



<b><u>Decision Ref:</u></b>	2021-0062
<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)
<b><u>Outcome:</u></b>	Rejected

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

The complaint concerns a breakage fee charged by the Provider to the Complainants when the Complainants sold their property and redeemed their fixed rate mortgage.

**The Complainants' Case**

The Complainants submit in their complaint form that the First Complainant telephoned the Provider on **15 October 2018** and was told that the fee for breaking out of their mortgage was €640.

The Complainants state that they sold their property and telephoned the Provider in **March 2019** at which time they were informed that the breakage fee would be approximately €4,800.

The Complainants acknowledge that the First Complainant was advised on the call on **15 October 2018** that the breakage fee quoted by the Provider could change in the future, however, the Complainants states that they believe this breakage fee would be “+10%” and not “800%”.

The Complainants state that despite numerous requests for copies of telephone call recordings, statements and calculations they have not been provided with these.

The First Complainant made further submissions to this Office on behalf of the Complainants by way of email dated **29 September 2020**.

These submissions clarify that the complaint *“relates not to the fact that a breakage fee needed to be paid but to the fact that despite numerous requests for information on how the fee was calculated, it was never disclosed by the [Provider] that the R in the formula related to the Euribor rate. If this information had been disclosed I could have chosen the day to repay my mortgage and saved myself thousands of euro. This is evident in the change of rate from the date of first call to the date I made payment. Funds were available to me to make the payment throughout this time.”*

The First Complainant made a further submission to this Office dated **7 October 2020** stating again that the Complainants were not disputing that the Provider had told them what the breakage fee was but that the Provider did not tell them how the breakage fee was calculated, therefore denying them the ability to make an informed choice as to the date of repayment. In particular, the First Complainant states that she no longer had her mortgage offer letter and despite several requests, she was not furnished with the formula used to calculate the breakage fee. The First Complainant states that she was only given the formula after she paid her mortgage and she has now *“discovered that ‘R’ is a variant of the EURIBOR rate”*

The Complainants want a refund of the excessive portion of the breakage fee that was charged to them as well as copies of all the calls they made to the Provider in respect of the matter.

### **The Provider’s Case**

The Provider in its Final Response Letter to the Complainants dated **2 May 2019** states that *“when it comes to any breakout fee it is important to note that any information or calculations provided to [a customer] on the matter of breakout fees are indicative only, relevant to the day the figures are supplied and may differ to the figures quoted on the day upon which the breakout fee actually applies”*. The Provider further states that this information was provided to the Complainant prior to the drawdown of the mortgage loan by means of *“the Mortgage Loan Offer Letter”* wherein the formula to calculate the amount was provided.

The Provider states in its Final Response letter that the formula to calculate the breakage fee is  $(\text{Amount} \times (R-R1) \times \text{Time})$  divided by 36500 and for the purposes of this formula, the variables are defined as follows:

*“Amount’ means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments: in the case of an endowment loan, this will equal the full amount of the early repayment or conversion.*

*'R' means the cost of funds that the Lender for the fixed rate period as incorporated in the existing interest rate applying to the Loan.*

*'R1' means the interest rate available to the Lender for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period.*

*'Time' means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period.*

The Provider states in its Final Response Letter that *"as the fee is provided on a day to day basis there is no possibility of providing an accurate future figure or information on how much the figure can fluctuate by from the [Provider's] perspective."*

The Provider made submissions to this Office dated **26 May 2020**. In these submissions, the Provider relies on Part 3 of the Mortgage Offer Letter, the General Terms and Conditions, to justify the breakage fee charged. The Provider submits that the Offer letter is clear in relation to the terms and conditions which govern the operation of the mortgage loan account. The Provider submits that the Complainants signed and accepted the terms and conditions of the Offer Letter, which is mutually binding on both parties.

The Provider refers to General Condition 7, Fixed Interest rate of the Offer Letter and in particular, clause (c) which states:

*"In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower will be liable to pay a sum to be calculated in accordance with the following formula. The sum will be equal to "C" where:*

$$C = \frac{A \times (R\% - R1\%) \times D}{365} \text{ and}$$

*"A" = the amount repaid early (or the amount which is changed from the fixed rate to a new rate) averaged from the date of early repayment (or rate change) to the end of the fixed rate period to allow for scheduled repayments (if there are any) and interest changes.*

*"R%" = the annual percentage interest rate at (sic) which was the cost of us funding an amount equal to "A" for the originally intended fixed rate period.*

*"R1%" = the annual percentage rate available to us for deposit of an amount equal to*

*"A" for a period equal to "D".*

*“D” = the number of days from the date of early repayment (or rate change) to the end of the fixed period.*

The Offer Letter provided a worked example also.

The Provider states that at the time the Complainants’ mortgage was drawn down, they had the full benefit of legal advice at that time and that the Complainants were fully aware of their commitments and liability to the Provider.

The Provider states in its submissions that the Complainant was quoted €4,822.46 as the breakage fee by telephone on **25 April 2019**. The Provider states that this was calculated by way of the formula noted under General Condition 7(c) of the Offer Letter:

*“Average balance: €123,216.79*

*Original cost of funds at date of fixing: 0.69000%*

*EURIBID (investment rate) at date of breaking fixed term: 0.11000%*

*Number of days remaining: 2463*

*The difference in the original cost of funds (0.69000%) and investment rate (0.11000%) is 0.58000%*

*The breakage fee is calculated by:*

***€123,216.79 x 0.58/36500 x 2463 = €4822.46”***

The Provider then states that the breakage fee payable by the Complainants upon redemption of the mortgage loan was €5,007.00 on **8 May 2019** and that this was calculated with reference to the same formula as follows:

*“Average balance: €123,284.16*

*Original cost of funds at date of fixing: 0.69000%*

*EURIBID (investment rate) at date of breaking fixed term: 0.08000%*

*Number of days remaining: 2450*

*The difference in the original cost of funds (0.69000%) and investment rate (0.08000%) is 0.61000%*

*The breakage fee is calculated by:*

***€122,284.16 x 0.61/36500 x 2450 = €5006.94”***

*This amount was rounded up to €5,007.00”*

The Provider also refers to the European Standardised Information Sheet that was provided to the Complainants dated **3 December 2015** which accompanied the Offer Letter. The Provider states that this correspondence also includes information regarding early repayment in the case of a fixed rate loan and provides a worked example of how the breakage fee is calculated.

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The Provider also refers to its correspondence of **18 April 2019** to the Complainant's Solicitor. The Provider states that this letter provided redemption figures and also provided a warning that *"any funding fee is only valid for today's date as the fee amount can change substantially with daily fluctuations in financial market interest rates. Please therefore request an up to date redemption quote on the date of redemption"*.

The Provider states that this letter further confirmed that the breakage fee figure was only a *"point in time"* figure and that a quote should be requested on the date of redemption.

The Provider states that the EURIBID investment rate on **15 October 2018** was .62000% and therefore the breakage fee was much lower. This breakage fee was calculated as follows: *"€125,455.98 x (0.69000%-0.62000%)/365 x 2655 = €638.79"* which the Provider states was rounded up to €639.00.

In respect of the assertion that the Complainants did not receive all items and information that they requested from the Provider, the Provider states that it processed all instructions from the Complainants properly and promptly.

The Provider has supplied a copy of all calls recorded and communications between the Complainants and the Provider's representatives.

The Provider made further submissions to this Office dated **7 October 2020**. The Provider states that the calculation of the breakage fee for breaking out of a fixed interest rate on a mortgage does not simply use the EURIBOR as asserted by the Complainants in their submissions dated **29 September 2020**. The Provider goes into further detail in these submissions as to how the figures in its breakage fee formula are determined. It states that the:

*"original cost of funds at date of fixing' (i.e. 'R') is provided by its Global Markets division on a daily basis across various fixed rate periods and circulated by its Treasury Department to be input on the Provider's internal systems. The rate is calculated by reference to the rate at which the Provider can borrow money on the Euro Interbank Market, for a period corresponding to the relevant fixed interest rate period (10 years in the immediate case). The Provider employs financial derivative instruments known as interest rate 'swaps' in its borrowing in order to protect against the effects of interest rate increases in exactly the same way the Complainants enjoyed this protection by fixing their interest rate on their mortgage loan with the Provider. (an interest rate swap is essentially an agreement between two parties to exchange a flow of payments between one another at an agreed interest rate for a set period of time.) In the immediate case, the rate of 0.69% was an indicative swap rate for "10 year vs 3m EURIBOR" that was taken from Bloomberg on the morning of 22 January 2016. It does not simply represent the EURIBOR. (Bloomberg is one of the most widely used trading platforms in the world, providing live pricing based on trades being executed in the market).*

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*As with the “R” variable, the EURIBID (i.e. ‘R1’) is provided by the Provider’s Global Markets division. The calculation of the EURIBID is quite complex but essentially it is again calculated by reference to the rate at which the Provider can borrow money on the Euro Interbank Market, for a period corresponding to the remaining fixed interest rate period (roughly 7 years in the immediate case). In the immediate case, the R1 rate of 0.08% represents the cost to the Provider of securing an indicative swap rate for “7year v 3m EURIBOR” as this was the rate at which the Provider was able to secure matched funding on 8 May 2019. Again it does not simply represent the EURIBOR.*

*The Provider submits that the breakage fee quoted on 15 October 2018 was considerably less than the fee charged on 5 May 2019 due to the well-publicised fall in EUR swap rates over the past number of years, which is the result of poor economic growth and low inflation in the Eurozone. The increased expectation of further European Central Bank (ECB) action through rate cuts or additional Quantitative Easing saw swap rates drop significantly during 2019. The ECB ultimately cut rates and announced further Quantitative Easing in the third quarter of 2019.*

*The Provider is aware that changes in financial markets are not something its customers would typically follow and hence, as clearly set out in the European Standardised Information Sheet immediately below the worked example, the Provider invites customers to contact it to obtain the funding fee if they are minded to repay their loan early:*

*‘Should you decide to repay this loan early, please contact us to ascertain the exact level of the exit charge at that moment’*

*Where, as in the immediate case, a customer signs an attestation in a set of terms and conditions to signify that they have read and fully understand the terms and conditions in a Mortgage Loan Offer, the Provider is fully entitled to rely on that agreement as confirmation its customers understand the implications of ending a fixed rate early. The Provider re-iterates that irrespective of the rates used in the formula for calculating the funding fee, the Complainants and/or their solicitor would have had to contact the Provider for confirmation of the funding fee, which would have been quoted on the particular day”.*

The Provider made a further submission to this Office dated **13 October 2020** stating that it is standard industry practice to provide breakage fee quotations either over the phone or in writing and notes again that breakage fees can fluctuate substantially and therefore “*can decrease as well as increase*”.

Ultimately, while the Provider states that it sympathises with the Complainants, it stresses that the breakage fee represents the financial loss to the Provider for the interruption in its matched funding commitments and this breakage fee fluctuates on a daily basis.

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### **The Complaints for Adjudication**

The complaints are that:

- the Provider overcharged the Complainants in respect of their breakage fee;
- the Provider failed to provide the Complainants with copies of their phone calls and requested documentation.

### **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 8 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.

Following the issue of my Preliminary Decision, the Complainants made a submission under cover of their e-mail to this Office, together with attachment, dated 15 January 2021, a copy of which was transmitted to the Provider for its consideration.

The Provider advised this Office under cover of its e-mail dated 19 January 2021 that it had no further submission to make.

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

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The Complainants drew down a mortgage loan of €150,000 on **22 January 2016** for a term of 25 years under the Mortgage Loan Offer Letter dated **3 December 2015** which was signed and accepted by the First Complainant on **8 December 2015** and the second named Complainant on **9 December 2015**. The interest rate was a fixed rate at 4.2% for the first 120 months, thereafter the mortgage loan account would roll to the standard variable rate, which was 3.9% at the date of offer.

Having considered the submissions from both parties, I accept that General Condition 7(c) of the Mortgage Offer Letter clearly sets out the formula used to calculate the breakage fee applicable to the Complainants' mortgage. I also accept that at the time the Complainants' mortgage was drawn down, they had the full benefit of legal advice and there is no evidence to suggest that they were not fully aware of their commitments and liability to the Provider in terms of this potential breakage fee.

In any event, I note that the Complainants do not dispute their liability for a breakage fee. Rather, they take issue with the amount of the breakage fee and the increase in the amount quoted.

Recordings of telephone calls have been provided in evidence and I have considered the content of these calls.

I place particular reliance on the fact that during the audio call on **15 October 2018** between the First Complainant and the representative of the Provider, the representative of the Provider clearly stated that the breakage figure stated was "*as of today*".

I note that the Provider, in the course of its submissions in this matter, has provided a detailed explanation as to how the Provider's internal processes work to enable it to calculate the figures that comprise the breakage fee formula. This has been done in more detail than was initially provided to the Complainants but I cannot fault the Provider for adopting this approach. It would be unnecessary for the Provider to go into extensive detail with regards to the manner in which the breakage fee formula is calculated for each and every mortgage holder that requests a breakage fee and indeed doing so, may, in my opinion, overcomplicate matters further by providing them with superfluous, unnecessary technical information relating to the Provider's internal processes.

The Complainants, in their post Preliminary Decision submission dated 15 January 2021, state:

*"I note that the finding states I was given a worked example of the formula with the offer letter - does that mean that I am not entitled to ask for it again, as I did repeatedly to no avail. As I'm sure anyone can appreciate, people don't always keep these documents on hand. I will also note that yes the formula is worked out - as in numbers are substituted for the letters, but it doesn't specify what the letters mean or refer to.*

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*That is the crux of this complaint - that is what I repeatedly requested and was denied. I note that the findings say it's not feasible I could have saved myself money had I know what R refers to, but attached is the evidence that I could have and shows the variation in what R was in the period while I was asking the bank to tell me.*

Source: <https://www.euribor-rates.eu/en/current-euribor-rates/5/euribor-rate-1-week/>



I remain of the view that the Provider did not deny the Complainants the ability to make an informed choice as to the date of repayment simply because it did not furnish the Complainants with the minutae as to how the breakage fee was calculated.

As the figures that comprise the breakage fee factor are set internally (albeit with close reference to external EURIBOR/EURIBID figures), it is simply not realistic for the Complainants to assert that had they had access to this more comprehensive information, they would have been able to utilise it to make a more cost-effective decision as to when to break away from their mortgage with the Provider. The only way for the Complainants to be certain as to the breakage fee charged, was for them to contact the Provider and obtain the daily rate on the day they decided to break away.

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In respect of the complaint that the Complainants were not provided with the phone calls/documentation they requested, I have been provided with no evidence to support this assertion. However, it is worth noting, that if the Complainants have concerns regarding a possible infringement of their data protection rights, any complaints in relation to data protection are outside the jurisdiction of this Office and the proper statutory body for the Complainants to have recourse to, is the Data Protection Commissioner.

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.

**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**

8 March 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.**