



<u>Decision Ref:</u>	2021-0256
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Loans
<u>Conduct(s) complained of:</u>	Increase in interest rate Delayed or inadequate communication Failure to implement payment terms
<u>Outcome:</u>	Rejected

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

This complaint concerns a business loan account.

The Complainants' Case

The Complainants state that they were approved for a term loan in the amount of €100,000 with the Provider in 2009. They stated that the terms and facilities of repayment provided that the loan must be repayable monthly over 120 months in the amount of €1,071.31 "which figure is based on current interest rates with payments to commence one month from drawdown".

The Complainants contend that they understood from the loan offer that:

"The interest rate quoted for this facility is the bank's variable (matrix based) rate, currently 5.24% per annum"

The Complainants state that in February 2019, they became aware that the loan would not be repaid within the 120 month agreed term. They stated this was a shock as they had expected that the loan would be repaid in full ahead of schedule due to having drawn down the loan in stages while making full repayments from the first stage drawdown. The Complainants state that when they contacted the Provider, they were told that the reason was most likely "interest-rate changes".

It is the Complainants' position, and it was their understanding, that the interest rates would be set on drawdown date and that the Provider did not inform them of interest-rate changes throughout the term and also that it failed to notify them that the term of the loan was going to extend past the original 120 month term and that the Provider failed to give them any option to readjust repayments.

The Complainants also state that it was unsuitable for the Provider to set up a standing order of the payment method and rather, it should have set up a direct debit if the rate was variable.

The Provider's Case

The Provider's position is that the Offer Letter issued to the Complainants clearly specified that the interest rate was a variable interest rate. The Provider further asserts that the Offer Letter clearly stated that the rate set out in the Offer Letter was expressly stated to be "indicative only" and is subject to change between the date of the Offer Letter and the actual drawdown of the facility.

The Provider submits that the Offer Letter expressly records an agreement by the Complainants in respect of the variable-rate upon which they drew down which provided that on a rate change occurring on the variable rates, the new rate would automatically apply to the facility from the date of that change and is that the Provider would give details to the Complainants in the statements which issue following such rate changes. The Provider further submits that the account statement issued to the Complainants clearly and prominently stated the applicable interest rate for the loan account.

The Provider accepts that it failed to write to the Complainants in a timely manner about the fact that the term of the loan would now exceed 120 months. The Provider further accepts that it failed to write to the Complainants with due regard to the time necessary for the Complainants to absorb and react to the information provided. In this regard, the Provider has offered the sum of €1,000 by way of a compensatory payment to the complainant.

The Provider submits that is not guilty of any shortcomings or wrongdoing in failing to offer the Complainants the option to adjust their repayments. The Provider submits that the onus lies with the Complainants, having been informed in the statements of interest-rate changes, to decide whether they wish to adjust the repayment amount by amending the standing order.

In relation to the standing order, the Provider submits that it is not in a position to process direct debit payments in respect of business loans and therefore it is a requirement that business loans are repaid by way of standing order and that the onus rests on a customer to amend their standing order as necessary to reflect any change in the stated repayments on the loan.

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The Complaint for Adjudication

The complaint is that the Provider:

- i. Failed to clearly advise the Complainants that the interest rate applicable to their loan was variable and subject to change throughout the term;
- ii. Failed to notify the Complainants of the interest-rate changes throughout the term of the loan;
- iii. Failed to notify the Complainants in a timely manner that the term of the loan would exceed the original 120 month term.
- iv. Failed to offer the Complainants the option to adjust the repayments.
- v. Set up an inappropriate method of payment.

The Complainants want the Provider to pay them an amount of approximately €3,000 which is representative of the amount of the additional interest they paid. There are also of the view that there should be a punitive compensatory award to the Complainants as against the Provider.

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.

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A Preliminary Decision was issued to the parties on 1 July 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' complaint is broken down into 5 identifiable issues, namely:

- i. That the Provider failed to clearly advise the Complainants that the interest rate applicable to their loan was variable and subject to change throughout the term;**

The Complainants in the complaint form to this office state that the Offer Letter says that the interest rate will be set on drawdown date and that it was set at 5.24% and should have remained because no rollover had occurred. The Complainants contends that while the Offer Letter refers to the Provider's variable matrix-based rate, this was only used between the time from the date of the Offer Letter to drawdown.

A copy of the Offer Letter dated 21 October 2009 has been furnished.

The Offer Letter refers to the interest-rate and states as follows:

"The rate(s) set out in this Offer Letter are indicative only in respect of the new facilities detailed and are subject to change between the day's of this Offer Letter and the actual drawdown of the facility. The actual rate will be determined on drawdown and subsequent rollover date (if applicable) and as set out in clause 5 of the standard terms and conditions set out in the appendix hereto.

1. The interest rate quoted for this facility is the bank's variable (matrix-based) rate, currently 5.24% per annum."

The Offer Letter goes on to provide in terms of repayment:

"Exact repayments will be determined on date of draw down based on the interest rate then prevailing.

1. The loan is repayable monthly over 120 months in amounts of €1071.31 which figure is based on current interest rates with payments to commence one month from drawdown."

The form of acceptance dated 30 October 2009 signed by both Complainants and which

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confirms "I have read and agree to be bound by and fully accept all of the terms and conditions contained in this Offer Letter and in the appendix to this Offer Letter".

The appendix to the Offer Letter contains additional terms and conditions.

Clause 5 provides as follows.

"5. Interest

(i) [Provider] rates:

The rate(s) set out in this Offer Letter, whether fixed or variable will be determined by the bank by reference to the borrower's category, term, purpose and security proposed for the facility.

Fixed rates are rates fixed for a period in excess of one year, determined on the date of original drawdown.

-Variable

On a rate of change occurring in the [Provider] variable rates, (whether primary or otherwise), the new rate will automatically apply to the facility as and from the date of such change and the bank will give details thereof to the borrowers in the statement which issues following such rate changes."

The terms and conditions also provide as follows:

Calculation of interest and conversions

"For all facilities set out in this Offer Letter, the bank will determine the rate of interest. Interest will be calculated and accrued daily on a basis of a 365 day count and become due and payable by the borrower on the daily balance outstanding (after adjustment is made for items in the course of collection) on the facility and shall be compound by as such quarterly or other periodic rests as the bank, in its absolute discretion, shall determine and in accordance with the bank's practice for accounts, from time to time.

For all facilities subject to a repayment schedule, any variation in the interest rate (whether arising because of an adjustment of interest rates, as between one fixed-rate. And another fixed rate period or otherwise) may be accommodated at the discretion of the bank by way of:

(a) an adjustment to the amount of repayments during the remaining period of the facility:

or

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(b) an adjustment of the number of repayments within the remaining period of the facility:

or

(c) an adjustment in the amount of the final repayment."

The Offer Letter expressly refers to a variable rate applicable to the loan and the Terms and Conditions also clearly distinguish between a variable and a fixed rate. The Complainants agreed to be bound by the terms of the offer and there was no suggestion and there is no reasonable inference to be made that they were unaware of the variable nature of the interest rate. There is no express fixed rate provision in the Offer Letter.

ii. That the Provider failed to notify the Complainants of the interest-rate changes throughout the term of the loan;

The loan was incepted in 2009 and the Provider has demonstrated that there were a number interest-rate changes from that point on and up to August 2011.

When the loan account was drawn down by the Complainants in December 2009, the interest rate was 4.74%. The interest rate changed on 9 December 2009 to 5.24%. On 25 August 2011, the interest rate changed to 5.74% and on 26 August 2011, the interest-rate changed to 5.24%.

On 29 August 2011, the interest rates changed to 5.74% and the Provider states that the interest rate did not change thereafter.

As is set out above, the Offer Letter stated that the Provider would automatically apply a new interest-rate to the facility as and from the date of such change. In addition, the terms and conditions expressly stated that when a rate change occurs to a variable interest loan, the Provider would give details of such change in the statement which issues after the rate change.

In this case, the Provider has only been able to provide statements from 4 November 2011 onwards. It happens to be the case that from this point onwards the lending rate remained constant at 5.74%.

I note that each of the term loan account statements that have been furnished state in the bottom right corner "*current lending rate applies to this account 5.740%*".

In addition, part of the evidence submitted by the Provider includes a Term Loan Statement issued to the Complainants dated 8 November 2010. This covers the period from 4 December 2009 to 4 November 2010. It is stated in this statement that up to 8 December 2009 the lending rate was 4.7% and that the current lending rate applied to the account was 5.240%.

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While it is disappointing that the Provider has been unable to furnish copies of statements covering the entire period, it would appear that the prevailing interest rate was notified to the Complainants by the Provider on each occasion that the term loan account statement was issued.

In addition to the foregoing, the Provider had obligations under the Code of Conduct for Business Lending to Small and Medium Enterprises 2012 and the Lending to Small and Medium Enterprises Regulations 2015 to take certain steps to notify customers of interest rate changes. The statutory provisions were only effective from the date of their respective commencements and it happens to be the case that there were no interest-rate changes during these periods and therefore the obligations under these provisions did not apply.

iii. That the Provider failed to notify the Complainants in a timely manner that the term of the loan would exceed the original 120 month term.

The Provider accepts its shortcoming in this regard and therefore it does not fall upon this office to make any determination to that effect.

iv. That the Provider failed to offer the Complainants the option to adjust the repayments;

In respect of this aspect of the complaint, there is no express provision in the Offer Letter or the terms and conditions that places an onus or obligation on the Provider, ongoing or otherwise, to take a unilateral step to offer the Complainants an adjustment to their repayments. The terms of the standing order and the amount being repaid each month was clear in the Offer Letter. The Provider points out that if the Complainants wished to make an adjustment to the standing order they could have approached the Provider in this regard, but they did not. While I believe it would have been prudent and helpful for the Provider to have offered the Complainants the opportunity to increase their repayments, I must accept there was no obligation on it to do so.

v. That the Provider set up an inappropriate method of payment;

In relation to this aspect of the complaint, the Provider explains that it is not in a position to offer direct debit payments for business loans and can only operate with the standing order. The Provider has not given any reasoning as to why this is the case. However, both parties to this agreement agreed that repayments would be made by way of standing order. That was the agreement from 2009 onwards and there is no evidence of any representations on the part of the Complainants during this period to alter that. The standing order was an express term of the agreement which the Complainants accepted.

While it is surprising that the Provider is unable to accept direct debit payments on the Complainants' account, I accept that such a decision falls within the commercial discretion of the Provider.

In recognition of its failure to notify the Complainants that the term of the loan would exceed the original 120 month term, the Provider offered the Complainants a sum of €1,000. In all the circumstances of this complaint, I consider that to be a reasonable offer to resolve matters. For this reason, 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**

27 July 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.

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