An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0109
Sector:	Banking
Product / Service:	Credit Union Loan
Conduct(s) complained of:	Application of interest rate
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to the APR quoted by the Respondent Credit Union in respect of lending facilities taken out by the Complainant. In essence, the Complainant is of the view that the Credit Union acted wrongfully by mis-stating the APR applicable to his loan(s).

In or around January 2012 the Complainant applied for finance in the amount of €20,000. A loan for €20,000 was approved, to be repaid over a 10-year period. Subsequent to draw down of the loan funds the Complainant sought to withdraw monies he had been saving with the Credit Union, which he says he had intended for *"personal purposes "*. His request was refused on grounds that his monies were classified as shares and were being held as security for his loan. In an attempt to assist the Complainant and against the backdrop of his withdrawal request being refused, the Credit Union offered to top-up his existing loan by €5,000. The Complainant accepted this offer. The Complainant entered into a fresh loan agreement for finance in the amount of €25,000, repayable over a 10-year period at an APR of 6.7%.

The Complainant outlines that in 2016 he began experiencing financial difficulties and so he re-examined the details of his loan. He states that upon close scrutiny of his loan agreement he realised that the APR quoted by the Credit Union takes no cognisance of the savings being held as security. At this point the Complainant had in the region of €4,000 held in savings. He states that he renewed his request to withdraw his savings, which request was once again declined.

The Complainant is of the view that given the restriction on withdrawing his savings, his savings account and loan account are being treated as one unified transaction. Therefore, he argues that in its calculation of APR, the amount held in savings ought to be factored in by the Credit Union because the loan amount extended must be viewed in light of the shares the borrower is no longer entitled to access as these shares are held as security under the loan.

The Complainant is of the view that due to the mis-statement of APR the Credit Union is overcharging him interest by approximately 34%. He further contends that by increasing his loan exposure by €5,000 when the subsequent loan facility was entered into, the Credit Union caused him to incur an additional interest charge in the amount of €l,849.

The Complainant's Case

The complaint is that the Credit Union acted wrongfully by mis-stating and/or mis-calculating the APR applicable to the Complainant's loan account, which mis-statement/mis-calculation has resulted in the Complainant being overcharged in respect of his borrowings.

In order to resolve his complaint the Complainant would like the Credit Union to-

- repay to him 34% of all interest already charged on his loan account; and,
- undertake to reduce by 34% all future interest payments on his loan.

The Provider's Case

The Credit Union rejects the complaint and states that it did not mis-state or mis-calculate the APR applicable to the Complainant's loan.

The Credit Union refers to Section 32(3) of the Credit Union Act 1997 and Rule 38 of the Credit Union's Rules (as they read at the relevant date, the 22 June 2012, prior to commencement of the Credit Union and Co-operation with Overseas Regulators Act 2012).

These provisions stipulate that a member with an outstanding liability will not be permitted to withdraw a share or deposit with the Credit Union unless the member will have enough savings to cover the outstanding liability after the withdrawal is made or, with the approval of the Board of Directors, the member's savings are not reduced to less than 25% of the outstanding liability post-withdrawal.

The Credit Union submits that in the Complainant's case, his application to withdraw his savings could not be acceded to because (a) he did not have sufficient savings in the Credit Union to cover the outstanding liability post-withdrawal and (b) had the withdrawal been permitted, his savings would have been reduced to less than 25% of his outstanding liability to the Credit Union, therefore the Board of Directors would not have been able to approve the withdrawal request.

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The Credit Union states that the Complainant's loan account and savings account are two separate accounts and do not constitute a single transaction, as alleged. The Credit Union points out that the Complainant has been charged interest in respect of his loan and has received dividends on his shares.

At the time of signing the respective credit agreements the Complainant pledged his shares as security for the loans, which, by Statute, entitles the Credit Union to hold the shares as such, for the lifetime of the loan.

Regarding the contention that the APR has been incorrectly calculated, the Credit Union explains that it must take into consideration the full value of the loan in calculating APR. The Credit Union must exclude monies held on deposit, as savings/shares, in the same way that it must exclude the valuation of other security held, such as Title Deeds to a property or Share Certificates. When calculating the APR on a loan, all types of security held must be discounted and the APR calculated as a consequence of the full amount of the loan, not a 'net' or 'set-off' amount. The Credit Union argues that to apply a set-off approach as suggested by the Complainant would be an attempt to completely alter the Credit Union model of lending. The Credit Union calculates APR in accordance with the Consumer Credit Act 1995 and uses a formula embedded into the code in its IT system. The formula the Credit Union uses complies with industry standards and accords with Central Bank Guidelines and the Irish League of Credit Unions APR calculator.

The Credit Union points out that the Complainant opted to accept the Credit Union's offer of additional finance in 2012 when his request to withdraw his shares was refused. While his complaint initially focused on the refusal to allow him access his savings, the Complainant subsequently reframed his complaint to concentrate on the issue of calculation of APR. The Credit Union emphasises that at no stage was any lending imposed on the Complainant.

The Credit Union denies that any interest overcharging has occurred. The Credit Union states that it is satisfied that interest has been correctly applied to the Complainant's loan accounts and that dividends have been properly credited to his share accounts as and when approved by members in general meeting.

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.

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Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 27 June 2018, 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.

In the absence of additional submissions from the parties, the final determination of this office is set out below.

As set out above, the Complainant's grievance relates to the APR applicable to his loan account, and more specifically to the manner in which said APR is calculated by the Credit Union.

While the Complainant appears to have objected to the Credit Union's refusal to allow him access his savings initially, in a letter marked 'E' attached to his Complaint Form, which letter issued to the Board of Directors of the Credit Union on the 3 April 2017, the Complainant clarified the scope of his complaint as follows-

> *"My complaint refers solely to the misstatement of the APR being charged* [to] *my loan. The refusal of my request to permit the withdrawing of my savings is of relevance to the fact that my savings account and my loan account are in essence a single financial transaction; I am not disputing that under Central Bank Guidelines you may be precluded from permitting withdrawals from my savings account."*

The Credit Union's attitude to the complaint is outlined above. Essentially, the Credit Union denies that it mis-stated or mis-calculated the APR applicable to the Complainant's loan and submits that the refusal to allow the Complainant access his savings was in accordance with law.

I will now set out the chronology of events leading up to the Complainant's dissatisfaction here.

On the 26 January 2012 the Complainant applied to the Credit Union for finance in the amount of €20,000 to fund the completion of improvements being carried out on his home. This loan was duly approved and on the 15 February 2012 an amount of €20,000 issued to the Complainant. A copy of the Credit Agreement pertaining to this loan has been furnished in evidence. The Important Information Summary on the first page of the Agreement details the following-

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TOTAL LOAN	€20000.00
Period of Agreement	10.0 Years
Number of Repayment Instalments	260 FORTNIGHT
Total Amount Repayable	€27183.00
Cost of Loan	€7183.00
APR	6.7%

The Complainant signed the 'Borrower's Declaration and Signatures to Agreement' on the 10 February 2012.

On the 11 June 2012 the Complainant telephoned the Credit Union and requested to withdraw his savings. This request was declined. By email dated the 12 June 2012 the Complainant emailed the Manager of the Credit Union to express his dismay at not being permitted to withdraw his savings and to query the APR in place. A copy of this email has been furnished in evidence. In this email the Complainant stated that he has been a member of the Credit Union for over 30 years and went on to outline his annoyance at not being permitted to access savings accumulated after his loan was granted-

" Yesterday I spoke to [an official] *in relation to drawing down some of these savings and she informed me that I could not withdraw <u>any</u> of the savings even amounts that*

I had saved subsequent to my drawing down the loan whilst I understood that the savings that I had with the credit union at the time of the loan approval were ringfenced and could not be accessed by me until at least a substantial part of the loan had been discharged, the attempt to refuse me access to that part of the saving made subsequent to the draw down of the loan was not only bizarre but surely without any legal authority."

Although the Credit Union stood by its decision to refuse the Complainant permission to access his savings (and confirmed that interest of 6.7% is calculated on the reducing amount of the loan), the Credit Union subsequently approved a top-up loan to the Complainant in the amount of €5,000. The documentation relating to this loan has been supplied in evidence. The Credit Agreement is dated the 22 June 2012 and outlines the following 'Important Information'-

New Loan Sought	€5000.00
Refinance Existing Loan	€19598.24
RPI Premium (if applicable)	
TOTAL LOAN	€24598.24
Period of Agreement	10.0 Years
Number of Repayment Instalments	260 FORTNIGHT
Total Amount Repayable	€33433.40
Cost of Loan	€8849.07

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APR	6.70%

Following the drawdown of additional funds, it seems that the Complainant's financial circumstances began to change, culminating in him applying for loan forbearance/an alternative repayment arrangement. These matters are not pertinent to this complaint and I do not intend to deal with them. In August 2016 the Complainant requested, once again, to withdraw savings. By letter dated the 30 August 2016 the Credit Union informed the Complainant as follows-

> *"Regarding your request withdraw your Shares, this request is rejected as these Shares are held as collateral ..."*

In its letter of the 30 August 2016, the Credit Union also referred the Complainant to Rule 38 of its Rules- Restrictions on withdrawal of shares and deposits.

As outlined above, the Complainant's current grievance is focused on the manner of calculation of the APR applying to a loan, and not on the refusal to access savings when a loan is in being. The crux of the Complainant's case is that he believes that there is a fundamental unfairness in not taking account of savings, access to which has been restricted, which forms security for the loan, in the calculation of the APR applicable to the loan. The restriction on withdrawing savings imposed by the Credit Union, therefore, is somewhat of an undercurrent to the Complainant's argument.

In his letter to the Credit Union dated the 3 April 2017 the Complainant outlined the essence of his complaint by way of illustrative examples of the way APR is advertised. The Complainant explained the following-

> *"To attempt to categorise my savings as security for my loan is something of a sleight-of-hand. The purpose of an APR is to facilitate comparisons between competing financial institutions as to the actual costs of a loan- in short, to provide a level playing field. Consider the example of two institutions A and B:*
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> - *A offers loans of up to €10,000 at an advertised APR of 8%; the cost of this loan on an annual basis would be €800 on borrowings of €10,000.*
> - *B offers loans of up to €10,000 at an advertised APR of 7%; but to avail of such a loan it is necessary to have at least €2,000 on deposit (on which nominal interest is paid) with that institution; the cost of this loan on an annual basis would be €700 (less the nominal interest paid) on borrowings of in effect €8,000. Assuming a nominal interest rate on deposits of 1%, the actual cost of the loan would be €680 [i.e. €700 - €20] and this equates to an APR of 8.5%.*
>
> *In such circumstances, permitting institution B to advertise an APR of 7% would be utterly misleading and render the purpose of APR as a mechanism of fair comparison, utterly null..."*

While I understand the argument the Complainant is making and furthermore, while I accept the frustration the Complainant must have experienced when the full import of

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the restriction on withdrawing savings (extending to those savings accumulated post issue of the loan funds) registered, the fact of the matter is that when he signed the Credit Agreements in question, the Complainant agreed that *"all paid shares, payment on account of shares and deposits "* could be applied to the payment of the loans taken out, in accordance with Section 35(8)(b) of the Credit Union Act 1997, as amended; a condition of each loan agreement wholly distinct from the calculation of interest. Given that the Complainant agreed to such a condition, a condition clearly and unambiguously articulated in the Credit Agreements, I simply cannot agree that the APR quoted by the Credit Union, which did not take into account any savings or shares held as security for the loan, was in any way misleading or misrepresentative.

When the Complainant added his signature to both Credit Agreements, he thereby declared that he had read and agreed to be bound by the terms and conditions *"contained in this Credit Agreement".* He also authorised the Credit Union *"at its discretion, to apply any and all paid shares, payments on account of shares or deposits to the payment of said loan, interest, costs and expenses, in accordance with Section 35(8)(b) of the Credit Union Act, 1997 (as amended) "*. Of note also is the following clause in the application form grounding the loan of €20,000, which the Complainant signed-

> *"I* [the Complainant] *hereby apply for a loan of €20000.00 for the following provident and productive purpose Home Improvements 10 Yr Or Less to be repaid in 260 fortnightly instalments of €104.55 inclusive of interest by means of payroll deduction/standing order/direct debit/cash, on the security of my committed savings and any other agreed security."*

The Credit Union emphasises that at the time of the Complainant's withdrawal requests and in conjunction with the signed Credit Agreements, it was mandated by law to refuse to allow him access his savings. I fully accept the Credit Union's position; I accept that by declining the Complainant's withdrawal requests the Credit Union was simply abiding by its own internal Rules and acting in accordance with the law. Section 32 of the Credit Union Act 1997 is the relevant legal provision. Although this legislative provision has since been amended following the enactment of the Credit Union and Co-operation with Overseas Regulators Act 2012, I accept the Credit Union's submission that the provision in force at the time (i.e. at the time the parties entered into the Credit Agreements in question, January and June 2012), is the relevant provision for purposes of this complaint. Section 32 reads as follows-

> *32.—(1) Notwithstanding anything in the rules of a credit union or in any contract, a credit union may require not less than 60 days' notice from a member of his intention to withdraw a share in the credit union and a member may not withdraw any shares at a time when a claim due on account of deposits is unsatisfied.*
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> *(2) Notwithstanding anything in the rules of a credit union or in any contract, a credit union may require not less than 21 days' notice from a member of his intention to withdraw a deposit.*
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> *(3) If a member of a credit union seeks to withdraw a share in or deposit with the credit union at a time when he has an outstanding liability*

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(including a contingent liability) to the credit union, whether as borrower, guarantor or otherwise, that withdrawal shall not be permitted unless—

(a) were the withdrawal to be permitted, the value of the member's savings immediately after the withdrawal would be not less than the amount of his outstanding liability; or

(b) the withdrawal is approved, in accordance with the registered rules, by a majority of the members of the board of directors voting at a meeting of the board;

but no approval may be given under paragraph (b) if were the withdrawal to be approved, the value of the member's savings immediately after the withdrawal would be less than 25 per cent. of his outstanding liability.

(4) If the Registrar sees fit to do so in the circumstances of a credit union, he may, on such terms as he thinks proper, by notice in writing addressed to the credit union provide that subsection (3) shall apply in relation to the credit union with the substitution of a higher or lower percentage than that for the time being applicable to the credit union under that subsection.

(5) Where a member of a credit union is indebted to the credit union and consents in writing to the credit union acting under this subsection, the credit union may, by way of set-off against the indebtedness, withdraw any of the member's shares or deposits; and such a withdrawal may be made notwithstanding anything in subsections (2) and (3).

Rule 38 of the Rules of the Credit Union against which this complaint is made is couched in almost identical terms to Section 32(3) of the Credit Union Act 1997, as follows-

"(3) If a member of a credit union seeks to withdraw a share in or deposit with the credit union at a time when he has an outstanding liability (including a contingent liability) to the credit union, whether as borrower, guarantor or otherwise, that withdrawal shall not be permitted unless—

(a) were the withdrawal to be permitted, the value of the member's savings immediately after the withdrawal would be not less than the amount of his outstanding liability; or

(b) the withdrawal is approved by a majority of the members of the board of directors voting at a meeting of the board;

but no approval may be given under paragraph (b) if were the withdrawal to be approved, the value of the member's savings immediately after the withdrawal would be less than 25% of his outstanding liability."

It is clear from both Rule 38 and Section 32 of the Credit Union Act 1997 that the Credit Union's refusal to accede to the Complainant's withdrawal requests (his initial request in 2012 when he sought to withdraw savings, €2,073.10 of which had been paid into his

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account between January and June 2012 and the subsequent withdrawal request in 2016) was wholly justified, and moreover dictated by law. I accept the Credit Union's submission that the Complainant's application for withdrawal of savings could not be permitted because *"(i) he did not have sufficient savings in the Credit Union to cover the outstanding liability after the withdrawal had been made, therefore he did not qualify under Rule 38(3)(a), and (ii) his savings in the Credit Union would have reduced to less than 25% of his outstanding liability to the Credit Union; therefore it was not an option for the Board to approve the withdrawal under Rule 38(3)(b)."*

It is apparent from the Complainant's submissions and correspondence that he may not have grasped the full import of the restrictive withdrawal clause prior to contract execution.

Indeed, this is borne out by the withdrawal requests he made, which were clearly beyond the boundaries of permissible withdrawals. This position is also reflected in a telephone conversation between the parties, a recording of which has been provided in evidence, when the Complainant was making initial enquiries about taking out a loan in the amount of €20,000, during the course of which the Complainant made reference to not using his savings of approximately €1 ,500 to fund his home improvements, explaining that he wanted to *"leave that there "* in case he *"needed money quickly"*. It would have been preferable if the Agent had clarified that if there was money in his Credit Union Shares Account that he would not have been able to access it until the loan was paid. However, I note that the Complainant indicated in another telephone conversation that his "*preference is to have matters dealt with in writing*". Further, I note that the Complainant described himself as a "*Barrister by training*" and therefore I am satisfied that the information provided by the Credit Union in writing ought to have been sufficient to enable him to understand that his Shares would be held as security.

I accept that given the Complainant's acceptance of the conditions attached to the loan agreements he entered into, he was on notice of the position regarding his savings.

For purposes of clarity I accept that the savings the Complainant accumulated before and around the time of drawdown of the loan facilities in question equated to shares within the meaning of the 1997 Act. Prior to commencement of the Credit Union and Co-operation with Overseas Regulators Act 2012, the interpretation section of the 1997 Act defined 'savings' as including *"shares and deposits "*. 'Share' was defined as follows-

> *"in relation to a credit union, each sum of one euro standing to the credit of a member of that credit union in respect of shares in the register of members required by this Act to be kept by that credit union."*

The Credit Union has informed this Office that in addition to the loan account at issue, the Complainant holds a *"Regular Share"* Credit Union share account. I am unable to accept the proposition put forward by the Complainant that the two accounts essentially comprise one transaction given the withdrawal restriction at play during the continuance of the loan. Although the advance of credit to a member encompasses a restriction on withdrawing shares held in the Credit Union, this does not serve to amalgamate the loan account with the savings/share accounts a member may hold. The accounts are separate entities and as

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outlined by the Credit Union in its letter to this Office dated the 15 September 2017 such is evidenced by the fact that interest is payable on a loan account, while dividends are paid in respect of a member's shares.

Returning again to the central issue, the APR chargeable by the Credit Union. Having considered the submissions of both parties regarding the method of calculation employed and the specific formula used, I do not see anything to indicate an error or mis-calculation by the Credit Union in its stated APR.

It is important to bear in mind that the Credit Agreements the Complainant entered into clearly stated the interest rate applicable to the loan. The 'Important Information' particulars of the Credit Agreements have been quoted above.

In its letter to this Office dated the 15 September 2017 the Credit Union explained that in calculating the APR, the full amount of the loan is considered, with any security held excluded from the calculation. This is in keeping with Section 10 of the Consumer Credit Act 1995, which states at subsection (2) that *"For the purpose of calculating the APR the total cost of credit to the consumer shall be determined, with the exception of the following charges…"* It is noteworthy that nowhere in Section 10 of the Consumer Credit Act 1995 is it declared incumbent on a lender to offset the value of securities held under a loan in the calculation of APR.

In its letter to this Office dated the 15 September 2017 the Credit Union explained that it would seek confirmation from its software provider that the formula and code used by said software provider in the calculation of APR complies with industry standards. Such a letter was subsequently procured and furnished to this Office under cover of letter dated the 14 March 2018. I note the Complainant's objections to this letter being considered at investigation stage given the timing of its arrival to this Office.

In circumstances where the Complainant has been provided with the opportunity to consider and comment on this letter, I am satisfied I can take note of its contents. The letter, penned by a representative of the Credit Union's software provider states the following-

> *"We can confirm that the Software as provided to* [the Credit Union] *calculates APR in compliance with the Consumer Credit Act 1995 and Part 5 of the European Communities (Consumer Credit Agreements) Regulations 2010 on the following basis:-*
>
> *(i) the relevant APR calculation/software input data was developed by the Irish League of Credit Unions who verified compliance of the APR Calculator with The Consumer Credit Act 1995 and Part 5 of the European Communities (Consumer Credit Agreements) Regulations 2010 in advance of providing us the information for programming into our systems (as provided to and operated by* [the Credit Union]*) …*

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(ii) *We then correctly programmed the relevant software including the APR calculation as provided, into the ...software/products used by* [the Credit Union]... "

Having considered the arguments and submissions advanced by both parties, I do not propose to uphold the complaint that the Credit Union's calculation of APR in respect of the Complainant's loan account is/was in any way flawed or that the APR was mis-stated. The evidence before me suggests that the Credit Union, in its dealings with the Complainant's loan account and the associated interest calculations, has at all times complied with the legal and regulatory provisions applicable to it, together with its own terms and conditions. I am satisfied that there is no basis for the suggestion that increased lending was imposed on the Complainant, thereby causing him to incur additional interest charges.

The evidence before me (i.e. documentation and telephone conversation recordings), demonstrates that the Complainant willingly and voluntarily entered into the subsequent top-up loan agreement and was clearly informed of the repercussions of that action through the printed details contained in the June 2012 Credit Agreement.

For the above reasons, I do not uphold this complaint.

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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

19 July 2018

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.***