



<b><u>Decision Ref:</u></b>	2021-0036
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Fees & charges applied (mortgage) Dissatisfaction with customer service Failure to provide correct information Failure to provide product/service information Failure to provide calculations
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

This complaint concerns the calculation of the breakage fee for a fixed interest rate period.

**The Complainants' Case**

The Complainants held a mortgage with the Provider which was subject to a fixed interest rate period. As per the account terms and conditions, the Complainants were aware that in the event they wanted to switch interest rates before the end of the fixed rate term, a fee described as a Break Funding Fee (BFF) would be payable.

The Complainants contacted the Provider on **7 November 2018** to find out what the BFF would be, as they were considering switcher deals available with other providers. The Complainants submit that they were informed that the BFF would be €1,139.80. In the event, the Complainants decided not to proceed with a mortgage switch at that point.

The Complainants state that they requested another BFF quote from the Provider in **February 2019**, and that the Provider informed them that the BFF would be **€6,166.80** – a difference of over €5,000 within a period of three months. The Complainants state that given the disparity in these figures they *“began to investigate why this was and first looked at the break funding fee formula.”*

The Complainants submit that the formula they understood to be applicable was:

**$B = (W-M) \times T/12 \times A$** , where

*B = the Break Funding Fee;*

*W = the Wholesale rate prevailing at the date the existing fixed rate applying to the loan was set;*

*M = the Wholesale rate prevailing at the switching/redemption date for the unexpired time period of the Fixed Rate Period;*

*T = the period of time in months to the end of the Fixed Rate Period;*

*A = the principal amount which is subject to the existing fixed rate and which is being switched or redeemed.*

The Complainants contend that the problem with this formula is that the Provider at the time of calculating these figures did not provide them with the “M” figure, which they contend makes it impossible for you to verify that their calculation is correct. The Complainants state that they contacted the Provider to obtain the “M” figure and were “*finally informed*” that for November 2018 the Wholesale rate was 0.23% compared with the February 2019 wholesale rate of -0.06%.

The Complainants state that they enquired with the Provider as to “*why this figure had changed so much when the markets seem to be stable, what determines changes in this figure?*” The Complainants contend that the response they received was inadequate and did not provide clarification. The Complainants state that in attempting to seek clarification on this matter the Provider “*basically gave me their vague formula again*”. The Complainants also submit that “*I have found [the Provider] are not transparent and will not explain their price jump in 3 months*”.

### **Complaint for Adjudication**

The complaint is that the Provider:

1. By not confirming how and where it obtains its wholesale rate at the time of switching / redemption, is not being wholly transparent with the Complainants;
2. Was aware of the Complainants' previous request for a BFF and purposefully sought out a wholesale rate at the time of switching/redemption that would ensure it was not lucrative for the Complainants to switch from their fixed rate period;
3. Is unfairly locking the Complainants into staying with them as a mortgage lender and thus denying them the opportunity to look elsewhere for a favourable switcher rate.

The Complainants want the Provider to clarify how the “M” figure is calculated at the switching/redemption date and also clarify who sets the figure.

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### **The Provider's Case**

The Provider issued a Final Response Letter (FRL) dated **23 April 2019**. The Provider referred to the BFF formula (as set out above) and stated that this information was available to the Complainants as seen in *"Section 4 of the regulatory information section of [the Provider] Home loan Application"*. The Provider states that the wholesale rate at drawdown was 0.29% and that the wholesale rate at the time of switching / redemption depends on the rate at the time that the BFF is requested.

The Provider issued a second FRL on **20 November 2019**. In this letter the Provider repeated the BFF formula and enclosed the relevant section of the Complainants' loan offer and mortgage application form and points out that both of these documents contain details of the formula.

The Provider advised that on 7 November 2018 the Wholesale rate at redemption was 0.23%, but on 13 February 2018 it was -0.06%.

The difference in wholesale rate prevailing on the redemption dates accounts for the difference in the BFF figures given. The Provider states that *"the difference in BFFs between November 2018 and February 2019 is due to a reduction in wholesale rates at redemption date"*.

The Provider stated that it was satisfied that the BFF calculation was clearly set out for the Complainants as seen in the loan offer and it considered that the Complainants were adequately informed that a BFF could apply should they want to break out of their fixed rate period. The Provider also submitted details of why such a fee is applicable.

The Provider rejects the suggestion that it has not been transparent and further contends that the terms under which a BFF is applied and calculated were detailed in the Complainants' loan documentation. The Provider also notes that this information is publicly available on its website.

### **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.

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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 25 January 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.

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

The Complainants applied for a mortgage with the Provider in **December 2016**. The signed application form advises that:

*“if, during a Fixed Rate Period, the Borrower repays early the whole or any part of the Loan or switches the whole or any part of the loan into a variable rate or another fixed rate, the Borrower may be liable to pay a 'break funding fee'...”*

The formula used to calculate the break funding fee (BFF) is provided (it is the formula set out above). Wholesale Rate is defined as:

*“the rate per cent per annum which the lender determines to be the market rate applying to an appropriate interest rate swap for the relevant time period”*

Examples are given of BFFs calculated where the Wholesale Rate increases or decreases over the term of the loan.

A loan offer letter issued on **21 June 2017** for a loan with a fixed interest rate of 3.35% (described as *“Indicative only. Will be set at draw down”*) for a period of 60 months from drawdown. The loan offer letter states *“If you repay any part of the loan during the course of a fixed rate period which is a year or longer in length you may be liable to pay a break funding fee. See the Statutory Warnings section below for further details”*.

The description of how a break funding fee may arise is set out at Section 7 of the loan terms and conditions, and the customer is referred to the statutory warnings for further information. The information from the application form is repeated, together with illustrative examples, in the statutory warnings on page 21 of the loan terms and conditions.

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There is no dispute about whether or not the Complainants were aware or given sufficient information about the circumstances in which a break funding fee would arise, or the formula that would be used when calculating such a fee – the Complainants were advised fully in this regard. They were aware that a fee would be applicable they contacted the Provider to find out what that fee would be in **November 2018**.

The dispute in this complaint is the extent to whether the Provider acted in an acceptable fashion with regard to furnishing information to the Complainants about what the Wholesale Rate is, at a given point in time, and how it is calculated.

The Complainants received a breakage funding fee quote of €1,139.80 on **7 November 2018**.

A few months later, they sought another quote and on **14 February 2019** the Provider informed them that the breakage funding fee would be €6,166.80.

The Complainants queried this figure and were advised that the reason for the difference in figures was possibly because the Wholesale Rate is different to what it was in November. The telephone agent offered to find out what the applicable rates were and revert when that information was received.

On **19 February 2019** the Provider's agent contacted the Complainants to advise that he was still awaiting the applicable Wholesale Rates.

The Complainants were advised of the applicable Wholesale Rates on **21 February 2019**. The Provider informed the First Named Complainant that the wholesale rates for the first quote was 0.23% and for the most recent was -0.06%. The Complainant queried what determines those rates. The Provider's agent was unable to answer. The Provider's agent agreed to send the full calculations by email.

On **26 February 2019** the First Named Complainant was advised of how to receive the email (it had to be sent in an encrypted format) with a full breakdown, that the rates are set weekly and determined by changes in market factors. The Complainant asked for another break funding fee quote to be sent to her. The Provider's agent agreed to send this and advised that this generally takes 3-5 days to issue. It was explained that the wholesale rate is largely dependent on Central Bank rates, which can change on a daily basis. The Complainant suggested that she could get a quote every week until she is happy with the figure, and the Provider's agent confirmed that this would be no problem.

On **28 February 2019** the Complainants were advised of the then current break funding fee quote of €5,990.35.

During a call on **4 March 2019** the Complainant queried whether the rate comes "from the ECB" and the agent confirmed "yeah it would do". The agent was unable to explain, however, how exactly it relates to the ECB rates. The Complainant requested a written explanation of how it is calculated, as well as another quote for the break funding fee.

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The Complainants made a complaint to the Provider which was received by it on **15 March 2019**.

In its first Final Response Letter dated **25 April 2019**, the Provider confirmed the formula which is used to calculate the BFF, and that the Wholesale Rate at drawdown was 0.29%. It stated that *“the Wholesale rate at breakage depends on the rate that the BFF is requested”*. This was a typographical error - *“depends on the rate”* should have said *“depends on the date”*.

The Complainants submitted a complaint to this Office on **5 May 2019**. The crux of that complaint was that the Provider did not furnish the “M” (Wholesale Rate prevailing at the time of the switch) figure with the Complainants. The Complainants felt that this constituted an unacceptable lack of transparency in the Provider's dealings with them.

The second Final Response Letter dated **20 November 2019** noted that the Complainants had been furnished with the calculation used to generate the break funding fee, included the relevant sections from the mortgage loan documentation showing how the BFF calculation was carried out, and noted the specific “M” values for the November 2018 and February 2019 calculations.

The complaint was modified somewhat to include the fact that the Provider did not explain how it determines the Wholesale Rate (as opposed to simply informing a customer what the rate it has determined is).

### Analysis

The evidence demonstrates that the Complainants were fully aware that a break funding fee was applicable, and of the formula used to calculate it.

Although the BFF quotes did not state what the wholesale rate (M) figure were when they were first provided, the Complainants were advised by late February / early March 2019 (that is, within 2/3 weeks of receiving the second quote and raising the issue) of the specific figures applied (0.23% and -0.06%); and were informed that the wholesale rate is calculated by reference to ECB rates, which is influenced by market factors. Full calculations were furnished to them.

The request from a retail customer that a Provider disclose the manner in which it calculates its wholesale rate insofar as it is applicable to a break funding fee is an unusual one. It is not surprising, nor is it unreasonable, that a telephone customer service agent was unable to answer this question. The rate is set by the Provider's treasury department and that department's basis for setting the rate would not be, in the normal course of business, something that a customer would seek.



The Provider has, in its responses to this office, set out how the wholesale rate is calculated by it. I consider this information to be, potentially, information of a commercially sensitive nature. I accept that it is not set in an arbitrary, unfair, capricious, anti-competitive or otherwise wrongful manner. The EURIBOR rates that it is based on are publicly available. Even without knowing the exact manner in which the Provider calculated its wholesale rate, the difference in the wholesale rate applicable (which in turn led to the difference in applicable BFF quotes) corresponds clearly with the decrease in the EURIBOR rates applicable when the quotes were sought.

The Provider furnished the applicable formula for the break funding fee when the mortgage was incepted. There is no evidence to suggest that the Provider has made any errors when providing BFF quotes to the Complainants (which were sought on a near-weekly basis from March to November 2019).

After it provided a quote for the break funding fee, and when it was requested by the Complainants, the Provider furnished the "M" figures used for the Wholesale Rate within 2 to 3 weeks. Many customers would not seek or be interested in this information. I have been provided with no evidence that the Provider has acted wrongfully in not furnishing this figure with a BFF quote as a matter of course.

There is no basis for me to find that the Provider was under an obligation to explain to the Complainant how it calculates its "Wholesale Rate" - the loan agreement states that it is the rate that is determined by the Provider to be the market rate applying to an appropriate interest rate swap for the relevant time period. This grants the Provider a broad discretion.

The Provider was not under an obligation to disclose the manner in which it calculates the Wholesale Rate to the Complainants.

When the Complainants raised the issue, the Provider advised them of the applicable wholesale rates for the break fund fee quotes as requested within a reasonable period of time.

The Provider has not furnished incorrect break funding fees to the Complainants.

I accept that the Wholesale Rate, or "M", figure is not set in an arbitrary, unfair, capricious, anti-competitive or otherwise wrongful manner.

For the reasons outlined in this Decision, I do not uphold this complaint.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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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 February 2021

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.