

## Top-up loans from licensed moneylenders

### A guide to the law on top-up loans from licensed moneylenders that may breach the rules in the Consumer Credit Act 1995

This guide has been issued following a finding of the Financial Services Ombudsman Bureau in June 2015 that two consumer borrowers in Co. Donegal had been sold a number of 'top-up' loans by a licensed moneylender. In that case, the Ombudsman found that sums had been deducted from new loans to repay earlier loans, a practice which is illegal **under Section 99 of the Consumer Credit Act 1995**.

**FLAC has produced this information sheet as a guide only and it should not be relied upon for any legal action. You can seek more information & assistance from the bodies listed at the end of this guide.**

A breach of Section 99 by a licensed moneylender is a criminal offence. However, the Act **does not say** that such loans are 'unenforceable' against the borrower, so that the amounts borrowed must be written off. Nonetheless, the Financial Services Ombudsman directed in its decision on the Donegal case that **the outstanding amounts that remained to be paid on the loans in question (not the full amounts originally borrowed)** must be written off. It also awarded each of the complainants a further sum of €450 each in compensation.

FLAC's booklet 'Moneylending and the Law' (issued 2007) states on page 10 that

A moneylender must not offer another loan to clear an existing loan. So top-up loans, where the borrower gets deeper into debt, are not allowed. Although the [Consumer Credit] Act does not say that a borrower is not bound by such a loan, it would in practice be difficult for a moneylender to recover money due under a top-up loan. In addition, a moneylender must not take a payment off the top of the loan. So you should get the full amount borrowed and not make the first repayment until the time set under the agreement.

This also means that a licensed moneylender is prohibited from charging any arrangement fee in connection with a loan and deducting that fee from the amount lent to the borrower.

- You can download FLAC's guide at <http://bit.ly/MLguide07>.

You should understand, however, that although top-up loans are prohibited by the Act, the law does not prevent a licensed moneylender from having two or more moneylending agreements with a borrower at the same time, as long as a new loan is not used to clear the balance on an existing one.

Readers should also be clear that the Ombudsman's decision explained above and the rules explained in this guide apply to licensed moneylenders only and not to banks and credit unions.

*Updated and reissued by FLAC in July 2015. This document is for information purposes only, it is not to be construed as legal advice. FLAC accepts no responsibility for actions taken on foot of this document or for the content of external websites or information sources referred to within it.*

- To check whether the moneylender you are dealing with is on the list of existing holders of moneylending licences, please see <http://bit.ly/1LY72Pi> - the Register of Moneylenders is about half-way down the page.

## 2. How would I know I have been given a top-up loan?

A top-up loan refers to a further loan from the same money lender which is used to pay off an existing loan balance.

### Example of top-up loan scenario:

- Amount of loan = €500
- Term of loan = 52 weeks
- Weekly instalments = €15
- Total amount to be repaid = €780 (52 x €15)
- Interest rate (Annual percentage rate of charge) = 157.3%

In this example, after 40 weeks (assuming I make all the weekly payments on time) I will have repaid a total of €600, leaving €180 left to pay. The moneylender (or its agent) offers me another loan of €500 on the same terms as the first loan.

It says that it will clear off the first loan by taking away the balance of €180 from the new loan amount of €500. This time therefore I only receive €320 but I will still have to pay back €780 (the remaining balance of €180 on the old loan plus the total new loan amount of €500) at €15 per week over the next 52 weeks. This is a top-up loan.

However, If my moneylender agree to lend me another €500 so that I am obliged to pay back €15 per week each on two different loan agreements, there is no top-up but two separate moneylending agreements.

## 3. How might I show that I have been given a top-up loan?

### ★ Lending documents

A licensed moneylender is obliged under the consumer credit legislation to give the borrower an agreement setting out the key terms in writing. The moneylender must also give the borrower a separate repayment book for any loan in which details of each of the repayments made under the agreement must be recorded.

It is unlikely that your agreement will actually show that the loan is a top-up, but you should check all the same. However, if there is a sum owed on one agreement which is cleared by a new agreement, then the repayment book on the first agreement should show that payments stopped at a certain point with the balance being cleared. So in the example above, when the second loan is offered, there is

€180 left to pay. Instead of that balance being cleared by 12 instalments of €15, the repayment book should show a payment of €180 being made.

This might be used to suggest that a top-up loan has been issued. It may not prove it beyond all doubt, but it is strong evidence. Where would a moneylending customer otherwise get his or her hands on a cash lump sum to clear the first loan?

You should also be aware that in the decision referred to above, the Financial Services Ombudsman noted that the agreements in question did not make it clear that amounts were loaned by way of refinancing, in other words, via top-ups. However, the complainants in the case had some handwritten notes on some of the agreements which indicated they had signed for one amount and received another lower amount. The moneylending company in question argued that 'refinancing' did not occur, but as it was not in position to interview the agent who made the loans and who had since left the company, the Ombudsman found that it was '*unable to establish... to a definitive degree, that unlawful refinancing did not occur*'.

## ★ Requesting copies of lending documents

You may not be able to find your original moneylending agreement/s. However, a licensed moneylender is obliged to keep a record of all moneylending agreements for a period of not less than five years from the date that the last repayment instalment is made under the agreement. You should ask the moneylender or the moneylender's agent to let you have a copy of these records.

If the money lender does not give you this information, you can apply in writing to the company under Data Protection legislation. You are entitled to any information that the moneylender holds about you, that is personal to yourself. The company may charge you a fee of up to €6.35 for this information. They may also look for proof of your identity. An example of a suitable letter would be:

To: *Name*  
*Address: (and any previous addresses over the past 5 years)*

*Date:*

*Account numbers with the company:*

*Dear Sir/Madam*

*I wish to make an access request under Section 4 of the Data Protection Acts 1988 and 2003 for a copy of any information you keep about me, on computer or in manual form in relation to my accounts with you. In particular, I wish to access details of all loans made together with full record of the date the loan was made, the amount of the loan, the amount and date of any deductions or charges from it and details of all repayments.*

*Yours faithfully*

*Signed (name)*

You are strongly advised to keep a copy of the letter for your records. When you post the letter, send it by express or registered post. If you do that, you will both have evidence of sending it and, through An Post's tracking system, you can check a couple of days later whether it has been delivered.

The moneylending company must give you the information if requested under Data Protection legislation. The normal time limit for the company to provide the information is 21 days. When you get an answer, it should include a copy of each and every account you have with the money lender. If the moneylender refuses or neglects to provide you with this information, you may make a complaint to the Office of the Data Protection Commissioner.

- ★ See [www.dataprotection.ie](http://www.dataprotection.ie) for more information.

If you need help understanding the accounts you have received, you can make an appointment with your local MABS office which will explain the documents to you.

## 4. How do I make a complaint to a licensed moneylender?

**You must first make a complaint to the licensed moneylender** to give it an opportunity to resolve your issue before you can refer the matter on to the Financial Services Ombudsman's Bureau.

The Central Bank introduced a Consumer Protection Code for licensed moneylenders in January 2009. Under Rule 27 of this code, all licensed moneylenders must have a written procedure for the proper handling of complaints. This procedure need not apply if the moneylender resolves your complaint to your satisfaction within five days.

Otherwise the moneylender is obliged to:

- ★ acknowledge your complaint in writing within five business days.
- ★ give you the name of the person who will be your point of contact.
- ★ provide you with an update on the progress of your complaint within 20 business days.
- ★ attempt to investigate and resolve your complaint within 40 business days.
- ★ where the 40-day target is not met, indicate the likely timeframe to resolve it.
- ★ inform you of your right to refer your complaint on to the Financial Services Ombudsman where the 40 day target is not met.
- ★ advise you in writing of the outcome of your complaint within five business days of completing its investigation.
- ★ inform you of your right to refer your complaint on to the Financial Services Ombudsman if you are not happy with the outcome of the investigation.

Each licensed moneylender will have its own complaints procedure. You can ask an agent to give you details of this procedure, look at the provider's website for the details or write to them, looking for a copy of the procedure. This procedure should be followed to avoid delays.

Generally speaking, your complaint will have to contain the following information:

- ★ Your name and address.
- ★ The account number/s.

- ★ When the loans were made.
- ★ The amount of the loans.
- ★ The amount you actually received.
- ★ The date of your complaint.

You should then confirm that your complaint is that you were offered a loan of a specific amount but that you received a smaller amount because a deduction was made to clear a previous loan. Before you file your complaint with the provider, write it out for yourself and you might also want to check with a FLAC clinic or a MABS office to make sure you have explained clearly what your complaint is.

It is very important that you keep a copy of the letter (or email) for your records. If you choose to complain by letter, send this by express post or registered post. That way, you will both have evidence of sending it and, through An Post's tracking system, you can check a couple of days later whether it has been delivered. If you choose to hand deliver your complaint, then deliver it to an office and get a written receipt from a staff member in the office to show it has been received. Make sure to ask the name of the staff member and note that as well.

Having received your complaint, the provider may ask you what you want them to do to resolve it. You do not have to say that at the stage of making the complaint. You might prefer to wait for its response to see what it wants to offer. At that stage you may need advice on what a reasonable solution would be. If you are in doubt, you should seek advice from a FLAC centre, a MABS office, one of the state-funded Legal Aid Board Law Centres or a solicitor in private practice about it.

You should note that in the Financial Services Ombudsman's decision mentioned at the start of this guide, the moneylender offered to close the outstanding balances on the customers' accounts in full and final settlement of their complaint (without admitting liability). The customers refused this offer and the investigation of their complaint by the Ombudsman went ahead. They wanted the balances written off, all the interest they had paid on their loans to be repaid to them and further compensation. The Ombudsman refused to order that interest paid be repaid to them because it was clear that they had defaulted in making payments on a number of their loan accounts.

## 5. Making a Complaint to the Financial Services Ombudsman

The Financial Services Ombudsman's Bureau is an office set up under Central Bank legislation to deal independently with unresolved complaints from consumers about the conduct of financial service providers, including licensed moneylenders. Any consumer is entitled to make a complaint free of charge. As already explained above, in order to go to the Ombudsman, you must first contact the licensed moneylender, outline your complaint and give it a reasonable opportunity to resolve the issue.

## ★ Complaint form

You must then fill out a specific form (available on the Financial Services Ombudsman website at <http://bit.ly/FSOform>). You may submit this form online or download it and send it by post. Again, it is recommended that you use registered post. The Ombudsman website suggests that:

On submitting your Complaint Form it is important that you include all relevant documentation which this office may rely on during the investigation. It is vital that you submit the referral letter from the Provider stating that its internal procedure has been exhausted and the complaint cannot be resolved. This may include letters to and from the Provider, policy documents, statements etc. It is important that you submit these as evidence to support your case.

## ★ Timeframes

Under the heading of 'General Timelines', the Ombudsman website explains as follows:

When we accept your complaint, we recommend mediation as the first and best option to resolving the matter.

When mediation is offered both parties to the dispute have 15 working days to respond.

If mediation has been refused or if accepted, has not been successful the following timelines indicates the average time per case:

- Assignment of Complaint to Investigator may take up to 6-8 weeks.
- Once assigned an investigator shall draw up a 'Summary for Complaint' which the provider has 20 working days in which to submit its response.
- Once the response is received it is sent to the Complainant for comment. The complainant has 10 working days to revert to this office. The Complainant's response, if any is exchanged with the Provider and it in turn has 5 days to respond to same.
- Generally the investigative process takes around 35-45 working days but may take longer depending on the complexity of the case.

Once the full exchange is complete a Finding should issue shortly thereafter

This section of the website goes on to explain that all timeframes are for guideline purposes only and that there is discretion to grant extensions to either party. It also explains that these timelines may be affected by the volume of cases being dealt with by the office.

## ★ Oral hearings

You should also note that it is possible for the Financial Services Ombudsman to deal with a complaint by way of an 'oral hearing' in certain limited circumstances. The website explains this as follows:

An oral hearing may be necessary where there is an issue of fact in dispute between you and the Provider which we cannot resolve fairly without hearing you both.

An oral hearing is not required in every case.

In the course of reviewing the evidence the Ombudsman will consider whether an Oral Hearing is necessary. It is solely at the Ombudsman's discretion to decide whether to hold an Oral Hearing. If an oral hearing is held then the oral evidence given under oath at that hearing will be reviewed together with the documentary evidence and a Finding will be issued to both parties.

The website goes on to set out detailed guidelines for the holding of oral hearings. It is possible that an oral hearing might be requested in a top-up loan case, for example, where there is a clear dispute between the moneylender's agent and the borrower surrounding the circumstances that resulted in the loan. If this is the case, you will need to seek advice from a FLAC centre, a Legal Aid Board law centre or a private solicitor on presenting your complaint.

## ★ Awards of the Financial Services Ombudsman

The Ombudsman has a variety of powers under the legislation. It may uphold your complaint fully or partly or it may reject your complaint. If your complaint is fully or partly upheld, the main result is likely to be financial compensation but the Ombudsman also has other powers such as seeking to change the conduct complained of or its consequences.

## ★ Time limits

You should note that, by law, the Financial Services Ombudsman has a strict time limit of six years. As a result, the Ombudsman cannot deal with a complaint if the conduct of the financial service provider complained of occurred more than six years before the complaint is made. The Ombudsman has no discretion to extend that time limit.

On the question of the time limit, you should note that the Ombudsman website suggests that

In order to preserve time, if the events that you wish to complain about are close to the expiry of a 6 year period, you should contact this office to make the complaint (in writing) and advise of the circumstances. In these instances the complaint will then be registered by the Office, before the expiry of the 6 year period. You will then be referred back to the Provider to allow them an opportunity to address the complaint.

## 6. Useful addresses and websites

### FLAC (Free Legal Advice Centres)

FLAC is an independent human rights charity that promotes equal access to justice for all.

13 Lower Dorset Street, Dublin 1

Legal Information Line: LoCall 1890 350 250 (from landline) / 01-874 5690 (from mobile)

Main website: [www.flac.ie](http://www.flac.ie) – *FLAC Guide to Moneylending & the Law*: <http://bit.ly/MLguide07>

List of legal advice centres countrywide: <http://www.flac.ie/help/centres/>

# FLAC guide to top-up loans from licensed moneylenders

July 2015



## Money Advice and Budgetary Service (MABS)

MABS is the State's money advice service and operates offices for the public nationwide as well as a helpline.

MABS Helpline: 0761 07 2000

Email: [helpline@mabs.ie](mailto:helpline@mabs.ie)

Web: <https://www.mabs.ie/>

## Financial Services Ombudsman Bureau (FSOB)

The Financial Services Ombudsman is a statutory officer who deals independently with unresolved complaints from consumers about dealings with financial service providers.

3rd Floor, Lincoln House,  
Lincoln Place, Dublin 2

Tel: +353 1 6620899 / LoCall: 1890 88 20 90

Web: <https://www.financialombudsman.ie/>

Email: [enquiries@financialombudsman.ie](mailto:enquiries@financialombudsman.ie)

## Central Bank of Ireland

Central Bank of Ireland

PO Box 559, Dame Street, Dublin 2

Tel: +353 1 224 6000 / LoCall: 1890 777 777

Web: <http://www.centralbank.ie/>

Email: [enquiries@centralbank.ie](mailto:enquiries@centralbank.ie)

## Legal Aid Board Law Centres

The Legal Aid Board is the State civil legal aid service and provides legal advice and/or representation to people who cannot afford a private solicitor. Legal aid is subject to a means test and a merits test. The Board operates a network of Law Centres throughout the country. If your legal rights have been infringed in the course of a moneylending agreement, one of these Law Centres may be able to represent or advise you in relation to court proceedings. Details of your local law centre are on the Board website or over the phone.

Legal Aid Board Head Office,  
Quay St, Cahirciveen, Co.Kerry

LoCall: 1890 615 200 / Tel: 066 947 1000

Web: [www.legalaidboard.ie](http://www.legalaidboard.ie)

Email: [info@legalaidboard.ie](mailto:info@legalaidboard.ie)

**About FLAC:** FLAC is a human rights organisation which exists to promote equal access to justice for all. FLAC's work on consumer credit addresses inadequate protections for consumers through strategic casework and policy work.

- FLAC offers basic, first-stop **legal information** via telephone - contact **lo-call 1890 350 250/01-874 5690**
- Basic **legal advice** is available at **FLAC centres** around Ireland. These **do not provide legal representation**. To find your nearest centre, go to [www.flac.ie/help](http://www.flac.ie/help).



*While every effort has been made to ensure the accuracy of this document, it is provided for general information only and is not intended as a substitute for individual advice. Therefore FLAC cannot accept any legal liability for its contents.*