

# Modification of the contractual conditions during the term of a fixed-rate mortgage

Topic: **Fixed-rate mortgage** Case number: **2019/04**

The customer repaid two fixed-rate mortgages before their maturity. The bank charged her an early repayment fee, taking into account negative reinvestment rates in addition to the interest rates agreed for the remaining term of the mortgages, so that the client had to pay more than if she had let the fixed mortgages expire in the normal way. The client defended herself against the additional negative interest charged, citing two rulings by the Zurich District Court. The bank refused to repay the negative interest to the client. The bank took the view that the case was different from those judged by the court and referred to its General Terms and Conditions of Credit in which the calculation of the early repayment fee was agreed. There it was pointed out that the relevant reinvestment rates can be negative in a negative interest rate environment. The client then submitted the case to the Ombudsman. Unfortunately, the bank was not prepared to find a solution in the ombudsman proceedings. The Ombudsman therefore had to refer the client to the ordinary courts.

In the year under review, the ombudsman again regularly received complaints about early repayment fees, in which banks had taken negative reinvestment rates into account and charged clients higher amounts than would have been due if the fixed-rate mortgages had expired properly. Since the persistent negative interest rate environment in the Swiss franc, two groups of banks have emerged. As observed by the Ombudsman, the larger group limits reinvestment rates to a minimum of 0% and, in the event of early repayment of a fixed-rate mortgage, charges clients a maximum of the interest that was agreed for the remaining term. A smaller group demands, in addition to the agreed interest, compensation in the amount that would have to be paid if the prematurely repaid capital were reinvested on the money and capital markets at the negative reinvestment rates applicable for the remaining term. In the meantime, court rulings have come to the conclusion that this practice was not permissible due to the interpretation of the contractual provisions applicable in the cases assessed. Some of the banks in the second group had in the interim clarified their contracts to the effect that they may charge customers any negative reinvestment rates in addition.

Two main problems arose in the present case. On the one hand, opinions differed between the client and the bank as to which version of the General Terms and Conditions of Credit and thus which specific wording was applicable for calculating the early repayment fee. The customer was of the opinion that the version that was valid at the time of the conclusion of her fixed-rate mortgage and the signing of the relevant agreements in 2013 was decisive. The bank had replaced it in 2017 and thus during the term of the fixed-rate mortgage concluded in 2013. The new version explicitly pointed out that reinvestment rates can be negative in a negative interest rate environment. On the other hand, the question arose as to how the provision applicable to the case should be interpreted.

The bank took the position that in the original version of 2013 it had stipulated the right to adjust the credit terms at any time. The new terms and conditions had not been contradicted by the client. In addition, the new version only clarified what was already relevant under the credit conditions applicable in 2013, namely that the reinvestment rates on the money and capital markets are used to

calculate the early repayment fee and thus negative interest rates result in the event of negative market rates. Finally, the bank took the view that the client had decided to repay the fixed-rate mortgage prematurely in 2019 without any action on her part. It was therefore clear that the General Terms and Conditions of Credit applicable at the time of repayment were applicable.

In the Ombudsman's view, it was untenable that the bank, on the basis of the reservation that it could adjust the loan conditions at any time, should change them during the term of the fixed-rate mortgage with effect for the latter. The effect of such an adjustment therefore had to be deferred until the existing fixed-rate mortgage had expired and could only be applied to any renewal or extension. Since the customer did not have to expect any such contractual amendments during the term of her fixed-rate mortgage, the Ombudsman did not consider the conditions for tacit approval of these amendments to be fulfilled in the present case. He was therefore of the opinion that the provisions applicable to the calculation of the early repayment fee at the time of conclusion of the fixed-rate mortgage were decisive in the case. In the Ombudsman's view, the customer's understanding at the time of conclusion of the contract was decisive for the interpretation of these provisions. For the sake of completeness, it should be mentioned that the High Court of the Canton of Zurich confirmed one of the decisions to which the customer referred in the present case a few weeks after the final notice was written and, in the reasons for the court decision, held the same opinion as the Ombudsman with regard to the relevant time for interpretation.

Opinions between the bank and the client also differed with regard to the interpretation of the provision on early repayment fees contained in the version of the General Credit Terms and Conditions applicable at the time the fixed-rate mortgage was concluded. The client considered the contractual provision to be practically identical to the one judged by the District Court of Zurich and concluded that the bank could only demand the maximum agreed interest for the remaining term of the fixed-rate mortgage as an early repayment fee. The bank did not consider the decision of an extra-cantonal court of first instance to be authoritative. In fact, the wording of the contractual provision on which the judgement was based was not identical to that which, in the client's opinion, was decisive in her case. However, the Ombudsman was of the opinion that a court which would assess the provision which in his opinion was decisive in the case would very probably come to the same conclusion as the District Court of Zurich and would consider the application of a negative reinvestment rate to be inadmissible. He therefore suggested that the Bank solve the case by way of settlement. As the bank categorically refused to make concessions, he had to refer the client to the ordinary courts, which could resolve such a dispute with a decision binding on both parties, and, to his great regret, had to conclude the mediation procedure without result.