DRN-5664223

## The complaint

Mr C complains Assetz SME Capital Limited ("Assetz") has introduced an unfair fee on his crowdfunding account.

## What happened

In December 2023, Assetz announced that it had decided to close its retail platform and conduct a solvent run-off of its retail loan book. Assetz says this was due to the substantial rises in bank interest rates which led to lenders withdrawing from the platform. As part of the run-off process, Assetz announced that it was necessary to introduce a Lender Fee.

Assetz wrote to lenders on 15 December 2022 to explain the following:

> *"The ceasing of new retail lending means a significant drop in our income for the retail part of the business. We are in the process of reducing overheads to match this new permanent state and in the meantime, have calculated the following Lender Fees to be applied to cover the anticipated costs of adjusting the business to a run-off footing then managing the loan book through run off and returning capital to investors.*
>
> *• Through to end of June 2023 - 2.9% pa of performing loans*
> *• July to December 2023 - 1.4% pa of performing loans*
> *• January 2024 onward - 0.9% pa of performing loans*
> *(This equates to an average fee level of 2.15% for the first 12 months and a 5-year effective fee of 1.15% pa)*
>
> *These are estimated fees and subject to review over time. They would be applied to interest received by investors (i.e.: on performing loans only), commencing once software updates are implemented."*

Assetz also explained in this notice that it was closing its secondary market, a tool which allowed lenders to sell their loans to other lenders on the platform. As such, lenders like Mr C were unable to exit from the loans they were invested in and had to wait for the pro-rata return of capital from loans that repay in the future.

Assetz then wrote to lenders on 17 May 2023 explaining the following Lender Fee amendments:

- Through to the end of December 2023 – 2.9% pa of performing loans.
- January 2024 onward – 0.9% pa of performing loans.
- This equates to an average fee level of 2.90% for the first twelve months and a five-year effective fee of 1.3% pa.

Assetz wrote to lenders again on 16 June 2023 to make them aware of further amendments to the Lender Fee:

- For the period of June-September 2023 – 6.25% pa of performing loans.
- October 2023 to December 2024 - 0.9% pa of performing loans.
- Post December 2024 no fee expected.
- This equates to an average fee level of 3.52% for the first twelve months and lower five-year average fee of 0.88% pa.

Mr C complained to Assetz in January 2023 as he was unhappy with the introduction of the Lender Fee.

Assetz considered Mr C's complaint but didn't uphold it. In summary, it said:

- Its terms and conditions made lenders aware that it could introduce a Lender Fee.
- When deciding to introduce the Lender Fee, it considered that any variation to its terms should strike a fair balance between Assetz's and lender's interests.
- The Lender Fee benefits lenders as it allows Assetz continue to provide its service and provide better outcomes for them.
- Alternatives to the solvent run-off were considered but were assessed to be potentially of much greater detriment to lenders.

Mr C didn't accept Assetz's response and so he referred his complaint to this service for an independent review.

One of our investigators considered Mr C's complaint but didn't uphold it. In summary, they said they were satisfied that Assetz had considered alternatives to a solvent run-off and that its decision was ultimately fair and reasonable in all the circumstances.

Mr C didn't accept the investigator's findings and so the complaint has been passed to me to decide.

I issued a provisional decision in November 2024 and I include a copy below:

***What I've provisionally decided – and why***

*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

***Fairness of Assetz's term changes***

*The crux of Mr C's complaint is that Assetz has unfairly introduced a Lender Fee on his crowdfunding account. I can see Assetz notified Mr C of this in its mailout dated 15 December 2022 and on its website.*

*Assetz says that it made lenders aware that it could introduce the Lender Fee in the terms and condition which lenders had to agree to in order to continue investing on its platform. I've looked at the terms that were relevant when Mr C opened his account and I note that these do explain the possibility of charging a fee. The terms said:*

> *"At present there is no membership or joining fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership or joining fee in future."*

*I note that Assetz updated its terms on 30 April 2020. This included the following term relevant to this complaint:*

> *"Under normal circumstances there is no membership or joining fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership or joining fee in future."*

*Assetz has referred our service to Section 21 of its terms to support that it could make updates to its terms. The relevant term says:*

> *"2. Where a change to these Terms does not affect existing Micro Loans and does not disadvantage existing Lending Members or where the changes are reasonably believed by the Assetz Capital Companies to be in the interests of the Lending Members, the Assetz Capital Companies may make any amendments to these Terms at any time with immediate effect. Where it is necessary or desirable to make changes to these Terms which affect existing Micro Loans or may disadvantage existing Lending Members, the Assetz Capital Companies will endeavour to provide 30 days' notice before any changes take effect. Any such notice shall be posted on the Website.*
>
> *3. Any amendments will be posted on the Website as soon as reasonably practicable. By continuing to use the Website, by either logging in or leaving investments within Investment Accounts or Access Accounts on a daily basis, each Lending Member agrees to be bound by the amended Terms."*

*While I appreciate this is a broad term, it does support that Assetz may vary its terms, but it still needed to consider the impact of any changes it made on its customers.*
*It's not for me to decide whether this term is fair or not – that is something only a court can decide. But as a regulated financial business, Assetz is under an obligation to treat its customers fairly. And the obligation I am under is to consider what is fair and reasonable in all of the circumstances – which includes having consideration for the relevant law and regulations, regulators' rules, guidance and standards, codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time.*

*The term is a 'variation clause' in that it allows Assetz to make changes to the terms of the contract. Assetz relied on this to introduce the Lender Fee. In December 2018, the Financial Conduct Authority ("FCA") published guidance that outlines the factors financial services firms should consider under the Consumer Rights Act 2015 ("CRA") when drafting and reviewing variation terms in consumer contracts. I consider this to be relevant guidance to help me decide whether Assetz has treated Mr C in a fair and reasonable way when it introduced the Lender Fee.*

*Factors that are typically considered when determining the fairness of variation clauses include things like whether the term creates a significant imbalance in the parties' rights and obligations, to the detriment of the consumer and whether customers are free to exit the contract if they don't accept the changes.*

*I think there are issues with the term which do touch on things that might suggest unfairness. This includes the fact the term relied on isn't specific as to when, and for what reason, the new charge might be introduced. It also doesn't make lenders aware of how much such a*

*change would cost them and it doesn't allow for lenders to exit without penalty if they don't accept the change.*

*Arguably, the nature of the platform itself made it impractical for investors to always be able to exit if they objected to changes to the terms and conditions, as selling their loans on the secondary market was never guaranteed. I'm also aware that the secondary market closed permanently shortly after the changes were introduced. All that said, even if I was to conclude that a court would likely deem this an unfair contract term, I don't think this complaint should be upheld. I will set out why below.*

***Assetz's reasoning for introducing the Lender Fee***

*In considering this complaint, I've had regard for the fact Mr C entered into an agreement which said he wouldn't pay a membership fee on his investments. He'd been warned he might have to pay one in future – but not how much that would be, when it would be payable, and on what basis (e.g. a percentage or a flat rate). However, I've thought carefully about the reasons given by Assetz for the need to introduce the Lender Fee in the context of the financial situation of Assetz and with our service's broader remit of determining what is fair and reasonable in the circumstances. This includes whether the introduction of the Lender Fee provides a fair balance between the legitimate interest of Assetz and Mr C's interests.*

*Assetz has explained that it needed to introduce the Lender Fee as a result of a variety of unanticipated events, including substantial economic factors which conspired to raise interest rates in historic fashion in the autumn of 2022. Assetz says these economic shocks included but were not limited to:*

- *The war in Ukraine.*
- *The on-going impact of Covid and the knock-on effects of public economic support during the pandemic (and its subsequent withdrawal).*
- *The economic turmoil caused by the mini budget of 23 September 2022 and spiralling inflation.*

*Assetz says that, given the significant and sudden rise in interest rates, its peer-to-peer loans were no longer as attractive to new and existing lenders and new loans stopped being originated. It says that this meant its fee structure which operated under normal circumstances was no longer suitable or sustainable. It says that without new loans being written there were no origination fees to fund the platform. It says the platform still had significant ongoing costs which were necessary to support the existing loan book and to ensure maximum returns for existing lenders.*

*I think it's worth explaining at this point that it's not my role to determine whether Assetz could decide to close its retail platform. I consider that to be a legitimate business decision that Assetz could fairly make. Rather, it's my role to determine whether, as a result of that decision, Assetz has fairly considered the impact of the introduction of the Lender Fee on lenders. And in doing so, it fairly considered the alternatives.*

*Assetz says it considered triggering its stand-by plan and wind down arrangements as an alternative to introducing the Lender Fee. Assetz says this would involve taking one of the following possible actions:*

- *Selling the business as a whole.*
- *Selling the loan book and use the proceeds to repay lenders (retail and institutional).*

- *Closing its origination business and focus solely on managing the run-off of the loan book whilst remaining solvent (and without any additional fees being charged) – essentially winding down the loan book over the normal term of the loans.*
- *Appointing administrators over to undertake an insolvent wind-down.*

*Assetz has provided our service with a comprehensive response to why each of these actions were considered to be unsuitable. I shall summarise the points provided under each heading below.*

***Selling the business as a whole***

*Assetz says that the economic turmoil of late 2022, which had substantially triggered the decision to close the retail platform in the first place, meant that any prospect of selling the business was considered highly unlikely – at any price.*

*In brief, it says a sale of the business would have involved the appointment of professional advisors; marketing the business for sale; receiving offers and identifying a willing buyer; due diligence assessments on the business and loan book income; and transaction processes. All of which it says would have taken a substantial time to implement. Assetz also says that any buyer would have had to dealt with the significantly changed inflationary and high interest rate economic environment.*

*Whilst I can't say with any certainty what the result of a sale of Assetz's business would have been for lenders, I'm satisfied that Assetz fairly considered this as an option and, on balance, I'm persuaded by the concerns it has raised regarding the timescales and prevailing economic factors involved. As such, I think it was fair and reasonable for Assetz to conclude, on balance, that this option would have likely resulted in worse outcomes for lenders than introducing the Lender Fee.*

***Selling the loan book***

*Similarly to selling the business, Assetz says selling the loan book would have involved the appointment of professional advisors; marketing the loan book for sale; receiving offers and identifying a willing buyer; due diligence assessments on the loan book income; and transaction processes. All of which it says would have taken also taken a substantial time to implement.*

*Additionally, Assetz says as part of the process, lenders would have had to be willing to sell their loans and it's likely that lenders would have wanted to receive a full return of their capital. However, Assetz says any buyer would have likely wanted to pay a steep discount in order to get a return on their investment. It says the loans have fixed interest rates and so become increasingly unattractive to prospective buyers as commercial interest rates rise – which they did very quickly in late 2022 and beyond.*

*I'm also aware that other peer-to-peer platforms have taken the decision to sell its loan books wholesale at a similar time and lenders have received just their capital back or a slight loss on their capital.*

*Whilst any loss is unquantifiable at this stage, I'm persuaded by Assetz's comments that it's likely a sale of the loan book would've required its lenders to agree to receiving less than their invested capital back. As such, I'm satisfied that Assetz fairly considered the sale of the loan book as an option and, on balance, I'm persuaded the concerns it has raised regarding the timescales and prevailing economic factors involved, mean its decision to not take this action was fair and reasonable.*

***Closing its origination business and focus solely on managing the run-off of the loan book whilst remaining solvent***

*Assetz says an assessment was made of the expected income from the loan book over its remaining term and it compared this to the costs expected to be required to complete the process of collecting the loan book and returning the funds to respective lenders.*

*Assetz says that having done so, it anticipated that a five-year wind down period would result in an operational loss of around £720,000. However, in addition to the staff costs relating to collecting the loan book and returning funds to lenders, Assetz says it was also carrying staff costs relating to originating new business which would not be needed in the wind-down. It says that the estimated costs of notice period pay, redundancy payments and associated costs, would result in a total operation loss of closer to £2.6 million.*

*I can confirm that Assetz has provided evidence of financial projections to support this. So, it follows that, faced with the prospect of such a substantial expected cash deficit in a managed wind-down, I'm persuaded by Assetz's claims that it wasn't financially viable to pursue this course of action. Assetz also claims that had this action been pursued, the directors would have likely had to move immediately to appointing administrators to operate the wind-down plan in an insolvent administration. I also find this persuasive given the significant costs needed and the lack of funds to meet them.*

***Appointing administrators***

*Assetz says it considered appointing administrators to operate an insolvent wind-down but felt it would have resulted in significant additional costs. Assetz says it undertook an analysis of the expected level of administrator fees over a five-year wind-down period and estimated it to be at least £3.26 million. In addition, it found that an administrator would charge recovery fees of up to 8% on any loans where they needed to take recovery action – which could lead to significant further fees over and above the £3.26 million. It also anticipated that another £2 million of fees was likely, if for example £50 million of lending was subject to recovery fees of 4%.*

*Assetz says that any shortfall between the income expected to be received from the loan book, in addition to the costs to operate the wind down, would be deducted by an administrator from lenders' returns. It says that taking the expected operational deficit of £720,000 and adding administration fees of at least £3.26 million and also factoring in the prospect of some redundancy costs and a reduction to expected income due to the insolvency process, the expected level of deductions from lender income over the insolvent wind-down was calculated to be in excess of £5 million.*

*Considering Assetz's assessment of the impact on lender returns through an insolvent wind-down was significant, I'm persuaded that Assetz's reasoning to not take this action was also fair and reasonable.*

***Was Assetz's decision to introduce the Lender fee fair and reasonable?***

*Taking all the above into account, I'm persuaded it was fair and reasonable for Assetz to conclude that there were significant risks of poor outcomes for lenders by taking any of the actions considered above. And bearing in mind Assetz's obligation to have regard for lenders best interests and to treat them fairly, I'll now go onto explain why I consider Assetz's decision to introduce the Lender Fee was fair and reasonable in these particular circumstances.*

*Assetz says that having considered its historic recovery rates, it estimated a return of close to 100% of capital, plus some interest. It says the front loading of the Lender Fee was necessary to protect the capital position, but the tiered approach would still result in a five-year effective fee of just 1.15% per annum. And so, introducing the Lender Fee was considered to be the most viable option to maintain the platform and provide better outcomes for its lenders.*

*Assetz says the introduction of the Lender Fee has been successful. To support this, Assetz says that as of 15 December 2022 (date of introduction of the Lender Fee), there were 337 loans with a principal amount of £194.9 million – this included 63 loans marked as default with a principal value of £33.3 million with expected losses of £25 million and provision funds of £9 million. In the first ten months of the run-off to 31 October 2023, the total number of loans has reduced from 337 to 280 – equating to a repayment of 57 loans or 17% of the portfolio. It also says the total principal amount of loans has reduced from £194.9 million to £159.7 million – equating to a reduction of £35.2 million or 18% of the portfolio.*

*I think for the reasons I've given, it was fair and reasonable for Assetz to conclude that this alternative was better, overall, for its lenders than the options it considered and the facts above show that, with hindsight, it had a positive effect on returning capital to investors.*

*In reaching its decision, it's clear from the evidence I've outlined above that Assetz gave due and careful consideration to the potential outcomes for lenders and I'm satisfied it examined the data it had available, as well as the forecasts it was able to produce, in order to conclude that of all the options, introducing the fee would likely provide the best overall outcome for its lenders. In other words, I'm satisfied that Assetz has had regard for its lenders' interests as it is obliged to under the FCA's principles, and that looking at the circumstances as a whole, it has treated its lenders fairly.*

*I've been provided with the financials it has used to demonstrate its decisions were fair and reasonable. Although I accept that some of the financials provided are forecasts or estimations, the methodology and assumptions seem to me to be reasonable as they were based on historic actual data. I must also consider that Assetz had to take action based upon events that had not yet occurred and the financials provided were consistent with the approach it has taken.*

*So, on balance, I'm persuaded Assetz's decision to introduce the Lending Fee was fair, as it was consistent with the objective of maintaining the solvent run-off of the platform, whilst allowing lenders to continue to benefit from capital repayments and some interest (albeit less than expected).*

**Responses to my provisional decision**

Assetz accepted my findings, but Mr C didn't. In summary, he said:

- My departure from the law was unfounded and I failed to identify the law and the likely outcome of it when making a finding based on fairness and reasonableness.
- There is an apparent bias or predetermination in my provisional findings, due, in part, to the use of standard wording found in other decisions concerning Assetz's Lender Fee and also because he felt that I failed to refer to all of the information provided by him in his complaint submission.
- In considering all the circumstances of the case, my findings only commented on Assetz's actions and reasoning at the time of it deciding to introduce the Lender Fee, rather than considering the circumstances following its introduction.

- Assetz and its associated companies are going concerns with substantial assets, and this should be considered when looking at the fairness of the Lender Fee being applied.
- Overall, Mr C felt the complaint should be upheld and thing put right by making an award in his favour of Lender Fees deducted with interest to date of payment.

**What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've carefully considered the detailed submissions that Mr C has provided. I can confirm that I've read and considered his submissions in their entirety. However, I hope Mr C doesn't take it as a discourtesy that I won't be responding to each submission or every point he has raised. The purpose of my decision is to explain my findings on the issues I consider key in the complaint. These key issues do overlap somewhat but for ease I've provided my findings under separate headings below.

Identifying the relevant law and my reasoning for departing from it

I understand that Mr C feels strongly that I haven't identified the relevant law which I've decided to depart from. As such, I will provide further clarification.

The FCA handbook sets out in section DISP 3.6 "Determination by the Ombudsman" the basis for which I'm required to decide Mr C's complaint. This says:

> *"The Ombudsman will determine a complaint by reference to what is, in opinion, fair and reasonable in all the circumstances of the case."*

And it goes on to say under DISP 3.6.4:

*"In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:*

*(1) relevant:*

*(a) law and regulations;*

*(b) regulators' rules, guidance and standards;*

*(c) codes of practice; and*

*(2) (where appropriate) what* [they] *considers to have been good industry practice at the relevant time."*

Therefore, my decision must take into account the relevant law (including, here, whether a court would consider Assetz's variation clause to be fair), but I'm not obliged to follow the law.

To be clear, I've also considered the wider FCA principles that place responsibility upon Assetz. The most relevant being:

- Principle 6: A firm must pay due regard to the interests of its customers and treat them fairly.
- Principle 7: A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.

Mr C entered into a contract with Assetz in August 2015 when he opened his first P2P lending account. At this time, the relevant law under which the terms of a newly entered

contract should be assessed is in fact the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR 1999"), rather than the Consumer Rights Act 2015 ("CRA 2015") referenced in my provisional findings, as the CRA didn't come into force until 1 October 2015. So, I've considered Mr C's complaint again in light of the UTCCR 1999.

I note the following sections from the UTCCR 1999 that are of particular relevance to my consideration of Mr C's complaint about Assetz:

UTCCR 1999 Reg 4 says that the UTCCR 1999 apply to contracts between a seller/supplier and a consumer:

> *"4.(1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer."*

UTCCR 1999 Reg 5 sets out how fairness should be understood:

> *"5.(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
> *(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term."*

UTCCR 1999 Reg 6 sets out how fairness should be assessed:

> *"6.(1) … the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*
> *(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate–*
> > *(a) to the definition of the main subject matter of the contract, or*
> > *(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."*

UTCCR 1999 Reg 7 says that the language of the contract should be clear:

> *"7.— (1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.*
> *(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12."*

UTCCR 1999 Reg 8 sets out the effect of an unfair term:

> *"8.— (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.*
> *(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term."*

The UTCCR 1999 (in schedule 2) also sets out a list of terms which may be regarded as unfair – and says that terms which have the following effect may be unfair:

> *"… enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;"*

But it also goes on to say (in schedule 2 2(b)) that some variation clauses in financial services contracts may be fair *"…where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately."*.

As I mentioned in my provisional findings, the FCA published guidance FG18/7: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015 (CRA 2015) in December 2018. While this guidance is focused on the CRA 2015, the FCA makes clear that the guidance is also relevant to the UTCCR 1999:

> *"this guidance…applies equally to factors that forms should consider to achieve fairness under the UTCCRs, under which the test of fairness is essentially the same."*

I explained in my provisional findings that I'd considered this guidance. I acknowledge it was published after Mr C entered into the contract with Assetz, but I'm satisfied it is still relevant to consider this guidance in my findings.

As explained in my provisional findings, when Mr C first entered the contract, my understanding is that there were no fees that were paid by lenders. He did have the ability to exit the contract but to release his funds from existing loans, he would first need to find a replacement lender to be available to take on his loan parts.

In seeking to introduce the Lender Fee, Assetz were introducing a fee that wasn't previously payable. So on face value, the following term would seem to fall foul of UTCCR 1999, as it allows Assetz to unilaterally introduce charges without notice and without giving lenders the ability to terminate the contract:

> *"At present there is no membership or joining fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership or joining fee in future."*

But I've also considered this term in light of the whole contract, with the following terms being relevant as these set out how Assetz's could make changes more generally:

> *"If there is a change in circumstances or a change in the law, HMRC practice or regulations or the interpretation of them, or if any Assetz Capital Company wishes to make changes to the services which it provides on the Network or Website, the Assetz Capital Companies may amend these Terms from time to time as they think fit.*
>
> *Where a change to these Terms does not affect existing Micro Loans and does not disadvantage existing Lending Members or where the changes are reasonably believed by the Assetz Capital Companies to be in the interests of the Lending Members, the Assetz Capital Companies may make any amendments to these Terms at any time with immediate effect. Where it is necessary or desirable to make changes to these Terms which affect existing Micro Loans or may disadvantage existing Lending Members, the Assetz Capital Companies will endeavour to provide 30 days' notice before any changes take effect. Any such notice shall be posted on the Website.*
>
> *Any amendments will be posted on the Website as soon as reasonably practicable. By continuing to use the Website, by either logging in or leaving*

*investments within Investment Accounts or Access Accounts on a daily basis, each Lending Member agrees to be bound by the amended Terms."*

It appears Assetz sought to use these latter terms to amend the former term. Looking at these terms, the contents appear to align with the guidance set out in FG18/7 within the potentially 'fair' reasons for amending the terms. But other parts of the latter terms – specifically the part that says Assetz's reasons for making a change might include *"change in circumstances… or if any Assetz Capital Company wishes to make changes to the services which it provides on the Network or Website"* – appear to fall outside FG18/7's potentially 'fair' reasons. So, I acknowledge that it makes it difficult for lenders, like Mr C, to understand when changes might be made or the level of changes that might introduce new charges.

I explained in my provisional findings that I thought there were issues with the terms which do touch on things that might suggest unfairness – such as the terms not specifying when, and for what reason, the Lender Fee might be introduced; the costs of the fee; and that Assetz didn't allow for lenders to exit without penalty. I understand Mr C doesn't think my decision fully considered these points, or the relevant case law, so I will provide further commentary around these points.

Mr C's contract with Assetz is open-ended. I note the following European case law from the case of *Vertrieb* – which acknowledged in open-ended contracts, the firm has a legitimate interest in being able to adjust the fees they charge. This says:

*"the legislature recognised, in the context of contracts of indeterminate length… the existence of a legitimate interest of the supply undertaking in being able to alter the charge for its service..."*

This opinion is also supported by the FCA guidance in FG18/7. So relying on the latter terms to introduce the Lender Fee doesn't automatically mean Assetz is treating Mr C unfairly.

I've looked at what the terms said about what notice is given and the ability to leave the contract. These explained:

*"Where it is necessary or desirable to make changes to these Terms which affect existing Loan Units or may disadvantage existing Lending Members, the Assetz Capital Companies will endeavour to provide 30 days notice before any changes take effect. Any such notice shall be posted on the Website."*

This demonstrates that only in some circumstances notice will be given and this is likely to be through updates to the website.

The ability for a lender to exit the contract is covered in Assetz's terms and I understand that lenders had the ability to stop participating in their investments, but there was only one option for a lender to free themselves. These are:

- Through transfer, where a lender could transfer their interest in a loan to another lender, which would bring the lender's commitment to an end, thereby freeing the lender;
- Though termination – where a lender could terminate their membership with immediate effect, but I understand this would only be possible if the lender does not have any current Loans outstanding.

This means while there is a general (and limited) ability to terminate the contract, there isn't a specific power to leave in response to a variation.

Mr C was first given notice of the Lender Fee on 15 December 2022, but his ability to reject the change and end the contract was significantly impaired at the time. As previously mentioned, the ability to close a P2P account was dependent on other lenders taking on loan parts. But importantly, at the time of introducing the Lender Fee, Assetz also made the decision to also close its secondary market, so Mr C was unable to exit from the loans he was invested in. As such, I acknowledge that both the former and latter terms could be determined as causing a significant imbalance in the rights and obligations of Assetz and Mr C, to Mr C's detriment.

I also acknowledge that, when he first entered the contract, Mr C wasn't aware when the Lender Fee might be charged or how much the Lender Fee would be. Indeed, the information given at the outset suggested he would pay no fees, and there was no information about how any future fee might be calculated. It seems unlikely that a reasonable consumer would have agreed to an individually negotiated contract which left them vulnerable to fees of an unspecified amount, calculated via an unknown method, which could be introduced at the discretion of the business. So, the evidence does point towards the likelihood that a court may find that both the former and latter terms are unfair under the UTCCR 1999.

However, as I've previously explained, I'm not bound by the law – rather I must decide the complaint based on what is fair and reasonable in all the circumstances of the case. I don't intend to repeat what I explained in my provisional findings beyond that I acknowledge that this decision represents a departure from the conclusion a court might reach. But in my opinion, for the reasons given in my provisional findings, it is nevertheless fair and reasonable for Assetz to charge the Lender Fee, based on all the circumstances of the case.

Apparent bias/predetermination due to the use of standard wording

Mr C says that there is an apparent bias or predetermination in my provisional findings, due, in part, to the use of standard wording found in other decisions concerning Assetz's Lender Fee.

As I've previously mentioned above, DISP 3.6 explains that an ombudsman's role is to determine a complaint by reference to what is, in their opinion, fair and reasonable in all the circumstances of the case. And in doing so, I acknowledge that this includes considering each case on its own merits.

However, paragraph 40.10 of Paget's *Law of Banking* makes it clear that ombudsman may develop guidance to enable them to consider similar complaints:

> *"There are often similarities between complaints brought to the FOS. This is unsurprising because financial products are generally sold on standard terms to a wide audience...*
>
> *As noted by Ouseley J in R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd5, "the fact that reasonable people can differ very strongly about what is or is not fair, necessitates the development by the Ombudsman of some guide or criteria which he can apply in his task. It also makes for consistency in decision-making.""*

Furthermore, the Court of Appeal in *R (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* also praised consistency of approach:

> *"Lastly, the common law requires consistency: that like cases are treated alike. Arbitrariness on the part of the ombudsman, including an unreasoned and unjustified failure to treat like cases alike, would be a ground for judicial review."*

In other words, as a service, we should consider each complaint on its own individual merits and we should also 'treat like cases alike'.

I appreciate Mr C has some concerns having read other published decisions regarding Assetz's introduction of the Lender Fee, however I can assure him that I haven't unthinkingly followed any standard wording used and that I have fully considered all of Mr C's submissions and the particular circumstances of his individual complaint before reaching my decision.

Non-consideration of Assetz's actions after the introduction of the Lender Fee and its associated companies being going concerns with substantial assets

I understand Mr C feels that my provisional findings only commented on Assetz's actions and reasoning at the time of it deciding to introduce the Lender Fee, rather than considering the circumstances following its introduction.

Essentially, Mr C suggests that at the time the Lender fee was introduced, the wider Assetz group of companies were in a better financial position than Assetz has previously indicated. And instead of charging a Lender Fee to retail lenders, Assetz should have asked the wider group (and particularly the new institutional lender company) to fund the Lender Fee of the retail platform.

My role doesn't require me to assess and identify the best option for funding the retail run-off. Rather, I've assessed whether the option chosen by Assetz – the introduction of the Lender Fee – is fair and reasonable in all the circumstances. I acknowledge that this includes considering the other available funding options, which I covered in my provisional findings, and I don't intend to repeat them in this decision. However, I have also now considered the option of the Lender Fee having been funded from Assetz's wider group.

Assetz has explained to our service that there was a group wide deficit at the time of its decision to introduce the Lender Fee and I can confirm that I've seen Assetz's quarterly group managements accounts which supports this. Assetz has also provided the run-off plan it shared with the FCA, which also clearly demonstrates a group wide deficit into the future, without the Lender Fee being introduced. Assetz has explained that this information is commercially sensitive and so I'm not in a position to share this information with Mr C. I appreciate Mr C hasn't seen this information, but under DISP 3.5.9R I'm able to accept information in confidence where I consider it appropriate.

With regard to the question about the institutional lender side of Assetz funding the run-off, I don't think this party was under any obligation to financially support the retail side of the platform. Furthermore, Mr C's points regarding this appear to be about the structural set up of the wider Assetz group, however, I can only consider the complaint against the respondent on this complaint – Assetz SME Capital Limited – which doesn't include the wider group such as the new institutional lender side of Assetz.

Summary

Having considered all of Mr C's further submissions, I'm not persuaded to depart from my provisional findings and, on balance, I'm satisfied Assetz's decision to introduce the Lending Fee was fair and reasonable in all the circumstance, as it was consistent with the objective of maintaining the solvent run-off of the platform, whilst allowing lenders to continue to

benefit from capital repayments and some interest (albeit less than expected). I'm also satisfied that Assetz carefully considered the alternatives and that its decision to introduce the Lender Fee was made with lenders' best interests in mind.

## My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 31 July 2025.

Ben Waites
**Ombudsman**