, during each 12 month period that begins on the annual date already set by the Bank for the previous Overdraft Limit. …

7.5 The 30 days mentioned in Clause 7.4 need not follow each other.

7.6 Where you fail to comply with Clause 7.4, the Bank will charge you an additional interest rate of 0.75% per annum. This will be charged retrospectively for the relevant 12 month period based on the average full overdrawn balance in the account over that time. This interest rate is in addition to the borrowing rate applicable to the account and will generally be included in the interest at the next interest quarter posting date."

The Provider says that, as stated above, the Complainants' account remained overdrawn between the **12 August 2015** and **14 December 2018** when it reverted to being in credit. The Provider says the Complainants' failure to comply with clause 7.4 had the effect of engaging the increased interest rate set out at clause 7.6. For the avoidance of doubt, the Provider says irrespective of the breach of clause 7.4, it was entitled at any stage from inception to demand repayment of the overdraft facility. The Provider says a breach of clause 7.4 is not an event of default; it does, however, entitle it to levy an increased rate of interest. The Provider says it cannot locate any record of the Complainants being informed of their non-compliance with clause 7.4.

The Provider says it cannot clarify whether similar letters were sent to other customers whose accounts were in a similar position to that of the Complainants' account. Where, as in this case, the Provider has a legal entitlement to call in a loan, it maintains a full commercial discretion whether or not to call in such loan.

The Provider says that it did not report the Complainants' current account or overdraft to the Irish Credit Bureau or the Central Credit Register and, as the outstanding balance was never greater than the credit limit at any point, the account was never in arrears.

The Complaints for Adjudication

The complaints are that the Provider:

Wrongfully issued the letter dated **1 November 2018**; and

Wrongfully determined the Complainants' complaint as having been resolved.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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 17 June 2021 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.

Following the issue of my Preliminary Decision, further submissions were received by this Office, copies of which were exchanged between the parties.

The Provider has made a post Preliminary Decision submission which it states it "*hopes will bring clarity on a number of issues highlighted"* by me. I welcome these clarifications. I also welcome the Provider's statement that "*from the outset, the Provider acknowledges and sincerely regrets that this relevant factual information was not provided during the adjudication process".*

Having considered these additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

Genesis of the Complaint

The UK Provider and the Provider are separate legal entities. However, the UK Provider and the Provider collectively form a group company which is a public limited company incorporated in Ireland (the **Group Company**).

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The UK Provider provides banking related services in Northern Ireland which is where the Complainants hold a number of their bank accounts and also reside. The Provider provides banking services in the Republic of Ireland and this is where the account the subject of this complaint is held. However, the letter the subject of this complaint was issued by the UK Provider in respect of the account held with the Provider.

The First Complainant submitted a complaint to the Financial Ombudsman Service in the UK in **January 2019** in respect of the letter received from the UK Provider dated **1 November 2018**. For clarity, the Financial Ombudsman Service (the **FOS**) is the UK equivalent of this Office.

In an email from the UK Provider to the FOS dated **4 February 2019**, the UK Provider stated as follows:

> *"The complaint refers to a joint account held with* [the Provider]*,* [account number]*. This account is held with* [address of Irish branch]*.*
>
> *The letter in the complaint refers solely to this account. …*
>
> *As such I don't believe that this complaint is one that you can look into being outside of your jurisdiction. This would come under the jurisdiction of the Financial Services and Pensions Ombudsman ROI."*

As the account in issue was located in the Republic of Ireland, FOS indicated in an email to this Office dated **7 February 2019** that the complaint did not come within its territorial jurisdiction and having consulted with the Complainants, FOS referred the complaint to this Office.

This Office emailed the First Complainant on **2 April 2019** advising her of the registration of her complaint and that the Provider had been contacted requesting that the Final Response letter issued by the UK Provider dated **17 December 2018** be considered at its Final Response letter for the purposes of the complaint to this Office.

The Provider issued its own Final Response letter to the Complainants on **22 May 2019** responding to the complaint raised with FOS. This letter concluded by informing the Complainants that if they were dissatisfied with the outcome of the Provider's response, they could refer the matter to this Office. The Complainants subsequently submitted a complaint to this Office.

By email dated **18 September 2020**, the Provider engaged with this Office in an effort to reach an amicable resolution of this complaint before the complaint proceeded to the adjudication stage. At the fourth paragraph of this email, the Provider states, as follows:

> *"The Provider acknowledges that it issued a letter of demand to the Complainants in relation to the overdraft facility on their joint current account. In this regard, the Provider must point out that an overdraft facility is repayable on demand.*

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Under the terms and conditions of its operation, the Provider can call in an overdraft without any need to demonstrate an event of default. However, in this instance, the Provider must acknowledge that there were shortcomings in our customer service for handling such demand, for which is it most regretful. The Provider is keen to acknowledge and apologise for any inconvenience and upset that this matter caused the Complainants."

In the correspondence outlined above, the Provider acknowledged that it issued the letter of **1 November 2018.**

The Provider subsequently delivered its Complaint Response on **6 November 2020**. In its Complaint Response, the Provider set out that both it and the UK Provider are separate legal entities and that it could neither speak to nor answer for the UK Provider's letter of **1 November 2018**, being the letter, and ultimately the conduct, the subject of this complaint. In this respect, the Provider states, as follows:

"The Provider accepts that correspondence was exchanged between the Financial Ombudsman Service of the UK, [the UK Provider] *and the FSPO, and that it was determined that the Provider was the appropriate respondent to the present complaint.*

It is in this context that the Provider acknowledged in its email to the FSPO of 18 September 2020 that it bore some responsibility for the issue of the letter of 1 November 2018; however, the Provider wishes to emphasise that, given the circumstances, it is severely limited in the manner in which it can appropriately respond to the present complaint."

Background to the Complaint

By letter dated **1 November 2018**, the UK Provider wrote to the Complainants in respect of their joint account held with the Provider, as follows:

"We refer to the above Account. We hereby demand immediate payment of the overdrawn balance together with interest that continues to accrue.

As you are aware, your overdraft is repayable on demand which means that the facility can be withdrawn at any time. After the expiry of the period of ten days from the date of this letter the overdraft limit attaching to this Account (expressed and/or implied) will be cancelled. Interest will continue to build up while your account remains overdrawn.

It is extremely important that you take this action within 10 working days from the date of this letter. If the overdraft is not cleared as demanded we will take the following action:

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- *Cancellation of your overdraft*

- *Take steps to recover the outstanding balance and interest*

You should be aware that we share information with Credit Reference Agencies and your continued failure to maintain your account in order may impact on your ability to access credit from other lenders."

The First Complainant made a formal complaint to the UK Provider in respect of this letter on **6 November 2018**. In response to this, the UK Provider wrote to the First Complainant on **9 November 2018**, as follows:

"Thank you for your complaint received on 6 November 2018, for which I was sorry to hear that you needed to contact us about your concerns.

Following your recent conversation with us I understand you are now satisfied that this issue has been resolved, and we will not be undertaking any further investigation into this matter. …"

Following receipt of this letter, the First Complainant contacted the UK Provider to explain that the matters identified by her on **6 November 2018** had not been resolved. It appears the First Complainant communicated this to the UK Provider by email, however, a copy of this email does not appear to have been supplied in evidence.

The UK Provider issued a Final Response letter on **17 December 2018**, as follows:

"Please accept my apologies that this matter has given you cause to complain. With regards to the letter we sent you dated 1 November 2018, I can confirm that this was sent to you correctly and you should refer to the contact details listed in the letter if there is anything that you would like to discuss. We have not made an error in sending you this letter or the contents within the letter.

I must apologise however that we sent you a letter indicating that you were happy with the outcome of your complaint. This letter was sent to you in error following your call to [agent] *on 6 November 2018. Unfortunately your complaint was recorded as resolved incorrectly and I can only apologise for the inconvenience that his has caused you.*

Taking my findings into consideration, I confirm I have upheld your complaint. …"

The Provider issued a Final Response letter on **22 May 2019**, as follows:

*"**Content of the letter dated 1 November 2018***

With regards to the letter sent to you dated 1 November 2018, I confirm that this was sent to you correctly.

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The letter clearly outlines that the overdraft facility is repayable on demand and interest will continue to build up on your account when it is overdrawn. I respectfully refer you to the enclosed terms and conditions of the overdraft facility and in particular;

3.0 Demand Nature of the Facility
3.1 …

The letter also advises that the overdraft facility will be cancelled within ten days of the date of the letter. However, this did not happen as you contacted the Bank and a complaint was raised on your behalf. The Bank received a lodgement in December 2018 which cleared the overdrawn balance and restored the account to credit. As a result, the overdraft facility has remained on your account.

Tone of the letter dated 1 November 2018

The purpose of the letter was to advise you of the overdrawn balance on the account and advise you of the actions that the Bank can and would take to ensure that the outstanding balance of the account was cleared.

The reverse side of the letter also contained details on how to make payments to the account and the charges that may be applied. This letter also provided contact information for a number of different organisations that can offer advice on the next steps for those in financial difficulty.

I am sorry if you are unhappy with the tone of our letter. Please be assured that this is a standard letter that is sent to all customers with an outstanding balance on their accounts. However, I acknowledge your comments and I have forwarded same to the relevant area as feedback.

Failure to maintain the joint account and threat to share this information with Credit Reference Agencies

I respectfully refer you to the terms and conditions as outlined in the enclosed brochure and in particular 7.4, which states; …

Your account had become overdrawn on 12 August 2015 and did not revert to credit until 14 December 2018; this timeframe far exceeds the required 30 days credit in a 12 month period. You were in breach of the above terms and conditions of your account and in light of this I am unable to retract the letter date 1 November 2018.

By way of information, where you have an overdraft facility of €500 or more, the Bank is obliged by the Credit Reporting Act 2013 to report the performance of your account to the Central Credit Register (CCR). When you are in excess of your overdraft facility this will be reported to the CCR and your credit rating may be affected.

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This may also affect your ability to access credit from [the Provider] *or other financial institutions in the future.*

I regret to advise having given careful consideration to the information provided to you I am unable to uphold your complaint. …"

Analysis

In my Preliminary Decision I had stated that I consider the conduct, the subject of this complaint, to be somewhat bizarre and worrying in that I could not understand how or why the UK Provider issued a demand for the repayment of an overdraft facility on a bank account held with an entirely separate legal entity. I stated that while I consider this to be a very striking feature of this complaint, neither the UK Provider nor the Provider has addressed this issue, and each have simply said the letter was correctly issued. In respect of the Provider, this seems to be at odds with the position adopted in its Complaint Response where it has emphasised the separate legal status of the two entities and that it cannot speak to or answer for the letter in any substantive way.

At that stage the Provider's evidence was that both it and the UK Provider are separate legal entities and the letter was correctly issued. However, the Provider had not furnished any evidence to show that it authorised or instructed the UK Provider to issue the demand for repayment of the overdraft or to issue the letter of **1 November 2018**.

The Provider has, in its post Preliminary Decision submission, detailed that:

"It is now absolutely clear to the Provider that the letter of demand on the Complainants' ROI current account was issued by the Provider's own collections unit, as explained further below. Therefore, the Provider further accepts full responsibility for the issuance of the Letter of Demand, the subject of the complaint. The Provider retracts and corrects any suggestion set out in replies to the FSPO to the effect that the Provider did not have complete responsibility for the letter of demand on the ROI current account. The Provider can confirm that following its engagement with your Offices in the adjudication process, and subsequent to the issuance of the Preliminary Ruling, the exact origin and nature of the error in this matter became clearer to staff who were investigating this complaint. In the Provider's replies to the Summary of Complaint, the Provider submitted that it could "neither speak to nor answer for [the Letter of Demand] substantively" and this submission was made bona fide and with a belief (albeit a mistaken one) as to its validity. It has now come to light that this statement is not accurate because the Provider has responsibility for any demand made on a ROI current account and for this, the Provider sincerely and unreservedly apologises to the FPSO and the Complainants".

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I had also stated in my Preliminary Decision that it was also not clear how the UK Provider had access to confidential customer information held by the Provider nor is it clear how a separate legal entity considered it had the legal capacity to access Provider information and seek to call in an overdraft facility on an account held by another entity. In its Complaint Response, the Provider had stated that it could not provide any detail of accounts held with the UK Provider or any link between them and the account held with the Provider. Logically then, it should follow that the UK Provider should not have access to details of the Complainants' Provider account. Furthermore, in a submission dated **26 November 2020**, the Provider stated: *"While the Provider has acknowledged a degree of responsibility for the issue of the letter, it is not correct to say that it had agency over any third party."*

The position adopted by the Provider, during the investigation of the complaint by this Office, suggested that it was unaware of the UK Provider's conduct or at least, that it did not share the Complainants' account details or give an instruction or permission to issue the letter of demand. While this gives rise to serious data protection concerns and the Provider's ability to ensure the security of confidential customer information, it also raised the question as to whether the UK Provider has engaged in conduct similar to this on previous occasions and continues to do so, and whether the Provider should have been aware of this conduct. Moreover, I was deeply concerned from the Provider's approach to this complaint that it appeared to condone such conduct in that it believed the letter of **1 November 2018** was correctly issued.

For this reason, in my Preliminary Decision I indicated my intention to bring my Legally Binding Decision to the attention of the Central Bank of Ireland for any action it may deem necessary.

In response to the above the Provider has, in its post Preliminary Decision submission, sought to offer clarification on how the conduct occurred and reassure the parties that it was not indicative of a systemic issue within the Provider, rather it now asserts that it was an unfortunate incident of human error which led to the issuing of the letter.

The Provider first submits that it "*believes the UK Provider could lawfully access the records of the Complainants' ROI current accounts for the following reasons*. *The Provider's Data Privacy Notice sets out that it can share information between all members of* the [name of company group redacted] *(the "**Group**") operating as separate legal entities and which includes the UK Provider."* The Provider then details the various reasons why such a practice is permitted, such as to "*enable the Group to manage its business for its legitimate interests. This will include the day to day running of the Group's business to enable Group members to share or access a customers' information. This is done for internal administrative purposes intended to help the Group form a single view of a customers' relationship with the Group. This is further intended to help the Group manage and build its relationship with its customers, assist the Group in understanding its risks better and it is an integral part of the Group managing its business".* It is then submitted by the Provider that every "*customer has a right to object to particular uses of their personal data where the legal basis for our use of their data is our legitimate business interests. However, in doing so it can have an impact on the services and products which the Group can/is willing to provide".*

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The Provider states to *"summarise, sharing information between Group companies is permissible, unless a customer has objected to it. In this case, there is no evidence that the Complainants objected to the Group's use of their data in the Group's legitimate business interests. The sharing of personal data amongst members of a group of companies is explicitly envisaged as a legitimate interest ii the General Data Protection Regulation (EU 2016/679) (the "**GDPR**"). In particular, Recital 48 of the GDPR states that: 'Controllers that are part of a group of undertakings or institutions affiliated to a central body may have a legitimate interest in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients' or employees' personal data'".*

The post Preliminary Decision submission then turns to offering an explanation for the conduct and how the error occurred.

It is detailed by the Provider that it "*has a function within its operation called* [redacted] *this department…provides experienced and dedicated management to its customers experiencing financial distress or at risk of experiencing financial distress"* the Provider states that the staff of the department are "*all employed by the Provider and not the UK Provider*".

The Provider confirms that the "[redacted] *also provide services to the UK Provider on an outsourced basis. The Provider can confirm that there is a confidential service agreement in place between* [redacted] *and the UK Provider. The service agreement provides that* [redacted] *effectively oversee, manage, negotiate, complete and conclude all debt repayment/debt forbearance or enforcement procedures in place of the UK Provider. In order for* [redacted] *to fulfil its role as a collections management service to the UK Provider,* [redacted] *have access, to data of both the Provider and the UK Provider".*

It is then submitted by the Provider that "*the Letter of Demand, the subject of the complaint, related to an account of the Provider which was handled by a department and staff employed by the Provider (and not the UK Provider) and therefore, accessing the relevant data was not subject to the confidential service agreement arrangements"*. The Provider details that in "*managing the Group's credit risk exposure*, [redacted] *made the decision to call in all debts owed by one of the Complainants which included the joint named overdraft facility which is the subject of this complaint*. [redacted], *as part of its outsourcing arrangement, issued a demand on UK facilities owed by one of the Complainants.* [redacted] *also issued a demand on the joint named ROI overdraft facility of the Complainants."*

The Provider wishes it to be noted that the "*administrative action of issuing the Letter of Demand of 1 November 2019, was completed by* [redacted]" *and that at the time of issuing "the Letter of Demand of 1 November 2019*, [redacted] *incorrectly* used the UK Provider's letter template and headed paper. [redacted] *should have used the letter template and headed paper of the Provider".*

The post Preliminary Decision submission of the Provider concludes with the Provider stating "*it is accepted that the UK Provider did not have the legal capacity to seek to call in an overdraft facility on an account held by another entity.*

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The UK Provider did not issue the Letter of Demand. The Provider accepts full responsibility for the issuance of the Letter of Demand".

The Provider has furnished a number of iterations of the Current Account Terms and Conditions and the Overdraft Terms and Conditions as part of its response to this complaint. At section 1.1 of the Current Account Terms and Conditions, 'Account' is defined as: *"… the personal current account in your name that you hold with us."* The terms 'we', 'us' and 'our' is defined at section 1.24 as: *"…* [the Provider] *having its registered office at* [Irish address] *and its successors, and legal or equitable transferees or assigns."*

In the Overdraft Terms and Conditions that were applicable at the time the letter of **1 November 2018** issued, I note that clause 10 states as follows:

> ***"10.0 Assignment & Disclosure of Information***
>
> *10. You consent irrevocably to any future transfer, howsoever arising of the Facility, the credit agreement and any or all security held for the Facility, whether as part of a transfer and securitisation or otherwise.*
>
> *10.2 You authorise the Bank to disclose any information or documentation relating to the Facility, the credit agreement, and any and all security held for the Facility to third parties including members of the* [Group Company] *for the purposes set out in this Clause. You agree that your authorisation is consent for the purposes of data protection law."*

Having considered the Current Account Terms and Conditions, the only entity with the legal authority to call in or seek to recover the Complainants' overdraft is the Provider and no other entity.

Further to this, while the Overdraft Terms and Conditions provide for information sharing, this is confined to the limited circumstances provided for in clause 10, which I am satisfied only apply when there is a transfer of the Complainants' account/facility and does not cover the situation which has arisen in this complaint as there is no evidence of any transfer of the Irish held account or overdraft facility. Further to this and as noted above, there is no evidence that the Provider shared, or authorised the sharing of, the Complainants' account details with the UK Provider.

Therefore, there is no evidence to show that the Complainants entered a contractual relationship with the UK Provider in respect of the account the subject of this complaint, that there was a transfer of any rights from the Provider to the UK Provider or that the Provider instructed the UK Provider to issue the letter.

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In light of the foregoing, it clear that the UK Provider had no entitlement to issue the letter of **1 November 2018**. For instance, it is not clear on the face of the letter that it was being issued on behalf of, or on the instruction of, the Provider; that the ownership of the account had transferred to the UK Provider; or that the UK Provider had acquired the right to demand repayment of the overdraft facility.

The UK Provider appeared to be seeking to rely on terms and condition (and a contractual relationship) that it was not a party to and had no apparent legitimate entitlement to invoke. For example, had the Complainants refused to repay the overdraft, it is not clear what power the UK Provider had to cancel the overdraft or the steps it could take to recover the outstanding balance, as communicated in the letter. Additionally, it is not clear what would have entitled the UK Provider to report an overdrawn account to credit referencing agencies in circumstances where the account in question was not one of its accounts and the overdraft facility was not owed to it.

Therefore, I stated in my Preliminary Decision that I was not satisfied that the UK Provider was entitled to issue the letter of **1 November 2018** or in any way interfere with the administration of the Complainants' joint account, which I believe was entirely a matter for the Provider. I accept the Provider's belated acceptance of this position in its post Preliminary Decision submission.

I accepted in my Preliminary Decision that if the letter had been issued by the Provider, in light of the applicable terms and conditions, the Provider would have been entitled to demand repayment of the overdraft. I remain of this view.

The terms and conditions which apply to the Complainants' joint account and the overdraft make clear that the Provider can seek the repayment of the overdraft on demand and there does not have to be an event of default or specific reason in order for the demand to be made. The terms and conditions entitle the Provider to demand the repayment of the overdraft irrespective of whether it was an agreed overdraft or not, and regardless of whether the overdraft limit had been exceeded. In terms of the maintenance of the account, I note from the evidence that the Complainants appear to have been in breach of section 7.4 of the Overdraft Terms and Conditions in that the account was not in credit for the required 30 day period prior to the issuance of the letter of **1 November 2018**.

However, I do not accept that the existence of a legitimate basis for the Provider's entitlement to issue a demand for repayment of the overdraft addresses or in any way gives legitimacy to the very serious concerns that have arisen in this complaint. Furthermore, having conducted its own investigation of the matter and in light of the Provider's Complaint Response, I do not accept that it was reasonable for the Provider to stand over the letter and maintain a position that it was correctly issued during the Provider's response to the Complainants' complaint and during the investigation by this Office. I consider this to have been an unfair, unjust and unreasonable approach to take when it was quite clear that the UK Provider had no authority to issue the letter.

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Furthermore, I believe the Complainants should have been aware of any and all links between their accounts.

Separately, I note that the overdraft facility was removed from the account in **September 2019**. However, it is not clear whether this was done by or on the instruction of the Provider or the UK Provider. While I am satisfied that the Provider has the appropriate contractual rights to do this, on the available evidence, I do not accept that the UK Provider would have the right or should possess the appropriate access to the Provider's systems to take such action.

The Complainants are also dissatisfied with the letter issued by the UK Provider on **9 November 2018** which incorrectly acknowledged that the First Complainant's complaint had been resolved. I note that the UK Provider subsequently apologised for this, advising that the letter was issued in error. I also note that the First Complainant's complaint was upheld by the UK Provider. While the Provider says it accepts some responsibility for the letter of **1 November 2018**, it is not clear whether it also accepts responsibility for the letter of **9 November 2018**.

However, although these letters were linked in that the complaint arose because of the **1 November 2018** letter, it is my opinion that the UK Provider's conduct in issuing the letter of **1 November 2018** and its investigation of the subsequent complaint are separate and discrete matters. As such, I do not consider that the UK Provider's conduct in respect of its investigation of the First Complainant's complaint comes within my jurisdiction and I do not propose to make any findings regarding this aspect of the complaint.

Goodwill Gesture

In this Complaint Response, the Provider says that:

> *"… the manner of the issue of the letter of demand failed to meet the high standard of customer service to which the Provider holds itself and, to acknowledge this customer service shortcoming, the Provider wishes to offer the sum of €500.00 in full and final settlement of the present complaint together with a written letter of apology, as requested by the Complainants."*

Having considered the conduct of the Provider, I do not consider that the goodwill gesture offered by the Provider is a reasonable sum of compensation for the Provider's conduct. This complaint cannot be relegated to some sort of lapse in customer service. While I welcome the Provider's admissions and clarifications, it is most disappointing that these were only forthcoming after I issued my Preliminary Decision.

The issues involved were serious and fundamental and required greater consideration, at an earlier stage, by the Provider.

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I note that the Provider has indicated that it will issue *"a written letter of apology, as requested by the Complainants."* I welcome this.

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

I direct the Provider to:

- rectify the conduct complained of by requesting that the UK Provider fully retract the letter of **1 November 2018**

- rectify the conduct complained of by retracting the position adopted in its Final Response letter dated **22 May 2019** that the letter of **1 November 2018** was correctly sent to the Complainants

- make a compensatory payment to the Complainants in the sum of €5,000

- provide reasons and an explanation to the Complainants as to how the UK Provider was able to access information regarding the Complainants' joint current account held with the Provider and demand the repayment of an overdraft facility in respect of an account held with the Provider

- inform the Complainants of all and any links between any accounts the Complainants hold with the Provider and any other accounts

I welcome the Provider's statements in its post Preliminary Decision submission in which it has indicated that it "*will be formally retracting the letter of demand dated 1 November 2018 by letter to the Complainants (to be copied to the FSPO*)", I further acknowledge and welcome the statement that the Provider "*hereby retracts its position adopted in its Final Response Letter dated 22 May 2019 that the letter of demand dated 1 November 2018 was correctly sent to the Complainants. The Provider accepts this letter of demand was not correct as it purported to concern a ROI current account of the Provider but was sent on the headed notepaper of the UK Provider*".

However, despite the Provider's acknowledgements and submissions and while I welcome the Provider's statement that it "*accepts full responsibility for the issuance of the Letter of Demand",* I propose to include the appropriate directions in my Decision. Further, it remains my belief that the conduct, the subject of this complaint, is a matter which should be brought to the attention of the Central Bank of Ireland as indicated above, pursuant to ***Section 56(7)(c)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld on the grounds prescribed in ***Section 60(2) (b), (f) and (g)*** for the Provider's unfair, unjust, unreasonable and improper conduct and for not providing an explanation for its conduct when it should have.

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by:

- requesting that the UK Provider fully retract the letter of **1 November 2018**
- retracting the position adopted in its Final Response letter dated **22 May 2019** that the letter of **1 November 2018** was correctly sent to the Complainants
- making a compensatory payment to the Complainants in the sum of €5,000
- providing reasons and an explanation to the Complainants as to how the UK Provider was able to access information regarding the Complainants' joint current account held with the Provider and demand the repayment of an overdraft facility in respect of an account held with the Provider
- informing the Complainants of all and any links between any accounts the Complainants hold with the Provider and any other accounts

The compensatory payment in the sum of €5,000 is to be paid to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

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

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

27 September 2021

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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.