



<u>Decision Ref:</u>	2021-0344
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Fees & charges applied (mortgage) Failure to provide accurate account/balance information Incorrect information sent to credit reference agency
<u>Outcome:</u>	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 state that they were just over one year into a five year fixed rate mortgage at 2.8% interest when they were advised on **27 November 2019** that the breakage fee would be €5,663.66.

The Complainants submit that they were assured by the Provider's agent that their breakage fee would be "*no more than a few hundred euros*" at the beginning of the process.

The Complainants attest that this breakage fee is a breach of EU Regulations. The Complainants submit that the EU Directive which has been in place since 2016 means that the Provider can only charge a penalty based on what the mortgage funds would earn on deposit.

The Complainants want the Provider to refund the sum of €5,663.66 and calculate the breakage fee in accordance with the EU Directive.

The Provider's Case

The Provider has cited the account terms and conditions which it states set out the calculation method for the break funding fee (BFF). It contends that the calculation method was set out in the loan offer in a clear and unambiguous manner, and that the Complainants were fully on notice that a BFF would be applied if the Complainants sought to break out from the fixed rate period early.

The Provider has stated that in December 2018 the Complainants were advised that the (BFF) was €139.34, and in November 2019 the Complainants were advised that the BFF would be €5,663.38.

The Provider submits that *"we can confirm that the difference in BFFs between December 2018 and November 2019 is due to a reduction in the wholesale rates at the redemption date" from ".29% to -.22%".*

The Provider states that the wholesale rate is the rate per cent per annum which the Provider determines to be the market rate applying to an appropriate interest rate swap for the relevant time period, and that when an existing fixed rate mortgage is redeemed early the requirement for an interest rate swap at the time the rate was fixed is no longer needed and there is a cost of unwinding that swap. The Provider has supplied an example in that regard.

The Complaint for Adjudication

The complaint is that the Provider breached an EU Directive and incorrectly calculated the Complainant's breakage fee.

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 September 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, this office received a communication from the first Complainant dated 8 September 2021, a copy of the which was transmitted to the Provider for its consideration.

The Provider has not made any further submission.

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

The Complainants applied for a mortgage with the Provider in late **2017**. 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, on that date a break funding fee will be payable to [the Provider]...”

The formula used to calculate the break funding fee (BFF) is provided as:

$B = (W-M) \times T/365 \times A$, where

B = the Break Funding Fee;

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

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

T = the period of time in days 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.

“Fixing Rate” is defined as:

“the rate (expressed as a % per annum) which [the Provider] in its absolute discretion shall determine to be:

- a) *[The Provider]’s cost of raising funds in whatever manner and from whatever source(s) [the Provider] may elect for the relevant period of time;*
- b) *Any costs arising for the relevant period of time (in respect of any part of the facility) incurred in direct or indirect compliance with any reserve asset and/or special deposit or liquidity funding requirement imposed by any Regulatory Authority whether or not such requirement have the force of law’*
- c) *Any other costs, fees or expenses, whether direct or indirect, which [the Provider] may incur in raising funds of like amount for the relevant period of time”*

Examples are given of BFFs calculated where the Wholesale Rate increases or decreases over the term of the loan. It is noted that *“a certificate in writing by an officer of [the Provider] stating the break funding fee applicable at any time shall be prima facie evidence against the Borrower of the amount of the applicable break funding fee save for manifest error”*.

A loan offer letter issued on **16 April 2018** for a loan with a fixed interest rate of 3.05% (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. I note that definition of the “M” value in the formula in this document is a simplified one from what is contained in the application form, as “M” is defined as *“the Wholesale Rate prevailing at the switching/redemption date for the unexpired time period of the Fixed Rate Period”* and *“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 period”*.

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 evidence demonstrates that the Complainants were advised fully of this.

The dispute in this Complaint is the whether the Provider has calculated the fee correctly and/or in accordance with applicable law, and whether the Complainants were given a quote for a BFF of *“a few hundred euros”* in error.

/Cont’d...

The Complainants received a breakage funding fee quote of €139.34 on **21 December 2018**, which was confirmed in writing by letter dated **24 December 2018**.

On **18 October 2019**, the Complainants (through their solicitors) sought redemption figures and on **13 November 2019** the Provider issued a letter confirming redemption figures (including the BFF at that time of €5,663.38).

On **27 November 2019** the Complainants telephoned the Provider and queried this figure. The Second Complainant stated that *"initially"* she was told the figure would be *"in the hundreds"* by LD. She states that she was quoted this *"two months ago"*. She was advised that the BFF is calculated based on wholesale rates.

On **28 November 2019** the Provider issued a Final Response Letter to the Complainants, stating that it confirms the difference between the BFF in December 2018 and November 2019 was due to a reduction in wholesale rates at redemption date.

The Complainants in their submissions to this office state that the Provider has since *"refused to give us another breakage fee"*. It is not clear what request this relates to, and I am unable to find evidence of a refusal on the part of the Provider to furnish a breakage fee quote.

The complaint can be considered in two parts – firstly that on some occasion between December 2018 and November 2019 the Complainants were told by a staff member of the Provider that the BFF would be *"in the hundreds"*, and secondly that the BFF figures provided have been calculated unlawfully or incorrectly.

In their Complaint Form, the Complainants state that this advice was given to them by a specific staff member ("**LD**") from the branch. This is reiterated in the telephone call of 27 November 2019 when the second Complainant states that she received a quote of a *"few hundred euros"* from LD *"two months ago"*. The Provider has been unable to locate this call.

I would note that although the second Complainant expressed frustration with having been induced into entering into the agreement (an agreement which was entered into in December 2018) on the basis of a contention that a breakage fee would only be a few hundred euro, she also gave the impression that this advice was given to her two months before the phone call of 27 November 2019. In those circumstances, even if I were to find that the Complainants were told the breakage fee would be *"a few hundred euro"* – if they were told this prior to entering into the fixed rate period, the break fee at that time would in fact only have been in the order of some hundreds of euro; if they were told this in or around September 2019, it would not have constituted a quote within the terms of the agreement (which requires quotes to be furnished in writing) and it could not have induced the Complainants to enter into an agreement (as they had entered into the agreement many months previously).

/Cont'd...

LD has provided an account of her recollection of interactions with the Complainants to the effect that she had no contact with them regarding a breakage fee between December 2018 and 26 November 2019 (after the Complainants' solicitor had already received a BFF quote).

This note states as follows:

"Customer drew down their mortgage with [Provider branch location] on 11/09/2018

Ms contacted me on the 10th December 2018 advising that they were considering selling the property and moving and queried what the breakage fee would be, I advised that I would need to request this information from our operations team.

(Please note that I do not have or never have had access to retail system which generates breakage fees so I have never provided an estimate or guide to any customer as I always request this information from our operations team)

This information was provided to me by operations on the 17th December – and operations queried if I would like this information posted to the customer which I confirmed it should be issued. The breakage fee quoted was 139.34.

Customer subsequently submitted an application for mortgage approval which was processed and approval issued.

At no stage from December 2018 until 26 November 2019 did the customer contact me regarding the breakage fee – Ms requested this on the 26th November via email when I was at a work place banking event and I advised Ms that I would not be in a position to, however it later came to light that Ms had already been provided this information as per redemption figures issued to her Solicitor.

Ms and Mr subsequently lodged a complaint advising that I had quoted her a figure over the phone at some stage between December 2018 and November 2019. I do not have access to calculating these figures so I could not have provided her same. Ms was originally quoted 139.34 in December 2018 and this was issued in writing advising of a 10 day window to break same.

The [Branch Manager] took ownership of the complaint when dealing with the customers given that the complaint was about them believing that I had given mis-information.

Some additional points to note, Ms email attached never advised that I quoted her a figure, this is something that she reported to the Manager and to her husband".

It may be that, at some point, in some context, one of the Complainants was told that the breakage fee would be "a few hundred euro". However, I do not have evidence that this constituted wrongful conduct.

/Cont'd...

Ultimately, this information is not material to the substance of the complaint that the BFF provided in December 2019 was calculated either wrongly or unlawfully. It is not in dispute that the BFF quoted in December 2018 was significantly lower than that quoted in November 2019.

I accept that the Complainants were fully aware that a break funding fee was applicable and were on notice of the formula used to calculate it.

The Complainants have not sought to impugn the calculations themselves, but rather have cited an EU Directive which they state *“means that the Provider can only charge a penalty based on what the mortgage funds would earn on deposit”*.

The Complainants are referring to ***SI 142/2016 – European Union (Consumer Mortgage Credit Agreement) Regulations 2016***, and in particular, Section 26(2) of the regulations which states:

“A creditor shall be entitled to fair and objective compensation, where justified, for possible costs directly linked to the early repayment, but shall not impose a sanction on the consumer, and any such compensation shall not exceed the financial loss of the creditor”.

The Provider furnished the applicable formula for the break funding fee when the mortgage was incepted. The formula is based on a number of variables, the one which has primarily caused the increase in BFF being “M”. The definition of “M” is set out above and is based on the Provider’s determination of the costs of the customer exiting the BFF early and ultimately depends on the Wholesale Rate. The Provider has furnished the wholesale rates for the applicable dates in its responses to the Complainants and to this office and confirmed that “M” that was applied was its prevailing wholesale rate.

There is no evidence that the BFF applied included any element of a “sanction” or “penalty” over and above the cost (or loss) to the Provider resulting from the Complainants’ decision to exit the fixed interest rate period early.

Ultimately, market rates have determined the BFF, and the Complainants have been unfortunate that the rate applicable at the crucial point in time for them resulted in a significantly higher BFF than what they would have paid had they broken out of the fixed rate in December 2018. However, I have no evidence that this misfortune was caused by any wrongful conduct on the part of the Provider.

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

I have no evidence upon which to find that the Wholesale Rate, or “M”, figure is set in an arbitrary, unfair, capricious, anti-competitive or otherwise wrongful manner, nor am I satisfied that the BFF constituted a “penalty” or “sanction” within the meaning of SI 142/2016.

/Cont’d...

Although I accept that the second Complainant received an indication, at some point in time, that the BFF would be in the region of “a few hundred euro”, I have no evidence that this information was incorrect at the time it was given.

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**

30 September 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.