



<b><u>Decision Ref:</u></b>	2022-0092
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Fixed Rate
<b><u>Conduct(s) complained of:</u></b>	Refusals (banking) Failure to provide accurate account/balance information
<b><u>Outcome:</u></b>	Rejected

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

The complaint concerns a fixed rate mortgage account and the application of a breakage fee which the Complainant alleges is inconsistent with the information given to him when he originally made enquiries as to what fee would be applicable, should he decide to clear the facility before the termination of the agreed five year fixed rate term.

#### **The Complainant's Case**

The Complainant submits that on **3 July 2018** he entered into a five year fixed rate mortgage agreement with the Provider. The Complainant further submits that he phoned the Provider on **23 July 2018** to enquire *“What penalty I would pay if I chose to repay the mortgage early, as I wanted to be sure it would not be an excessive fee”*.

The Complainant states that he was informed that *“breakage fee at that time would be €257”* and that rate was based on interbank interest rates and was subject to change. The Complainant further states that he *“considered his amount completely acceptable”*.

The Complainant states that in **June 2019** he sold his property and became subject to a breakage fee when the facility was paid back before the expiry of the five year fixed rate term set out in the terms and conditions of the loan. The Complainant further contends that the breakage fee was calculated by the Provider as €6,368 (six thousand, three hundred and sixty-eight euro) and that *“obviously I was completely shocked by this because I couldn't understand how the breakage charge could have changed so drastically in only 11 months”*.

The Complainant submits that as far as *"I could see, there had been no significant change in the interest rates"*.

The Complainant further submits that he made an official complaint to the Provider in relation to the amount of the breakage fee and was subsequently informed that the figures were correct and that they *"will not be returning or reimbursing any of my money"*.

The Complainant contends that the Provider's letter:

- does not outline how it established the percentage for the figure for the *'original cost of funds at data fixing'* of 0.22%:
- states that the Euribid figure on **23 July 2019** was 0.20% and on **25 July 2019** it was - 0.38%

The Complainant further contends that the deposit reference rate, Euribid, is derived from the Euribid reference rate and that the value of the Euribid changes daily, as much as the Euribor, and are therefore intrinsically linked. A detailed definition of the Euribid bid rate is contained in this submission.

The Complainant states that he noted that the Euribid figure is not made widely available and *"would question why the Provider is using this secretive and hidden figure in the first place"*. The Complainant further contends that it looks like the Euribor rates remain almost unchanged between the dates when he was quoted a breakage fee of €257 (two hundred and fifty seven euro) and the date he redeemed his mortgage and was quoted €6,368 as a breakage fee.

The Complainant states that he:

*"cannot understand how, and it would appear that the interbank interest rates/Euribor/Euribid changed very little, Provider increased their quoted breakage fee by nearly 2500%"*.

The Complainant further states that he believes that the Provider is *"lying about the rates in an attempt to claw back the cash back they give me when I took out the Mortgage"*. The Complainant contends that *"the central bank have stated that EU law dictates the breakage fees must be fair and objective, justified, must not exceed the financial loss of the creditor and must not impose a sanction on the consumer"*. The Complainant further contends that he is at a financial loss of €6,368 which he states *"I desperately need and simply cannot afford to do without"*.

The Complainant wants the Provider to refund him around €6,000 (six thousand euro) as on **23 July 2018** he was quoted a breakage fee on his mortgage of €257 and on **25 June 2019** he was charged a breakage fee of €6,368 and therefore would expect to be reimbursed somewhere in the region of €6,000 (six thousand euro).

### The Provider's Case

The Provider in its final response letter dated **3 July 2019** submits that:

*"In order to lend to a customer at a fixed rate for a fixed term, the Provider must manage its own interest rate risk, by borrowing for the same term at a fixed rate. The rate the Provider borrows at is referred to as "R" in the formula"*

The Provider further submits that when a customer decides to break out of their fixed term contract, the Provider incurs a cost because it in turn will need to break out of the fixed borrowing it took out, to fund the mortgage or else place the funds repaid by the customer on a deposit rate for the remainder of the term. The Provider's letter says that this rate is referred to as "R1" in the formula.

The Provider submits that the formula to calculate the breakage fee is set out as follows:

$$\text{Break charge} = \frac{\text{Amount} \times [R\% - R1\%] \times \text{Time}}{365}$$

The Provider further contends that the definitions contained in the above formula is as follows:

Amount - 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.

R- The cost of the funds for the Provider of the date the fixed period was entered into.

R1 - The interest rate available to the Provider for the funds placed in the money market on the date of the early repayment i.e. the current Euribid for the remaining term.

The Provider submits that the funding fee is simply the difference between (i) the cost to the Provider to borrow to fund the fixed rate loan and (ii) the investment return it can now receive for the days that the Complainant breaks his fixed rate contract with the Provider. The Provider further submits that using the formula outlined above, the fixed rate funding fee on **23 July 2018** was €257 and on the date when the mortgage was redeemed, **25 June 2019**, it was €6,368. A detailed breakdown of these calculations is contained in this submission in the Provider's final response letter dated **3 July 2019**.

The Provider states that due to the change in (a) the average balance, (b) investment rates and (c) number of days remaining of the fixed rate term, the funding fee "can change on a daily basis". The Provider further states that the "sum is to compensate the Provider for the costs to it of obeying the Complainant's request to unwind the fixed rate" and that this fee is calculated in line with the EU Mortgage Credit Directive.

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The Provider states in its letter to the Complainant dated **20 August 2019** that it has reviewed its final response letter dated **3 July 2019** and states that *“they are satisfied that the figures and formula provided to you are correct”*. The Provider submits that *“I must advise that I am unable to uphold this complaint. However, please be sure we have given this matter due consideration”*.

### **The Complaint for Adjudication**

The complaint is that the Provider incorrectly calculated the breakage fee on the repayments of the Complainant’s fixed rate mortgage account. The Complainant says that the information given to him when he originally made inquiries as to what fee would be applicable should he decide to clear the facility before the termination of the agreed five-year term, was inconsistent with the actual fee charged.

### **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 Complainant was 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 **2 February 2022**, outlining the preliminary determination of this office 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 consideration of additional submissions from the parties, the final determination of this office is set out below.

Prior to examining the substance of the complaint, I consider it useful to set out the chronology of events (quoting certain correspondence) as well as the relevant terms and conditions of the policy.

**9 March 2018**

The Complainant telephoned the Provider requesting to switch his mortgage from third party mortgage provider. The loan had a remaining balance of €283,000 (two hundred and eighty-three thousand) and a remaining term of approximately 24 years. The Complainant stated he was interested in the 3% rate of interest, fixed over a period of five years.

The Provider has submitted that it confirmed that as their current account customer, the Complainant was eligible for the 3% cash back plus offer with 2% cash back being credited into his current account within 45 days of drawdown and an additional 1% cash back, on the fifth anniversary of the mortgage.

**27 March 2018**

The Complainant telephoned the Provider to progress the mortgage loan application. When it was discussed that the Complainant might have some money to lodge into the mortgage account in the future, the Provider advised him of several options one of which was a fixed rate option. This rate guarantees a set rate for a specific term either 1,2,3,5 or 10 years. The Provider's agent stated during this call that: *"this ensures your monthly repayment remains the same during the term of the fixed rate. Should you repay the loan early or change to another rate within the agreed you may have to pay a funding fee with the fixed rate... [the Provider does] let you overpay by maximum of 10% of the monthly payment without incurring a fee..."*. The Complainant during this call stated that he understood.

The Complainant stated he wished to apply for the five year fixed interest rate, over an overall term of 23 years and stated he wished to pay over a shorter period of time than the 24 years, that was remaining on his mortgage.

The Provider's agent also explained the cashback option and finally summarised the Complainant's application which included that the five year fixed rate at 3% had been selected and the Complainant confirmed this information was correct. The Provider's agent made reference to high volume of applications at the moment. The Complainant stated this might be due to *"all the whisperings of the interest rates going up"* to which the Provider's agent responded by making reference to using a mortgage protection policy, which would be required. The Complainant stated that he had engaged the services of an independent financial advisor. I note that the reference to the

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financial advisor was only mentioned in respect of the mortgage protection policy.

- 5 June 2018** The Complainant telephoned the Provider to state that he had not drawn down his mortgage loan but he wanted to know what would the break fee be for a fixed rate. The Provider's agent stated that the breakage fee would change from day to day. The Complainant said he wished to know the APR (annual percentage rates) put into the formula used to calculate the breakage fee and the Provider stated that the administration department could send a letter to the Complainant setting out the calculation of the breakage fee, once the mortgage had been drawn down.
- 5 June 2018** The Provider's agent telephoned the Complainant to discuss his mortgage loan application and the Complainant stated that he was considering changing from his fixed rate to a variable rate. The Complainant enquired as to the breakage fee which would be calculated to which the Provider's agent stated that the formula took into account the difference between the fixed rate available on the day (of breakage) and the fixed rate on the mortgage loan account based on the balance. The Complainant asked if the fixed rates available were higher at the day of the breakage, than it was at that date at which the mortgage was obtained, this would mean there was no breakage fee. The Provider's agent stated that this "*might be*" but the Provider "*had no way of knowing*" what the rates would be in the future.
- 7 June 2018** The Provider's agent telephoned the Complainant and discussed his request to change the rate from fixed to variable. The Complainant stated the breakage fee for fixed rate would only increase considerably if "*interest rates drop below what is on offer*" in the terms of the offer letter, but "*an educated guess would be that the interest rates will...go up*". The Provider's agent stated she was not "*100% sure about that*" but that his solicitor would be in a better place to go through the terms of the letter of offer and "*there is a certain calculation*" which takes into account the term left on the mortgage. The Complainant stated he would discuss it with his solicitor and revert.
- 3 July 2018** The Complainant drew down a mortgage loan in the amount of €283,042 for term of 23 years.
- 23 July 2018** The Provider issued a letter of completion to the Complainant, including a summary of the mortgage details, setting out that the mortgage interest rate had been fixed at 3% until **3 July 2023**.

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- 23 July 2018** The Complainant telephoned the Provider regarding a breakage fee. He queried how much he would have to pay for a breakage fee if he sold the mortgaged property and redeemed the loan early. The Provider's agent stated that the figure would be €257 as at **23 July 2018**.
- 6 February 2019** Letter from Complainant's solicitor to the Provider seeking to take up the title deeds of the mortgaged property and also requesting for the redemption figures for all loans affecting the mortgaged property, on foot of which the Provider would release its charge on the mortgaged property.
- 12 June 2019** The Complainant's solicitor telephoned the Provider inquiring how to request a redemption quote for their mortgaged loan account, noting the sale of the mortgaged property was due to close the following week. Provider agent told the Complainant's solicitor to send a request in writing, but that the Complainant could telephone the Provider and seek the redemption figure himself as well.
- 17 June 2019** The Provider issued a redemption quote to the Complainant's solicitor confirming the amount required to redeem the mortgage loan being €282,669.10 (two hundred and eighty two thousand, six hundred and sixty nine euro and ten cent) as of **17 June 2019**. This included a breakage fee of €5,803 (five thousand eight hundred and three euro). The letter further stated that the breakage fee figure was "*... point in time only and therefore a redemption quote should be requested on the date of redemption*" and that interest of €22.59 (twenty two euro and fifty nine cent) per day applied each day beyond **17 June 2019**.
- 21 June 2019** The Complainant's solicitor issued a letter to the Provider enclosing a cheque for €282,759.42 (two hundred and eighty two thousand, seven hundred and fifty nine euro and forty two cent, for the redemption figure as per the quote of **17 June 2019** to include four day's interest of €22.59 per day since then, in order to redeem the mortgage loan. The letter enclosing this cheque appears to have been delivered by courier, so was received on the same day.
- 25 June 2019** Cheque for €282,759.46 was credited to the mortgage loan account. The Provider has submitted that at the point when the cheque was credited, the breakage fee had increased by €565 (five hundred and sixty five euro) and an additional interest charge of €91.05 (ninety one euro and five cent) accrued leaving an outstanding amount of €656.05 (six hundred and fifty six euro and five cent).

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- 27 June 2019** The Complainant telephoned the Provider to discuss the breakage fee. The Provider's agent stated that the breakage fee was based on "*a number of variables*" including the rates available on the money markets, which were not known in advance and the numbers of days remaining on the fixed rate period. The Complainant then spoke to another agent of the Provider who was a supervisor and stated that this breakage fee increasing by €6,000 was "*absolute robbery*". The Provider's agent stated that the breakage fee can fluctuate and depends on the "*money markets*" and she stated she did not have the power to negotiate the breakage fee. The Provider's agent stated that she would lodge the complaint after the Complainant so requested. She stated "*you will get a formal response... and if you wish to go to the Ombudsman etc...you can go to those channels*".
- 27 June 2019** The Complainant again telephoned the Provider seeking a breakdown of the breakage fee. The Provider's agent stated that she did not have the documentation to hand regarding the breakdown of the figures "*because it was computer generated*" and would require the administration department to send out the breakdown. She noted that it could take up to ten days to have the documentation sent out. She then stated he should update his new address on online banking for his current account, to allow the calculation of the breakage fee to be sent out.
- 2 July 2019** The Complainant telephoned the Provider. The Provider's agent stated there was a balance of €656.05 because the breakage fee of €6368 was due as of **26 June 2019**. She stated that the redemption figures lodged by the Complainant's solicitor had not taken into account the increased breakage fee from the date of the redemption quote to the date the redemption monies were credited to the mortgage loan account. She stated that the breakage fee applied was on a quarterly basis. The Complainant also stated that his direct debit repayment of €1,420.58 (one thousand four hundred and twenty euro and fifty eight cent) had been taken from his current account and the Provider's agent stated that she would instruct the administration department to refund the difference, being €764.53 (seven hundred and sixty four euro and fifty three cent).
- 3 July 2019** Final response letter issued by Provider to **27 June 2019** complaint.
- 8 July 2019** Provider refunded €764.53 to Complainant's current account.
- 8 July 2019** Mortgage loan account closed.



**9 July 2019** The Complainant sent letter to the Provider in relation to the calculation of the breakage fee. The Provider has accepted that the letter of **9 July 2019** was stamped as having been received by the Provider on **16 July 2019**. It appeared that the Complainant may not have received the Provider's final response letter of **3 July 2019** at the time of writing.

**9 August 2019** The Complainant telephoned the Provider to discuss the letter of **9 July 2019**, which he stated he posted on **11 July 2019**. The Provider has submitted to this Office that at the time of the call, the Provider was experiencing technical difficulties with its complaint management system and advised the Complainant it would call him back, "*but regrettably*" this was not done. The Provider has submitted that it "*wishes to offer the Complainant €500 by way of apology for failing to acknowledge his letter of 9 July 2019 and for its failure to return a call to him as promised, in light of the ongoing technical difficulties it was experiencing on 9 August 2019.*"

**9 August 2019** The Complainant issued a further copy of his letter of 9 July 2019 to the Provider in relation to the calculation of the breakage fee.

**20 August 2019** The Provider issued a letter to the Complainant by way of reply to his letter of **9 August 2019**, enclosing a copy of the final response letter of **3 July 2019** setting out its final position.

In the Final Response letter of **3 July 2019** the Provider set out the formula for the breakage fee, as already outlined in the "Provider's Case" above. This calculation is:

$$\text{Break charge} = \frac{(\text{Amount} \times [R\% - R1\%]) \times \text{Time}}{365}$$

The letter also stated that to break the fixed rate, the Provider charges a funding fee which is the actual cost to the Provider of breaking the fixed rate contract. This funding fee is the difference between the cost of the Provider's borrowing to fund the fixed rate loan and the investment return it could now receive from the date the Complainant breaks the fixed rate contract with the Provider.

The Provider stated that the funding fee is calculated based on the difference between the cost of funds paid to fund the fixed rate loan, and the investment return made as a result of receiving fixed rate cash from a customer breaking a fixed rate contract, for the remaining period of the fixed rate contract.

I also note that the Provider says that the formula is included in the General Condition 7 of the mortgage loan offer letter and mortgage form of authorisation accepted by the Complainant, which stated:

*“EARLY REPAYMENT OR ENDING A FIXED RATE EARLY*

*When a fixed rate period applies to a loan or part of a loan we may suffer a loss if (1) you repaid the loan or part of it before the date you were due to pay it, or (2) you and we agree in writing to change the fixed rate to a new fixed interest rate or to a variable interest rate or (3) we oblige you to pay the amounts you owe us following your default. If we suffer such a loss you must pay us compensation when we ask you to pay it.”*

I note this section of General Condition 7 also set out the formula for the method of calculation and, in particular, the definition of the “Amount”, “R” and “R1” as outlined above.

The calculation for the two breakage fees quoted to the Complainant have been explained by the Provider as follows:

**23 July 2013**

Average balance:	€260,229.97
Original cost of fund at date of fixing:	0.22%
EURIBID (Investment rate) at date of breaking fixed term	0.20%
Number of days remaining of fixed rate	1805

The difference in the original cost of funds (0.22%) and investment rates (0.20%) is 0.02%  
The funding is calculated by:

$$€260,229.97 \times 0.02 \div 36500 \times 1,805 = \mathbf{€257}.$$

**25 June 2019**

Average balance	€263,875.75
Original cost of fund at date of fixing	0.22%
EURIBID (Investment rate) at date of breaking fixed term	-0.38%
Number of days remaining of fixed rate	1,468

The difference in the original cost of funds (0.22%) and investment rates (-0.38%) is 0.60%  
The funding is calculated by:

$$€263,875.75 \times 0.60 \div 36500 \times 1,468 = \mathbf{€6,368}.$$

In the Complainant's letter of complaint dated **27 April 2020** to this office, he stated that the source of the interest rates was the crux of the complaint against the Provider.

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He asserted that the Provider was unwilling to provide information as to where it obtained the interest rates that *"they plugged into the formula"*. He also stated he found it "abhorrent" that the Provider was not compelled to provide this information.

The Provider replied to the complaint by stating that the Complainant's solicitor was duty bound to fully explain the implications of the mortgage loan offer letter to the Complainant and if the Complainant was in any doubt, it was open to him to seek further advice from his solicitor. The Provider submitted that the importance of obtaining independent legal advice, was highlighted at page four of the mortgage loan offer letter.

The Provider also made reference to the section of the final page of the mortgage loan offer letter, which stated:

*"I confirm that I have read and fully understand... the terms conditions contained in this offer letter and confirmed that I accept his offer letter on such terms and conditions."*

I am satisfied from the evidence that the Complainant received independent legal advice in advance of signing the contract which bound him to the terms agreed

#### ***Communications by Provider to Complainant prior to drawdown***

Provision 4.54 of the Central Bank of Ireland's Consumer Protection Code 2012 (CPC 2012) states that prior to providing a product or service:

*"a regulated entity must:*  
*a) provide the consumer, on paper or on another durable medium, with a breakdown of all charges, including third party charges, which will be passed on to the consumer; and*  
*b) where such charges cannot be ascertained in advance, notify the consumer that such charges will be levied as part of the transaction."*

Provision 4.25 of the CPC 2012 states

*"Where a regulated entity: a) offers credit on a fixed interest rate to a personal consumer; or b) offers a personal consumer the option to fix their rate or to switch to a fixed rate, on an existing credit agreement; the regulated entity must provide, in the credit documentation, a worked example specific to the personal consumer of the early redemption charge in monetary terms and details in relation to the calculation of this charge."*

Regulation 17 of European Union (Consumer Mortgage Credit Agreements) Regulations 2016 ("2016 Regulations") states that:

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*“Adequate explanations*

*17. (1) A creditor and, where applicable a mortgage credit intermediary, shall provide adequate explanations to the consumer on the proposed credit agreement and any ancillary services, in order to place the consumer in a position enabling him or her to assess whether the proposed credit agreement and ancillary services are adapted to his or her needs and financial situation; this and the next following paragraph are subject to paragraph (3).*

*(2) The explanations shall, where applicable, include:*

*(a) the pre-contractual information to be provided in accordance with:*

*(i) in the case of creditors, the information specified in Regulation 15;*

*(ii) in the case of mortgage credit intermediaries, the information specified in Regulations 15 and 16;*

*and*

*(b) in all cases—*

*(i) the essential characteristics of the products proposed;*

*(ii) the specific effects the products proposed may have on the consumer, including the consequences of default in payment by the consumer; ...”*

Schedule 2 of the 2016 Regulation, provides details of the European Standardised Information Sheet (ESIS) sheet to be supplied to consumers pursuant to Regulation 15 before entering into a relevant mortgage agreement (Part A of the Schedule 2). This ESIS must be given to consumers before entering into the mortgage loan and should contain the following regarding early repayment:

*“Section ‘9. Early repayment’*

*(1) The creditor shall indicate under what conditions the consumer can repay the credit early, either fully or partially.*

*(2) In the section on exit charges the creditor shall draw the consumer’s attention to any exit charge or other costs payable on early repayment in order to compensate the creditor and where possible indicate their amount. In cases where the amount of compensation would depend on different factors, such as the amount repaid or the prevailing interest rate at the moment of the early repayment, the creditor shall indicate how the compensation will be calculated and provide the maximum amount that the charge might be, or where this is not possible, an illustrative example in order to demonstrate to the consumer the level of compensation under different possible scenarios.”*

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Regulation 26 states:

*“Early repayment*

*26. (1) A consumer has a right to discharge fully or partially his or her obligations under a credit agreement prior to the expiry of that agreement. In such cases, the consumer shall be entitled to a reduction in the total cost of the credit to the consumer, such reduction consisting of the interest and the costs for the remaining duration of the contract.*

*(2) 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.*

*(3) Notwithstanding paragraph (2) and without prejudice to paragraph (4), a creditor’s entitlement to compensation under this Regulation shall arise only in the circumstances where the borrowing rate provided for in the credit agreement:-*

*(a) may not be changed, or*

*(b) may not be changed over a period of at least one year, or*

*(c) may not, for a period of at least five years, exceed the rate applicable on the date of the making of the credit agreement by more than two percent.*

*(4) A creditor shall not in any event be entitled to compensation under this Regulation in respect of—*

*(a) subject to subparagraph (b), any period of the credit agreement that remains after early repayment,*

*(b) if the case is one falling within subparagraph (b) or (c) of paragraph (3) and the early repayment occurs before the expiry of the period referred to in that subparagraph, any period of the credit agreement that remains after the expiry of the period so referred to.*

*(5) Where a consumer seeks to discharge his or her obligations under a credit agreement prior to the expiry of the agreement, the creditor shall provide to the consumer without delay after receipt of the request, on paper or on another durable medium, the information necessary to consider that option. That information shall at least quantify the implications for the consumer of discharging his or her obligations prior to the expiry of the credit agreement and clearly set out any assumptions used. Any assumptions used shall be reasonable and justifiable.*

*(6) A creditor who contravenes a provision of this Regulation commits an offence.*

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The “borrowing rate”, in relation to a credit agreement under the 2016 Regulation , means the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down.

What Regulation 26 means is that the Provider may only seek “*fair and objective compensation*” for the breakage fee, where there is a fixed interest rate on the mortgage loan and for the period up until the date of breakage. Under Regulation 26(5), the Provider is obliged to also set out “*the information necessary to consider that option [of breakage from mortgage]. That information shall at least quantify the implications for the consumer of discharging his or her obligations prior to the expiry of the credit agreement and clearly set out any assumptions used.*”

Finally, Regulation 15 (5) states that the Provider must provide the consumer with the personalised information needed to enable the consumer to compare the credits available on the market, to assess their implications and to make an informed decision on whether to conclude a credit agreement, including:

*“(5) Where the borrowing rate or other costs applicable to the offer of credit are determined on the basis of the selling of underlying bonds or other long-term funding instruments, the borrowing rate or other costs may vary from that stated in the offer in accordance with the value of the underlying bond or other long-term funding instrument.”*

The Provider states that a “know your customer” assessment was carried out on **11 April 2018** to establish the suitability of the mortgage. I also note the Statement of Suitability dated **16 April 2018** the Provider stated:

*“A fixed rate is suitable as you require the certainty of fixed mortgage repayments to enable you budget. You understand that a fixed rate can be more expensive than a variable rate. You also understand that you may be obliged to compensate us for broken funding where you break out of the fixed rate early.”*

The Provider has submitted that at no stage in the “*know your customer*” process did the Complainant says that he may need to redeem the mortgage prior to the end of the fixed rate period. The Provider stated that it was not until the telephone conversation of **27 March 2018** that he stated “*in 15 years I might have some money to put into it..... not in the next few years*”. The Provider says that the first time it learned that the Complainant made reference the fact he was “holding” the mortgage property, was on **5 June 2018** and he indicated he would seek advice from a solicitor during the phone call on **7 June 2018**.

The Complainant in a submission on **20 September 2020** stated that during the **7 June 2018** phonecall, it appeared to him that the operator on the other end of the phone did

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not know the information surrounding the breakage fee calculation and that the Provider's agent could have informed him of the rates that were used to calculate the breakage fees.

He says had he could have chosen a different mortgage rate. The Complainant also says that the first he ever heard of "*money markets*" was when he spoke to the supervisor and queried why this was not explained to him when he was initially seeking information surrounding the breakage fee, before entering into the mortgage.

The Complainant also says that the figures in the terms and conditions of the mortgage contract, regarding breakage fees were misleading and led consumers to believe that the rates were from the European Central Bank (ECB) and not the Euribid.

The Provider responded to this assertion by stating that during the **27 March 2018** call, the Complainant had:

- Made reference to interest rates going up;
- Said he had enlisted the services of an independent financial advisor;
- Stated "*everything was pretty clear*" and:
- Said that he had been "*doing his[his] research...for quite a while.*"

The Provider says that it was not obliged to provide financial advice or comment on a customer's decision to select a fixed rate of interest. The Provider added that the extent of its advices were limited to the advantages and disadvantages of a selection of suitable products and why a particular product is most suitable, if it was recommended. The Provider also submitted that it was "*entitled to assume that the Complainant, having had the benefit of independent financial advice from his financial advisor, fully understood the implications of the funding fee for breaking out of a fixed interest rate.*"

The Provider also stated that the Complainant could have availed of legal advice from his solicitor, as many of his queries were before his drawdown on **3 July 2019**. The Provider further submitted that during the **5 and 7 June 2019** telephone calls, the Provider's agent, when asked, stated that the figures for the APRs could not be provided on a hypothetical basis. The Provider states that the conversation demonstrated that the Provider "*exercised caution not to influence the Complainant's decision*".

The Provider further says that the use of the term "*money markets*" during the telephone conversation on **27 June 2019** "*refers to the market upon which financial instruments, such as derivatives are traded.*" The Provider also says that the Complainant was correctly informed that the funding fee was calculated with reference to "*fluctuations in interest rates but again, the Provider was entitled to assume the Complainant had obtained independent financial advice from his financial advisor and it was not incumbent on the Provider to have a discussion with the Complainant in relation to the complexities of matched funding.*"

The Complainant submitted that it was clear that the interest rates he was referring to were the “*ECB interest rates*” and that the reason he did not ask about “*matched funding for fixed rate loans*” was because the Provider’s agent allowed the implication to stand that it was applying ECB rates. He also submitted that the Provider, by “*lean[ing] on the fact*” that he had a financial advisor to inform him was “*tantamount to admitting the truth*”. I note that the Complainant has not denied that he had a financial advisor.

I am satisfied that the Provider complied with Provisions 4.25, 4.54 of the CPC 2012 and Regulation 17 and Schedule 2 of the 2016 Regulations concerning the information required for a European Standardised Information Sheet. This information was provided to the Complainant as it was contained in Clause 7 of the Part 5 General Conditions, which was included with the Mortgage Loan Offer Letter dated **16 April 2018**, accepted by the Complainant, with the benefit of legal advice.

Regarding Provision 5.1 of the CPC 2012 I note that on **27 March 2018** the Complainant stated that “*in 15 years I might have some money to put into it..... not in the next few years*” and on **5 June 2018** that he was “*holding*” the mortgage property.

Provision 5.1 of the CPC 2012 required the Provider to gather and record information regarding the Complainant to include details of his personal circumstances including, where relevant, his knowledge and experience of financial products and known future changes to his circumstances.

Accordingly, I'm of the view that the Statement of suitability issued by the Provider on **April 2018**, and the advice given during the telephone conversation of **27 March 2018** by the Provider’s agent, did not breach the Provider’s obligations under 5.1 of the CPC 2012, because the information up to that point, did not indicate that the Complainant required specific information regarding a breakage fee.

However as already noted, the reference to the financial advisor by the Complainant only arose during the telephone conversation on **27 March 2018** in respect of the mortgage protection policy. It was not expressly stated that such advice would be used to consider specific issues such as any breakage fee, regarding the mortgage, but it is clear nevertheless, that this financial advice arose in the context of protecting the loan in question. I am satisfied that the Provider’s agents during the telephone calls in **March and June 2018**, gave sufficient warning to the Complainant regarding the potential cost of a breakage fee and it was at all times open to the Complainant to discuss this with his financial advisor, if he had any questions. I note that during the first telephone conversation on **5 June 2018**, the Provider’s agent stated that the administration department could send a letter to the Complainant setting out the calculation of the breakage fee once the mortgage had been drawn down. During the second call on **5 June 2018**, when asked by the Complainant if the fixed rates available were higher at the day of the breakage than it was at that date at which the mortgage was obtained, this would mean there was no breakage fee, the Provider’s agent stated that this “*might be*” but the Provider “*had no way of knowing*” what the rates would be in the future.

I note that on **7 June 2018**, the Complainant stated his opinion that the breakage fee for fixed rate would only increase considerably if *“interest rates drop below what is on offer”* in the terms of the offer letter, but *“an educated guess would be that the interest rates will...go up”*. The Provider’s agent stated she was not *“100% sure about that”* but that his solicitor would be in a better place to go through the terms of the letter of offer and *“there is certain calculation”* which takes into account the term left on the mortgage. The Complainant stated he would discuss it with his solicitor and revert.

Though the Provider’s agents were unable to explain with forensic detail the exact basis of the Euribid and swap rate calculations by the Provider when calculating such fees, I am satisfied that the Complainant was sufficiently cautioned that he should avail of independent legal advice regarding the potential cost. It is also clear from the evidence that the Complainant had given some thought to how a breakage fee would work, before he proceeded to drawdown the loan.

Provision 2.5 of the CPC 2012 states the Provider must ensure it seeks from its customers information relevant to the product or service requested. Though I understand the Complainant’s frustration regarding the content of the telephone conversations, I am satisfied that the exact calculation of the breakage fee was set out by the Provider on **16 April 2018**, and it is unreasonable to expect a Provider’s agent during such calls to explain the complex nature of the calculation, and therefore I do not accept there was any breach of its obligations under Provision 2.5 of the CPC 2012.

#### ***Formula used to calculate funding fee***

The Provider submits to this Office that *“Original Cost of Funds”* as mentioned in the Final Response letter **3 July 2018** was provided by the Provider’s Global Market Division on a *“daily basis across various fixed rate periods and is circulated by the Treasury Department input on the Bank’s internal systems.”*

The Provider submitted that the rate is calculated by reference to the rate at which the Provider can borrow money on the Euro Interbank Market, for the period corresponding to the relevant fixed interest rate period. The Provider states that it employs financial derivative instruments known as *“swaps”* when borrowing, in order to protect against the effects of interest rate increases in *“exactly the same way the Complainant enjoyed this protection by fixing his interest rate on his mortgage loan.”*

The Provider submits that the 0.22% rate was *“an indicative swap rate”* for *“5year vs 3m Euribor”* that was taken from Bloomberg on the morning of **3 July 2018**.

The Provider has explained the large difference between the amount of the breakage fee quote from **23 July 2018**, and the actual of breakage fee on **26 June 2019**. I note that the explanation on how the breakage fee was calculated, was complex, however, I accept the Provider’s submission that the breakage fee quoted on **23 July 2018** was considerably less than the fee charged on **26 June 2019** due to the following reason:

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*“... 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. In the immediate case, the breakage fee applied on 26 June 2019, when 4 years remained on the fixed term, was calculated based on a 4-year swap rate of -0.38%”*

The Complainant queried why these figures were not made public by the Provider and stated that *“they are setting these rates at whatever suits them based on internal figures and being deliberately misleading”*. He also stated that these figures are an obscure financial fact. Since the preliminary decision of this Office was issued on 2 February 2022, the Complainant has added further submissions that:

*“As the Provider has repeatedly stated their figures are not based on annual interest rates but in fact on interest rates that change on a daily basis and are calculated internally with no watchdog to assume they are done so in a true or fair manner. Any legal advice that was sought by us at the time would have been based on the use of the word 'annual' which is not only misleading, it is outright incorrect. The contract that I signed says that these figures are annual rates, if they are actually daily rates then this should be stated in the contract and surely the Provider is therefore in breach of their own contract.*

*In addition, on 5 June 2018 the Provider states 'the Complainant was advised that the formula took into account the difference between the fixed interest rate available on the day and the fixed rate on the mortgage loan account, based on the balance outstanding on the mortgage loan account.' This is exactly what I was told by the provider, so I was informed completely incorrectly about the source of the interest rates. They are not based on the 'fixed rate on the mortgage loan account' as stated by the provider. I was completely misinformed about the source of the interest rates and the Provider should be held legally accountable for this, and be forced to reimburse me because I was directly misinformed by them.”*

He also submitted that:

*“Another issue that has not been addressed in this preliminary decision is the sheer basis on which breakage fees are calculated by the Provider. The central bank have stated that EU law dictates that breakage fees must be 'fair and objective, justified, must not exceed the financial loss of the creditor and must not impose a sanction on the consumer'. Their system of calculating fees based on internal figures that are subject to zero scrutiny and which charge such utterly excessive amounts of money complies with none of the above rules. They are charging over €6,000 to break out of a mortgage and this changes on a daily basis. What hope does an average consumer have. The laws are there to protect against this, to protect the rights of average consumers and I feel they have been breached by this utterly unfair system.”*

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I accept that it is appropriate for the Provider to calculate the rate for inclusion in the formula, by reference to the rate at which the Provider can borrow money on the Euro Interbank Market, for the period corresponding to the relevant fixed interest rate period, and in my opinion, this is objectively a transparent and fair approach, and I note that this was the approach to calculating the actual loss to the Provider from the Complainant's decision to break from the fixed rate period he had agreed.

I also accept the Provider's position that because of the continuous change in the average balance, the investment rates and indeed the number of days remaining of the fixed rate term, the funding fee is a figure which can be subject to daily variations. I take the view in that respect, that annual interest rates available, can be subject to daily changes and I don't accept that the Complainant was misinformed in that regard, when the Provider sought to supply him with an explanation of how the breakage fee was calculated.

I take the view that the method of calculation of the breakage fee was sufficiently referred to in the documentation sent to the Complainant on **16 April 2018** and this complied with Regulation 17 and Schedule 2 of the 2016 Regulations. Accordingly, I do not accept the Complainant's complaint concerning the figures for the calculation. I am satisfied these were correctly set out and explained, in the Mortgage Loan Offer Letter dated **16 April 2018**, prior to drawdown by the Complainant.

I note that the Complainant telephoned the Provider on **9 August 2019** to discuss the letter of **9 July 2019**, which he stated he posted on **11 July 2019**. The Provider has submitted to this Office that, at the time of the call, the Provider was experiencing technical difficulties with its complaint management system and advised the Complainant it would call him back, "*but regrettably*" this was not done. The Provider has submitted that it "*wishes to offer the Complainant €500 by way of apology for failing to acknowledge his letter of 9 July 2019 and for its failure to return a call to him as promised, in light of the ongoing technical difficulties it was experiencing on 9 August 2019.*" I am satisfied that the Provider did not comply with Provision 2.8 of the CPC in this regard, which states it must handle "*complaints speedily, efficiently and fairly*" and Provision 2.2 of the CPC 2012 which states it must act "*with due skill, care and diligence in the best interests of its customers*".

The Complainant also queried why his solicitor had to wait from **12 June 2019** to **21 June 2019** for a redemption quote. In this regard, I note the letter of the Provider dated **17 June 2018** which stated that the amount required to redeem the mortgage loan included a breakage fee of €5803 (five thousand eight hundred and three euro). The letter further stated but the breakage fee figure was "*... point in time only and therefore a redemption quote should be requested on the date of redemption*" and that interest rate of €22.59 (twenty-two euro and fifty-nine cent) per day applied each day beyond **17 June 2019**. Accordingly, after his solicitor sent the cheque on **21 June 2019**, the Provider submitted that at the point when the cheque was credited, 4 days later, on **25 June 2019**, the breakage fee had increased by €565 and an additional interest charge of €91.05 accrued, leaving an outstanding amount of €656.05.

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Although the Complainant continues to take issue with this additional charge in his most recent submission to this Office, I accept that he was on notice that the quotation for the breakage fee given was “*point in time only*”, and that this was subject to change, if the breakage fee was not paid that day.

In my opinion, there is no evidence of wrongdoing on the part of the Provider in its dealings with the Complainant, regarding the information supplied to him in relation to the manner in which a breakage fee would be calculated, should he elect to repay any part of the mortgage loan during the initial 5-year fixed rate term. Accordingly, I am satisfied that it is not appropriate to uphold this complaint.

I note that in the course of the investigation of this complaint, the Provider has acknowledged that it failed to meet its obligations to respond to the Complainant’s complaint, and in that context, it has offered the Complainant a compensatory payment of €500. On the basis that this remains open to the Complainant for acceptance, I do not consider it necessary for this Office to make any direction in that regard, and instead, it will be a matter for the Complainant to make direct contact with the Provider, if he wishes to accept the offer in question. In that event, he should make contact expeditiously as the Provider cannot be expected to hold that offer open indefinitely.

### **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.**



**MARYROSE MCGOVERN**  
**Financial Services and Pensions Ombudsman (Acting)**

14 March 2022



## **PUBLICATION**

### **Complaints about the conduct of financial service providers**

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.

### **Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.