



<u>Decision Ref:</u>	2019-0341
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to apply a tracker rate at a point in time CBI Examination Failure to apply the correct tracker rate as part of the Examination
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainants' mortgage loan held with the Provider, on their private dwelling house and the overcharge of approximately €15,200 in interest by the Provider on the loan account.

The complaint was received by the Financial Services Ombudsman in **August 2011**. It detailed that the Complainants had entered into a tracker mortgage loan (ECB + max 1.40%) signed in December 2004 for the sum of €249,000.00 over the term of 35 years. The Complainants fixed the interest rate for a period of four years from **1 August 2007**. The Complainants submit that there was no indication at that time that the mortgage loan would not revert to a tracker interest rate once the fixed interest rate had ceased. The Complainants broke from their fixed rate in **November 2008** and a variable interest rate was applied to the account. The Complainants submit that during a telephone call with the Provider they were told that they were not entitled to apply a tracker interest rate to the mortgage loan. The Complainants submitted that the Provider never advised them in November 2008 that if they had allowed the term of the fixed rate to expire they could have gone back on the tracker rate of interest.

This complaint was placed on hold by the then Financial Services Ombudsman's office between **May 2012 and July 2015** as a result of High Court and Supreme Court litigation that was ongoing at that time. The litigation was not in relation to this complaint but dealt with similar issues to those arising in relation to this complaint.

On conclusion of the litigation, engagements then took place between the Central Bank of Ireland (the “Central Bank”) and the Provider with respect to a scheme of redress for mortgage account holders who were affected by particular conduct of the Provider.

The Complainants’ mortgage loan account was considered by the Provider under the Provider’s mortgage redress programme. The Complainants’ complaint remained on hold within this office throughout the process.

An offer was made to the Complainants by the Provider in **August 2015**, as part of the Provider’s mortgage redress programme in relation to admitted failures of the Provider regarding the Complainants’ mortgage loan account, as follows;

“On 01/11/2008, [the Complainants] broke from the fixed interest rate period which applied to [the Complainants’] mortgage account at that time. This break took place before the scheduled maturity date of the fixed interest rate period.

*In breaking from [the Complainants’] fixed interest rate period early, [the Complainants] lost a contractual right to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period. **However at the time that [the Complainants] broke from [their] fixed interest rate period, [the Provider] did not inform [the Complainants] that [they] would be unable to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period.**”*

In the offer made to the Complainants in 2015, the Provider proposed to provide redress and compensation to the Complainants as follows;

Part One: Redress – Balance reconstruction and possible net refund

The redress offering detailed that *“if [the Complainants] had been on a tracker mortgage since [their] fixed interest rate period matured, it is possible that [the Complainants] may have paid less than the amount [the Complainants] actually paid.”*

The Provider recalculated the mortgage loan account on the basis that the Complainants would have chosen to move to the tracker rate mortgage until their account was closed.

The Provider *“calculated a net refund of overpayments due”* to the Complainants of €15,352.86.

Part Two: Compensation – Additional compensation payment

The Provider offered the Complainants €3,000 in recognition of their failure in this matter and €400 *“to pay for independent advice”*, if the Complainants chose to seek advice in relation to the offering.

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The Complainants signed the Payment Authorisation Instruction Form on **16 September 2015** accepting the redress and compensation offer. The Provider confirmed by letter dated **22 September 2015**, that the redress and compensation payment had been made to the Complainants' nominated bank account.

The Complainants submitted an appeal to the Provider's appeal panel on **16 September 2015**. The Complainants appeal was twofold as follows;

1. As part of the mortgage redress programme, the Provider should have applied the tracker interest rate to the Complainants' mortgage loan account from November 2008 when the fixed interest rate period was broken.
2. The Provider should have applied a tracker interest rate to the Complainants' new mortgage loan account from June 2014.

The appeal panel issued a decision dated **01 December 2015**, which decided that the Complainants were successful in their appeal. The content of the appeal panel's decision is set out later in this decision.

The Complainants signed the acceptance form to the appeal panel decision on **21 December 2015**. There was correspondence between the Complainants, the Provider and the appeal panel with respect to implementing the decision of the appeal panel between December 2015 and July 2016. The Complainants subsequently withdrew their acceptance during a telephone conversation with the Provider on **19 July 2016**. The appeal panel decision had not been implemented at that time by the Provider.

As the Complainants had been through the Provider's appeal panel and they had not accepted the outcome, the investigation and adjudication of the complaint to this office was progressed.

The conduct complained of that is now being adjudicated on by this office and that is the subject of this Decision, is as follows;

1. The Provider failed to apply the tracker interest rate to the Complainants' mortgage loan account from **November 2008** when the fixed interest rate period was broken by the Complainants.
2. The term of 22 years on the tracker portability mortgage now offered to the Complainants is unfair, in that, the term of their variable interest rate mortgage is 35 years.
3. The Provider has unfairly offered the Complainants a tracker portability mortgage with an additional 1%.

The Complainants' Case

The Complainants submit that the applicable tracker interest rate on their mortgage loan account should be backdated to the date upon which they broke from their original fixed

rate in **November 2008**, rather than from the maturity date of the fixed rate on **29 July 2011**.

The Second Complainant submits that she made a call to the Provider on **13 November 2008** and asked for “figures” to be sent to her to come off the fixed rate and go back on the tracker interest rate. The Second Complainant submits that she was told that the Provider was for a limited period of time waiving any penalties for breaking the fixed interest rate period but that the account would be going on a variable interest rate. The Complainants submit that they were not informed during this call that they would be entitled to revert to a tracker interest rate if the mortgage loan stayed on the fixed interest rate period until its expiry in **July 2011**.

The Complainants submit when they were applying for their new mortgage in **2014** that they sought for a tracker interest rate to be applied to that account. They submit that they discussed this with the assistant manager in the branch. The Complainants submit that while they have been offered a tracker portability mortgage loan, as directed by the Appeal Panel, they are seeking for the tracker portability mortgage loan not to include the additional 1% portability rate. The Complainants also submit that the term of the tracker rate portability mortgage should match the term of their existing variable rate mortgage loan, which is 35 years.

The Complainants are seeking for the Provider to put them “*on a tracker mortgage with a split rate variable and minus the 1% portability*”.

The Provider’s Case

The Provider submits that the Complainants applied for their original mortgage loan through their chosen brokers in 2004. The Provider submits that a Letter of Loan Approval was issued on **9 December 2004** offering a Tracker mortgage loan (ECB + max 1.40%) facility for the amount of €249,000 over 35 years. The Provider submits that the Complainants signed a Letter of Acceptance for the mortgage loan facility in the presence of their solicitor on 14 December 2004.

The Provider submits that in **July 2007**, the Complainants were in contact with the Provider’s Mortgage Department to discuss their mortgage account to include the option of switching to a fixed interest rate period. The Provider sent a letter to them enclosing a list of the fixed interest rate options available at that time, and informing them that if they opted to transfer to a fixed interest rate a transfer fee of €100.00 would apply. The Provider submits that the Complainants subsequently returned the signed options form on **1 August 2007**, indicating their preference for a 4 year fixed interest rate at 5.50%. The Provider submits that the Complainants’ mortgage loan was amended from a tracker rate of 5.25% to a fixed rate of 5.50% from 1 August 2007.

The Provider submits that on **13 November 2008**, the Complainants wrote to the Provider requesting to exit the fixed rate period early in favour of moving to a variable rate. The Provider submits that the mortgage loan account was immediately amended to the

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variable rate and remained on a variable rate until the account was redeemed in **June 2014**.

The Provider submits that when the Complainants sought to fix for a four year period it would not have been "*relevant, correct or appropriate*" for the Provider to inform them that they would not be able to revert back to their original contract once the fixed rate had ceased, because the Complainants would have been entitled to revert back to their original contract on the expiry of the four year fixed interest rate period.

The Provider submits that the implications that arose were due to the fact that the Complainants' contractual entitlement to a tracker interest rate was only available on the expiry of the fixed interest rate period. However that entitlement was lost, in November 2008, when the Complainants chose not to allow the four year fixed interest rate period to expire, but rather they chose to break out of that fixed period early in favour of a variable rate. The Provider submits that if the Complainants had allowed the four year fixed interest rate to naturally expire in **July 2011** that the Complainants would have been offered the option of choosing a tracker interest rate on the expiry date in accordance with the terms and conditions of their loan agreement with the Provider.

The Provider submits that as a result of the Central Bank investigation the Provider identified a failure in connection with the management of the Complainants' mortgage loan account. The failure that was identified in relation to the Complainants' mortgage loan account was the failure to inform them that by breaking early from the four year fixed interest rate period in **November 2008**, that they would lose their entitlement to a tracker interest rate on the expiry of the term in **July 2011**. The Provider submits that the Complainants have been redressed for this failure. The Provider submits that the purpose of the redress and compensation offer was to return the Complainants' mortgage loan account to the position it would have been in had the failure not occurred and to compensate the Complainants for that failure.

The Provider submits that the Complainants moved house in **2014** and drew down their current mortgage loan as a Managed Variable Rate Home (Loan >80% and <=90% LTV) in June 2014.

The Provider submits that the Complainants were successful in their appeal to the appeal panel with respect to the application of a tracker portability product to their mortgage account. The Provider submits that it was directed by the appeal panel to apply a tracker interest rate of ECB + 1.4% on the balance of their original mortgage at the time of its redemption in 2014 within 10 working days. The Provider submits that there was an issue implementing that decision but that the Provider notified the appeal panel of this and offered the Complainants a more favourable tracker interest rate of ECB + 1.25%, together with a balance adjustment of €2,335.18 and a net refund of overpayments of €5,174.01 on the mortgage loan taken out in 2014.

The Provider states that "*it is the Bank's position that the Complainants' original complaint to the FSO, in 2011, has been resolved pursuant to the [mortgage redress programme]. Further, it is the Bank's position that by virtue of the fact that the Complainants signed up*

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to and accepted the [appeal panel] Decision, the Complainants are prevented from pursuing this current complaint to the FSO (and or to the Courts). This submission and the previous submissions delivered on behalf of the Bank are provided strictly without prejudice to that preliminary objection to this complaint”.

The Complaints for Adjudication

The complaints for adjudication are;

- (1) The Provider failed to apply the tracker interest rate to the Complainants' mortgage loan account from November 2008 when the fixed interest rate period was broken by the Complainants.
- (2) The term of 22 years on the tracker portability mortgage now offered to the Complainants is unfair, in that the term of their variable interest rate mortgage is 35 years.
- (3) The Provider has unfairly offered the Complainants a tracker portability mortgage with an additional 1%.

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 Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

A Preliminary Decision was issued to the parties on 9 October 2019, 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.

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

Before examining the issues raised by the Complainants, I will firstly address an issue with respect to the jurisdiction of this office to consider this complaint, which was raised by the Provider.

I note that the Independent Secretariat to the appeal panel, wrote to the Provider and the Complainants on **4 December 2015** enclosing a copy of the appeal panel decision.

The Complainants then raised queries in respect of the appeal panel decision. The appeal panel set out its position with respect to those queries in the letter of **17 December 2015**.

It appears that the Complainants signed the acceptance of the appeal panel decision on **21 December 2015**, which details that the acceptance was in “*full and final settlement*” which meant that the Complainants would not “*be entitled to make any other claim or complaint to the Financial Services Ombudsman...and/or the Courts in relation to the offer made to you by the Bank under the [redress programme] and/or your Appeal, except as regards the costs of your Appeal which will be dealt with separately.*”

Point 6 of the appeal panel decision **acceptance form** sets out:

“If you accept the [appeal panel] Decision, and the [appeal panel] Decision directs the Bank to take any other action which the [appeal panel] considers appropriate, the Bank will endeavour to take that action within 10 business days of the Bank’s receipt of your completed Acceptance Form”.

I note that the Provider did not implement the appeal panel’s decision within 10 working days and it wrote to the Secretariat of the appeal panel on **12 April 2016** stating, that it had difficulties implementing the decision and set out a proposal of how the decision could be implemented.

The Provider’s internal notes of **19 July 2016** state, among other things, the following:

“Spoke with [the Second Complainant] via mobile... I referred to the fact that they had signed the acceptance for the Tracker product offered as a result of the [independent secretariat] review and asked if they were still happy to accept this, [the Second Complainant] advised that they wished to withdraw this acceptance. To put Banks response in writing to customers Rang [independent secretariat] and spoke with [a representative] who is to query the process regarding withdrawal of acceptance- she will revert as soon as she has an update”.*

I note that the Provider’s internal notes dated **19 July 2016** also state that:

“[a representative] from [the independent secretariat] rang and confirmed that according to the T&Cs the customer can decide not to accept the [appeal panel]

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decision but as soon as the customer signs the acceptance this is binding on her. She recommended that I revert to legal”.

While the Complainants signed the acceptance of the appeal panel’s decision on **21 December 2015**, I note that they sought to withdraw their acceptance during a telephone conversation with the Provider on **19 July 2016**. As the decision of the appeal panel had not been implemented at the time of withdrawal and as the Provider had sought to change the terms of the decision, by way of their proposal of **12 April 2016**, I am of the view that the Complainants are entitled to proceed with their complaint through this Office.

I will now proceed to deal with each of the elements of the Complainants’ complaint in turn.

(1) The Provider failed to apply the tracker interest rate to the Complainants’ mortgage loan account from November 2008, when the fixed interest rate period was broken by the Complainants

The Complainants signed the **Acceptance of Loan Offer** (Mortgage Loan Account ending **389**) on **14 December 2004**. The Letter of Loan Offer provided for the following;

“Loan Type: Tracker Mortgage (ECB + max 1.4%) – Home Loan

...

Term: 35 year(s)”

The Acceptance of Loan Offer outlines as follows;

“I/we the undersigned accept the within offer on the terms and conditions set out in

- i. Letter of Approval*
- ii. The General Mortgage Loan Approval conditions*
- iii. The [Provider] Mortgage Conditions”*

The following are extracts from the **Special Conditions** in the **Letter of Approval** applicable to the mortgage loan, relevant to this complaint;

- **Special Condition D**

“THE INTEREST RATE APPLICABLE TO THIS TRACKER MORTGAGE LOAN MAY BE VARIED FROM TIME TO TIME BY [THE PROVIDER] PROVIDED THE INTEREST RATE WILL NOT EXCEED 1.40% OVER THE EUROPEAN CENTRAL BANK REFINANCING RATE (THE “ECB RATE”)”

- **Special Condition E**

“THE ECB BASE RATE MAY BE VARIED FROM TIME TO TIME BY THE EUROPEAN CENTRAL BANK (THE “ECB”). IN THE EVENT OF ANY VARIATION OF THE ECB RATE, THE INTEREST RATE APPLICABLE TO THIS LOAN WILL NOT BE MORE THAN 1.40% OVER THE ECB RATE AS VARIED BY THE ECB AND THE REVISED INTEREST RATE FOR THE LOAN WILL APPLY NOT LATER THAN ONE CALENDAR MONTH FROM THE DATE

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PROVIDED BY THE ECB AS THE DATE ON WHICH THE VARIATION TO THE ECB RATE WILL TAKE EFFECT.”

- **Special Condition H**

“PLEASE NOTE THAT WHERE THE APPLICANT SWITCHES THE RATE ON THIS LOAN TO A RATE WHICH IS FIXED FOR A CERTAIN PERIOD, THE APPLICANT MUST INFORM [THE PROVIDER], ON EXPIRY OF THE FIXED RATE PERIOD, WHETHER THE RATE ON THE LOAN IS TO SWITCH INTO A FURTHER FIXED RATE (IF AVAILABLE) OR WHETHER THE LOAN IS TO REVERT TO A TRACKER MORTGAGE LOAN AS DESCRIBED ABOVE. IN THE ABSENCE OF INSTRUCTIONS FROM THE APPLICANT AT THE EXPIRY OF THE FIXED RATE PERIOD, THE INTEREST RATE WILL SWITCH TO THE THEN CURRENT VARIABLE INTEREST RATE AND AS MAY BE VARIED FROM TIME TO TIME THEREAFTER”.

The following is extracted from the **General Mortgage Loan Approval Conditions** applicable to the mortgage loan, relevant to this complaint;

“Conditions relating to fixed rate loans

5.1 *The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*

5.2 *The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*

5.3 *Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:*

- (a) a sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid, for the remainder of the Fixed Rate Period, or*
- (b) a sum equal to [the Provider’s] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis), which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate Period of the loan, or part thereof, being repaid.*

5.4 *Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed period to convert to a variable rate loan agreement which will carry no such redemption fee.”*

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The Complainants contacted the Provider by telephone on **12 July 2007**, seeking options with respect to applying fixed rate options to the mortgage loan. This office has not been provided with audio evidence of this telephone call, as it appears that the Provider does not have an audio record of this call. While this is disappointing, it is not in dispute between the parties that the call took place and that the purpose of the call was to request that the Provider issue fixed interest rate options to the Complainants.

The Second Complainant submits that during this call she was advised that she would receive a letter in the post and she should tick the appropriate box for the number of years that they wished to fix the mortgage loan. The Complainants submit that they decided to choose a four year fixed interest rate. The Complainants state *"From both the phone call to the mortgage service team and the letter we received from [it], there was no indication to us that we would not revert back to our original contract once the fixed rate had ceased. If at this stage it had been explained to us thoroughly of the implications of us fixing our mortgage we would have not even considered switching to a fixed rate"*.

The Provider submits that when the Complainants sought to fix for a four year period in July 2007, it would not have been *"relevant, correct or appropriate"* for it to inform them that they *"would not be able to revert back to their original contract once the fixed rate had ceased"*, as the Complainants would have been offered a tracker interest rate on the expiry of the four year fixed interest rate period.

In this regard, **Special Condition H** to the mortgage loan sets out what would happen at the *"expiry"* of a fixed interest rate period, in the event that a fixed interest rate was applied to the mortgage loan. Special Condition H is clear in this respect, that on the *"expiry"* of the fixed interest rate, that the mortgage holder was required to inform the Provider, whether the loan was to switch to a further fixed interest rate (if available) or whether the loan was to revert to the tracker loan as described in the special conditions. The Complainants' tracker interest rate was ECB + 1.4%. In these circumstances, I cannot accept the Complainants' submission that the Provider should have advised them, in the telephone call in **July 2007** that the loan would not revert to a tracker interest rate, as this would not have been correct.

The Provider issued a fixed rate instruction form on **13 July 2007**, which included a list of fixed interest rate options and outlined as follows;

"If you choose a fixed rate, the standard fixed rate conditions will apply"

The fixed rate instruction form was signed by the Complainants electing for a fixed rate of 5.50% for four years. The Complainants' mortgage loan was amended from a tracker rate of 5.25% (ECB + 1.40%) to a fixed rate of 5.50% with effect from **1 August 2007**.

It is understood that the Complainants contacted the Provider by telephone to change the rate applied to their mortgage loan on **13 November 2008**. This office has not been provided with audio evidence of this telephone call. In this regard, the Provider submits that *"due to the passage of time, [the Provider] has been unable to locate a record or any internal notes of the telephone call between the Complainants and the [Provider] on 13 November 2008."* It is most disappointing that the Provider does not have a copy of the

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audio of this call. However, I note that it is not in dispute between the parties that a telephone call took place.

The Second Complainant submits that she telephoned the Provider's Mortgage Department from the First Complainant's mother's landline between 9.30am and 10.00am *"where I asked to have figures sent to me to come from fixed rate back to my tracker rate. During this conversation I was told for a limited time [the Provider was] waiving any penalties to customer's but was told I would revert back to a variable rate at no time during my time on the phone was I told that I would be entitled to revert back to the tracker if I stayed on my 4yr and stuck out term of the fixed rate. The [Provider] member of staff told me to write a fax stating I want to go onto a variable rate..."*.

I note that the Complainants' letter to the Provider dated **13 November 2008**, states the following:

"The above named would like to change our mortgage from a fixed rate to a variable rate. We rang a customer service rep and were told that no penalty would be incurred if this could be done as soon as possible. If there is a problem could you contact me on..."

I note that the Provider accepts that there was a failure in connection with the management of the Complainants' mortgage loan account in **November 2008**. This failure was identified as a result of an investigation by the Central Bank. The failure that the Provider identified, was that the Provider *"failed to inform the Complainants that, by breaking early from the four year fixed interest rate period, in November 2008, they would lose their entitlement to a tracker interest rate at the expiry of the four year fixed term ie. July 2011"*. I note that redress and compensation was offered to the Complainants, from **July 2011**. Further content of the redress and compensation letter is quoted in the background section of this decision, and I do not consider it necessary to repeat that content here again. The Provider submits that the offer made to the Complainants was based on giving them the benefit of an assumption that had they been informed that by breaking early from their fixed rate period, they would lose their entitlement to a tracker interest rate, they would not have done so. The Provider states *"the Complainants also received the benefit of a second assumption that they would have chosen to remain on the four year fixed interest rate until the scheduled maturity date, at which point, they would have selected a tracker interest rate. An additional payment was also provided to the Complainants to compensate them for the Bank's failure in this matter"*. The Provider submits that the level of redress and the amount of compensation offered to the Complainants was reasonable.

The issue to be determined is whether the Provider should have applied a tracker interest rate to the Complainants' mortgage loan account from **November 2008** when the fixed interest rate period was broken by the Complainants. In this regard, it is most disappointing that the audio recording of the telephone call that took place on **13 November 2008** is not available. In these circumstances, I note the accuracy with which the Second Complainant describes the time and location of the telephone call. I also note that the Provider has not furnished any evidence that contradicts the Second

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Complainant's submission that she requested figures for the mortgage loan to be returned to a tracker interest rate at that time and was advised by the Provider that this was not possible.

On the basis, I accept that the Complainants did make a request for a tracker interest rate to be applied during the call on **13 November 2008** and the Provider's representative informed them that it was not possible to do so. As such, it is necessary to consider whether this information given by the Provider's representative to the Complainants at that time was correct.

In this regard, I have considered the content of the terms and conditions applicable to the Complainants' mortgage loan, including the Letter of Approval, the General Mortgage Loan Approval conditions and the Provider Mortgage Conditions.

Special Condition H in the **Letter of Approval** outlines that if the Complainants switched the rate on the loan to a rate that was "*fixed for a certain period*", that on the "*expiry of the fixed period*", then the Complainants had the right to inform that Provider whether the loan was to switch to a further fixed rate, if one was available, or to "*revert*" to the tracker mortgage of ECB + 1.4% (which was contained in Special Condition E). Special Condition H, then goes on to say that in the "*absence of instructions*" from the Complainants that the interest rate would then switch to the "*then current variable interest rate*".

Having regard to the language used in Special Condition H, I am of the view that Special Condition H is sufficiently clear, such that a prudent borrower would be aware that the "*expiry*" of a fixed interest rate, related to the "*expiry*" of the "*certain period*" for which the mortgage loan was fixed. It is clear that what was envisaged was the natural expiry of the "*certain period*" that the mortgage loan was fixed for. Furthermore, in circumstances where, Special Condition H goes on to set out the rate that would be applied if there was no instructions from the Complainants, it could not be the case that the meaning of the word "*expiry*" contained in Special Condition H, could be interpreted as applying to circumstances where the fixed interest rate period was brought to an end by the Complainants seeking to break out of that fixed interest rate period.

With respect to the Complainants' mortgage loan the "*expiry*" within the meaning of Special Condition H meant the expiry of the "*certain*" four year period which applied between **1 August 2007** and **31 July 2011**.

I note that the **Conditions relating to fixed rate loans** in the **General Mortgage Loan Approval Conditions**, were stated to be "*applied*" when the fixed interest rate instruction took effect from 1 August 2007. I note that **Condition 5.4** of those conditions outlines that the Provider and the Complainant "*shall each have the option at the end of each fixed period to convert to a variable rate loan agreement will carry no such redemption fee.*" It appears to me that **Condition 5.4**, also does not apply in the circumstances of a break in a fixed interest rate period.

I note there is also no specific provision in the conditions applicable to the Complainants' mortgage loan that sets out what interest rates would or should be made available to the Complainants in the event of a break of a fixed interest rate period.

As such, it appears to me that when the Complainants called the Provider on **13 November 2008** and sought "*figures*" to break out of the fixed interest rate period and apply a tracker interest rate to the mortgage loan, there was no contractual obligation on the Provider to offer the Complainants a tracker interest rate at that time. The Complainant was seeking to vary the terms of the mortgage loan during the four year "*certain period*" of the fixed interest rate and it was a matter for the Provider to decide firstly whether it wished to accede to that request and if so, secondly what interest rate products it wished to offer to the Complainants. In the circumstances, it appears that the Provider elected to offer a variable interest rate, and the Complainants accepted this offer and instructed that a variable rate be applied by fax dated **13 November 2008**.

It is of course disappointing that the Provider failed to highlight to the Complainants, prior to breaking from the fixed rate in **November 2008**, that the consequences of this were that the mortgage loan would not return to the tracker rate of ECB+1.4% at the expiration of the four year fixed interest rate period in July 2011. The Provider failed in its duty to provide information to this effect to the Complainants' in **November 2008**. That said, I note that the Provider has accepted its failure and offered compensation and redress to the Complainants in relation to this failure.

Therefore, in the circumstances of this particular complaint, there was no obligation on the part of the Provider to offer the Complainants a tracker interest rate on the Complainants' mortgage loan when the Complainants broke from their original fixed rate on **13 November 2008**. In these circumstances, I am of the view that when the Provider's representative informed the Complainants in the telephone call on 13 November 2008, that they could not apply a tracker interest rate to their mortgage loan at that time, that piece of information given was correct.

I note that as part of this element of the Complainants' complaint the Complainants take issue with the role of the Provider's Service Department, who the Complainants contacted by phone. The Complainants submit that during the conversation with the Provider on **13 November 2008** they were not seeking financial advice. The Complainants state that they were "*merely looking for figures*". The Complainants also state that "*if a [Provider] customer is looking to switch from their rate to a higher or lower rate surely such a major decision should have to be signed off by a high management member and at this point questions as to if the [Provider's] customer is aware of the implications in switching their rates and make sure they fully understood them, it is just really duty of care to a customer. [The Provider] only looked [after] their own interests not the customers*".

The Complainants have also raised an issue with respect to a telephone call that took place on or around **19 November 2008**, as follows;

"Even after coming off fixed [rate] we were never told our variable rates would go up so I had to ring the customer services and I was told not to worry the rate would be

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going down after Christmas, I don't have the exact date of this phone call but it would have been on or before the 19th November 2008".

The Provider states that *"Notwithstanding the fact that the Bank has no records of the telephone call, it is the Bank's submission that variable interest rates by their very nature, and as the term "variable" suggests, tend to vary and may increase or decrease, depending on some... factors... Therefore, it would have been impossible for a representative of the Bank to have predicted variable rate fluctuations for any future date"*. The Provider goes on to state that *"it is worth noting that the variable interest rate of 5.80% in November 2008 did decrease in 2009, and went as low as 2.55% in June 2009, though it did vary upward again later in 2009"*.

The Provider submits that the criteria it takes into consideration when calculating increases or decreases of a variable interest rate on mortgage accounts include cost of capital, cost of risk, cost of borrowing and availability of funds. The Provider submits that it sources funds from a variety of different areas including a limited level of funding from the European Central Bank (ECB) together with funds from customers' deposits and the wholesale money market. The Provider states *"Accordingly, the variable rate for mortgage accounts offered to customers is a reflection of the blended costs that the Bank incurs together with its competitive position in the marketplace at any given time"*.

The Provider submits that in relation to calls received from its customers, staff members working on the mortgage line in Provider's Service Department are fully trained, and would not advise customers whether to change rates or not. The Provider submits that the facts would be given to the customers but advice is not given. The Provider states, that *"What the [Named Service] staff can confirm on the customers request is the various interest rates [the Provider] were offering and the approximate repayment for each interest rate. It is then the customer's decision whether to change rates or not"*.

I have been provided with a copy of **Terms and Conditions** with respect to the Provider's Service Department. These terms and conditions, define the Provider's Service Department, as;

"...the system provided by the Bank from time to time to enable Customers to access and utilise services provided by the Bank using telephone, internet or other technology-based communication."

A *"Customer Service Adviser"* is defined in the **Terms and Conditions** as:

"a Bank representative who assists a Customer to access and utilise the [Named] Service."

I note that **Clause 6** of the **Terms and Conditions** provides that:

"The [Named] Service is a method of accessing and utilising services provided by the Bank. Accordingly save to the extent that these conditions provide otherwise,

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all mandates relating to the Accounts and all Terms and Conditions applicable to the Accounts remain in full force and effect..."

I note that **Clause 15.3** of the **Terms and Conditions** also provides that:

"The Customer acknowledges that the Bank is not giving or offering to give investment advice via the Website or the [Named] Service. Any content or information received on or via the Website or the [Named] Service should not be relied on for important personal financial or business decisions, and the Customer should consult an appropriate professional for advice which is specifically tailored to the Customer's particular circumstances. Nothing in the Website or the [Named] Service constitutes or shall be deemed to constitute advice or an invitation to invest or otherwise deal in shares or other securities. Content and information received via the Website or the [Named Service] Service is supplied by sources believed to be reliable. However, calculations made using such data are not guaranteed by these sources, the Bank or any other person or entity and may not be complete".

The **Consumer Protection Code 2006 (the "CPC 2006")**, was in effect at the time that the telephone calls were made to the Provider in November 2008. The following provisions from the CPC 2006 are relevant;

- **Chapter 1, General Principles**
"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it...acts with due skill, care and diligence in the best interests of its customers"
- **Chapter 2, Common Rules for all Regulated Entities, Provision of Information**
"A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."

Whilst I accept that the purpose of the Provider's Service Department as set out in the **Terms and Conditions** is to assist the Provider's customers and provide information to customers, as opposed to advice, the Provider must also be mindful of the provisions of the CPC 2006, as quoted above. There is an obligation on the Provider to act with "*due skill, care and diligence*" in all dealings with a customer and to ensure that "*all information it provides to a consumer is clear and comprehensible*". This includes during telephone conversations.

As outlined above the Provider failed in its duty to provide pertinent information to the Complainants in relation to the effect of breaking the fixed interest rate during the telephone call on **13 November 2008**. As noted above, the Provider has accepted its failure in this respect.

With respect to the telephone call that took place on or around **19 November 2008**, it is again disappointing that this office has not been furnished with an audio recording of the

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telephone call. In any event, I do not think it is necessary to consider the audio recording, as quite aside from any call that took place on or around **19 November 2008**, it is clear that there was uncertainty on the part of the Complainants with respect to the nature of the variable interest rate at that time. There is no evidence on the file that the Provider issued any correspondence to the Complainants to confirm the application of the variable interest rate or to bring the Complainants attention to any key information with respect to the application of the variable interest rate. In these circumstances, I am unsurprised that the Complainants sought information from the Provider's Service Department by telephone with respect to movements in the variable interest rate applicable at the time.

In this regard, I find the failure of the Provider to issue correspondence to the Complainants on or after **13 November 2008**, confirming the application of the variable interest rate to the mortgage loan was a breach of the CPC 2006.

(2) The Provider has unfairly offered the Complainants a tracker portability mortgage with an additional 1%.

The Complainants decided to move house in 2014 and met with the Provider in its branch to discuss their options. As outlined in the background section of the decision, at this time, the Complainants' complaint with respect to an entitlement to a tracker interest on their mortgage loan account was on hold with the Financial Services Ombudsman. A variable interest rate applied to the existing mortgage loan account that the Complainants held with the Provider.

On **16 April 2014**, the Provider issued a **Statement of Suitability** to the Complainants. I note that the **mortgage details agreed** section of the of the Statement of Suitability outlines as follows;

<i>"Amount of loan required</i>	<i>€225,000.00</i>
<i>Property price/value</i>	<i>€275,000/€275,000</i>
<i>Loan Purpose</i>	<i>Moving House</i>
<i>Loan Type</i>	<i>Loan to Value Managed Variable Rate</i>
<i>Homeloan >60% and <=70% LTV</i>	
<i>Repayment term required</i>	<i>35 years</i>
<i>Flexible repayment option</i>	<i>None"</i>

I note that pages 3 to 7 of the **Statement of Suitability** outlines **Key Information** regarding **mortgages**, under the following headings;

*"Home Loan for First Time Buyers
Home Loan for Moving House
Residential Mortgage Top Up
Refinance (Debt Consolidation) or Switching your Mortgage to us
Further Advance
Mortgages for Residential Investment Properties
Information about our interest rates"*

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The **Letter of Approval – Particulars of Mortgage Loan** issued to the Complainants dated **16 April 2014**, with the following details;

“Loan Type: Loan to Value Managed Variable Rate Homeloan > 80% and <=90% LTV

<i>Purchase Price/Estimated Value:</i>	<i>€275,000.00</i>
<i>Loan Amount:</i>	<i>€225,000.00</i>
<i>Interest Rate:*</i>	<i>4.45%</i>
<i>Term:</i>	<i>35 year(s)</i>
<i>Monthly Instalment (Principal and Interest):</i>	<i>€1,057.87</i>
<i>Property Insurance Amount:</i>	<i>€198,000.00</i>
<i>LTV:**</i>	<i>82%</i>

**Please note that this rate may change prior to drawdown of the mortgage in response to market conditions.*

***LTV% includes all loans and cross charges on the mortgage property.”*

This loan was drawn down (mortgage loan account ending **638**) by the Complainants in **June 2014** and mortgage loan account ending **389** was redeemed.

In August 2015, the Provider wrote to the Complainants with respect to the failure identified on mortgage loan account ending **389** and recalculated that mortgage loan account on the basis that the Complainants would have chosen to move to the tracker rate mortgage until their account was closed in June 2014.

The Complainants submitted the following to the Provider’s appeal panel;

“On 13-11-2008 we requested to come off our fixed rate and revert back to our tracker. This did not happen, we were put back [on a] variable rate (which the bank have already [taken] responsibility for this failure). So from Nov 19th 2008 we should have been on our tracker mortgage and still been on it in 2014 when we decided to move house.

When applying for our new mortgage in several meetings this issue was brought up with the assistant manager in [the Provider’s] branch in [named location]. We told him our case was with the FSO and that we would be looking to have the tracker mortgage rate applied to our new mortgage once we win our case. His reply was that we are excellent candidates that meet all the right criteria for us to bring old mortgage balance to the new house on the tracker and the remaining balance to be either fixed or variable which we choose.

After the meeting I emailed the FSO telling them of the meeting that requested our tracker to be [applied to the] new mortgage.

What we want to happen:

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From June 2014 for us to be on tracker rate for [new property] for the sum of roughly €207,000 this sum would have to be checked this would have been the approx. amount of our mortgage in June 2014 [on the Complainants' previous mortgage loan] and for the balance to be split to either a variable or fixed depending on what we decide. Back in 2014 [the Provider was] doing an incentive for customers who were not in negative equity to move home and carry their mortgage. We strongly believe we would have been one of these customers to have brought our tracker with us if it was not for the failure of the bank back in 2008.

Our requests:

- 1. We would like to revert back to a tracker mortgage.*
- 2. We would like an outlined detail of rates of what rate we will be on for tracker mortgage.*
- 3. A list of rates available to us for the remainder of the balance both variable and fixed rates.*

This issue is one of the main issues we have in this Redress Programme that we are still without our tracker mortgage which was a failure of [the Provider]."

The Appeal Panel requested information from the Provider with respect to the availability of the Tracker Portability Product and whether the Complainants would have been eligible for the scheme. The Provider outlined by letter dated **24 November 2015**, that the product was launched on 27 February 2014 and that if the Complainants had been on a tracker rate in June 2014, the Complainants would have been eligible for the tracker portability product "*subject to meeting the required criteria*". The Provider detailed that when the Complainants mortgage loan account ending 389 was redeemed the balance was €204,692.69.

The Appeal Panel issued its decision on **01 December 2015**. It outlined its decision as follows;

"The [appeal panel] had decided that [the Complainants] have been successful in their appeal.

Reasons for Decision:

Having fully considered the facts of the appeal, the [appeal panel] arrived at its decision for the following reasons:

- It had been established and substantiated that due to the Bank's failure, the customer's account was treated as a variable rate mortgage for the period from November 2008 to June 2014 when it ought to have been a tracker rate mortgage. Had the account been a tracker rate mortgage at the time [the Complainants] moved home in 2014 they would have been entitled to the Tracker Portability Mortgage product offered by the Bank.*

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As such, the [appeal panel] request that the Bank offer [the Complainants] the option of availing of a tracker rate of ECB + 1.40% (currently the equivalent of a rate of 1.45%) on the balance of their original mortgage at the time of its redemption in 2014, being €204,692.69, and that the interest rate applicable to the balance of the loan (approximately €20,307.31) would be in line with the loan agreement in place with [the Complainants].

Subject to [the Complainants'] acceptance of this offer, the Panel instructed the Bank to make the forgoing adjustment to the account with effect from 20 June 2014 and that any overpayments on the account be reimbursed to [the Complainants] accordingly".

The Complainants received a letter from the Provider on **21 December 2015**, which outlined as follows;

"We are writing to inform you of an information error previously included within documentation you received during the application process for your [Provider mortgage ending 638].

As part of the [Provider] mortgage application process each applicant receives a Statement of Suitability letter which sets out the product that you chose and the reasons why that product is suitable for you. Page 2 of the Statement of Suitability issued to you on 16/04/2014 contained inaccurate product information for the "Loan Type" chosen, quoting Loan To Value Managed Variable Rate Homeloan > 60% And <=70% Ltv when the product you chose was Loan To Value Managed Variable Rate Homeloan > 80% And <=90% Ltv.

We apologise for this error and are satisfied that the error had no impact on the product you selected and currently hold.

....

Please find enclosed for your records an amended Statement of Suitability with the correct "Loan Type" quoted"

This letter enclosed a Statement of Suitability, which comprised 9 pages in total. I note that pages 3 to 9 of the **Statement of Suitability** outlines **Key Information regarding mortgages**, under the following headings;

*"Home Loan for First Time Buyers
Home Loan for Moving House
Residential Mortgage Top Up
Switching your Mortgage to us
Tracker Portability
Transferring Negative Equity
Further Advance
Mortgages for Residential Investment Properties*

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Information about our interest rates”

The **Tracker Portability** section of outlines information in relation to the tracker portability product including, as follows;

- *“You can move home and keep the current tracker interest rate product that applies to your primary residence plus an additional 1%. As you are aware your tracker interest rate is made up of the ECB rate + a margin. For the purposes of tracker portability the tracker interest rate that will be ported will not include any adjustments that have been applied to the margin since the current tracker rate product was set up on the primary mortgage.*
- *The maximum term you can avail of is the current term remaining on the primary mortgage (term will be rounded up to the nearest year).”*

The Provider wrote to the appeal panel on **12 April 2016** and outlined that since the date of the appeal panel decision, the Provider had been investigating possible ways to implement the decision and *“proposed”* the following;

- *“The Bank notes the decision of the Panel to offer the customer a tracker rate of ECB + 1.4% on the balance of their original mortgage at the time of its redemption in 2014, being €204,692.69. Please note as previously discussed the Bank no longer offers this product type and therefore it is not a product which is available or which can be supported on our system for any new or existing mortgage accounts.*

The Bank would like to apologise for the delay in determining a resolution on this rate matter. I can now confirm that in order for the customer to benefit from the decision, and strictly on an exceptional basis, the Bank is willing to offer [the Complainants] a rate of ECB+1.25% (currently the equivalent rate of 1.25% as the ECB rate dropped to 0% with effect from 31st March 2016).

- *Open a new mortgage for the balance of €199,912.53 (the balance of €204,692.69 having reduced to this amount) with the term remaining of approximately 271 months, (this is subject to change based on the date of implementation).*

In order to open a new mortgage, the Bank will require the customers to work with the Bank to complete the following mortgage account opening process to facilitate the implementation of these changes;

- *The customers will be required to visit a [Provider] branch to complete a Mortgage Application Form (for €199,912.53). If the customer wishes to proceed with this proposed implementation, they should please contact us with their preferred branch, and a date that suits, and we can then arrange an appointment on their behalf.*

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- *The customers will be required to submit ID and address verification, 3 payslips, P60's, salary certs and 6 months bank statements (with the Application Form).*
- *The customers will be asked to nominate a solicitor who can arrange the required updated legal documentation for this new mortgage on their behalf. The information regarding the solicitors' details should be provided to the Bank before the loan offer issues. Please be advised the Bank will cover the reasonable legal costs incurred for the requirement of a solicitor to complete the legal documents for the new mortgage.*
- *Following the Banks assessment of the customers' documentation the Bank will issue a Loan Offer to the customers. The customers will be required at this stage to comply with the Loan Offer conditions to enable the Bank to issue the new mortgage loan.*

Please note the following;

- *Had [the Provider] not made the error, the rate on the customer's mortgage would have been a Tracker Rate of ECB + 1.25% and therefore a Portability Rate of ECB + 1.25% + 1% would have been applicable on the new mortgage which issued on the 06th June 2014. In line with the above the Bank will implement a balance adjustment of approx. €2,335.18 to the customers new mortgage with [the Provider]. This figure represents the difference in the balance had the customer availed of Portability Tracker Rate from 20th June to date (dates as outlined in the BDO decision of the 04th December 2015). These figures are subject to change based on date of implementation.*
- *The Bank will lodge the new mortgage amount €199,912.53 internally against the balance on the customers' existing mortgage [ending 638]*

Following the above lodgement, a scheduled balance of approx. €17,106.41 will remain on the customers' existing mortgage [ending 638]. A new monthly repayment will then be recalculated based on the new balance, the current (MVR rate of 4.2%) and the term remaining (400 months as of today's date but is subject to change up to the date of implementation). Please be advised the customers will be liable to repay this amount to the Bank over the remaining term of the mortgage.

- *The Bank will issue a refund of overpayments directly to the customers of approx. €5,174.01 (these figures are subject to change based on the date of implementation).*

Following the opening of the new mortgage account, the lodgement to the existing mortgage and the balance adjustment applicable the monthly repayments on each account will be:

New mortgage Account (number to be confirmed) with a balance of approximately €197,577.35 will be approximately €837.18 not inclusive of TRS or insurance, if applicable, on a tracker rate of 1.25% (ECB + 1.25%).

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Existing mortgage account [ending 638] with a balance of approximately €17,106.41 will be approximately €80.47 not inclusive of TRS or insurance, if applicable, on the Managed Variable Rate of 4.20%.

The Bank acknowledges the delay in responding on this matter and would like to apologise for this delay. We believe the above proposed implementation benefits the customers in this instance."

The Complainants did not accept the Provider's proposal. I note that the Provider has confirmed to this office that its proposal as outlined in its letter of **12 April 2016** remains open to the Complainants.

The Complainants submit that when they took out their new mortgage loan in **June 2014**, the subject of the tracker portability rate that includes the addition of 1% was never enclosed in the terms and conditions, and a tracker portability rate that includes the addition of 1% was not explained to them by the bank manager at the time. The Complainants state that the Provider *"didn't act in the customers best interests and discuss this or even bring this to our attention. If this had been discussed with us at the time of us taking out our new mortgage we would have never had moved, as we would have had just a normal tracker mortgage. Instead now we face the hardship of having a tracker mortgage + an extra 1% of a portability and also a split mortgage with a variable rate"*.

The Provider submits that its Tracker Portability Mortgage product became available on **27 February 2014**. The Provider submits that the purpose of this product was to allow customers who had an existing tracker mortgage account with it to move home and to keep the tracker interest rate that applied to their primary mortgage plus an additional 1%. The Provider submits that when the Complainants moved home in June 2014, their existing mortgage loan account was classified, at that time, as a variable interest rate mortgage, and therefore, was not an option that was made available to them. The Provider submits that in light of this it did not include or enclose the terms of the Tracker Portability product to the Complainants. The Provider states that *"Furthermore, it would not have been relevant, necessary or appropriate for the Bank to discuss the product with the Complainants, during their MVR Mortgage Account application in June 2014"*.

The Provider submits that if a tracker interest rate was applied to mortgage loan account ending 638 when it was drawn down, the rate would have been ECB + 1.40% + 1.00%. The Provider submits that on **12 April 2016**, it issued correspondence to the appeal panel in relation to implementing the appeal panel decision, outlining how it was proposing to implement the finding of the appeal panel and offered the Complainants a tracker interest rate of ECB + 1.25%.

It appears that there may be some confusion on the part of the Complainants, as to the tracker interest rate that has been offered by the Provider to the Complainants with respect to mortgage account ending 638. This confusion may have arisen because of the revised Statement of Suitability that was issued by the Provider to the Complainants on **21 December 2015**. It appears that the purposes of the revised Statement of Suitability was to correct a typographical error with respect to the Loan to Value ratios that were

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contained in the original Statement of Suitability, that issued in April 2014. The original Statement of Suitability outlined the Loan to Value as “>60% and <=70%” when the correct Loan to Value was “> 80% And <=90%”. I note that the correct Loan to Value ratio was outlined in the letter of offer that issued to the Complainants in April 2014 and was accepted by them.

The revised Statement of Suitability issued to the Complainants on **21 December 2015**. I note that it was not until **12 April 2016**, that the Provider’s proposal with respect to the mortgage loan account ending 638 issued to the Complainants. However, it appears that on the basis of the 21 December 2015 document that the Complainants are of the belief that a 1% margin is being applied to the Tracker Portability Product, now on offer by the Provider to the Complainants. However, I note that this is not the case. The reason for the confusion appears to be because the **Key Information regarding mortgages** section of the revised Statement of Suitability (issued in December 2015), contains additional information that was not contained in the original **Key Information regarding mortgages** section of the initial Statement of Suitability (issued in April 2014). In particular, it includes a section on the Tracker Portability Product (as quoted above) which sets out that the Tracker Portability Product carries an additional margin of 1%. The Provider has submitted that the change in the documentation occurred because the Complainants’ mortgage loan was classified as a variable rate loan at the time the original Statement of Suitability issued in April 2014, however by the time the revised Statement of Suitability issued in December 2015 the Complainants’ original loan had been classified as a tracker interest rate loan. This revised classification was because of the adjustments made to the Complainants’ mortgage loan account in August 2015.

Given the series of interactions between the Complainants and the Provider between **August and December 2015**, it is not surprising that this confusion arose. The Complainants had been advised by the Provider in relation to the error on their mortgage loan account, (which meant they were entitled to a tracker interest rate from 2011), they had appealed the Provider’s redress and compensation offer to the appeal panel, the appeal panel’s decision had issued to them on **04 December 2015** (which had upheld their appeal in relation to their entitlement to port their tracker onto their new mortgage loan in 2014 on ECB + 1.4%) and then the Complainants received the letter dated **21 December 2015**. Although the letter of **21 December 2015** was unrelated in substance to the Complainants’ appeal to the appeal panel, it is clear that given the series of events that it created confusion for the Complainants at that time.

It is important for the Complainants to be aware that if the Complainants had been on a tracker interest rate (ECB + 1.4%) in **April 2014**, when they approached the Provider to redeem their mortgage loan ending 389 and take out a new mortgage loan to purchase their new property, the tracker interest rate that would have been offered to them in the normal course would have been a rate of ECB + 1.4% + 1%, for the balance outstanding on their mortgage loan and for the term remaining on that loan. In the Complainants’ case, the balance outstanding on mortgage loan account ending 389 was €204,692.69 and the term remaining was 26 years (the original loan was drawn down in **May 2005**).

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The offer that was made by the Provider to the Complainants in its letter of **12 April 2016** and which remains on offer from the Provider, is the application of a tracker interest rate of ECB + 1.25% on the balance that was outstanding on mortgage loan account ending 389 (€204,692.69) from 20 June 2014. It is understood that this will involve the following;

- A. The Complainants opening a new mortgage loan account with the Provider, which involves the Complainants completing and submitting certain documents to the Provider. The amount of the mortgage loan for an amount of €204,692.69 less a balance adjustment (which represents the difference in the balance had the Complainants availed of the Portability rate of ECB + 1.25%). This figure was €2,335.18 in April 2016 but at this point will have changed.
- B. The Provider will lodge the new mortgage amount against the existing mortgage ending 638. The balance will be placed on the then current variable interest rate. This figure was €17,106.41 in April 2016 but at this point will have changed.
- C. The Provider issuing a refund of overpayments made to the Complainants. This figure was €5,174.01 in April 2016 but at this point will have changed.

Having regard to the fact that the Provider has offered to put the Complainants in a position whereby the Complainants (if they accept the offer) will be given the benefit of a reduced rate of ECB + 1.25% on the balance that was outstanding on mortgage loan account ending 389 (€204,692.69) from 20 June 2014, I am of the view that offer proposed by the Provider is a very reasonable offer. The proposed offer gives the Complainants the benefit of a rate of interest that is 1.15% lower than the rate that would have applied had the tracker portability product of ECB + 1.40% + 1% applied in the normal course from April 2014, on the balance of €204,692.69. Therefore the amount involved would be significant.

It is disappointing that the offer with respect to the application of the tracker portability product on mortgage loan account ending 638, was not made by the Provider initially in August 2015, when the error was identified and admitted by the Provider on mortgage loan account ending 389. I would have expected that the Provider would have considered the ongoing consequences for the Complainants' with respect to the loan taken out in 2014 and offered redress and compensation for mortgage loan account ending 638 in August 2015. This would have spared the Complainants having to pursue an appeal to the appeals panel.

In any event, the complaint that the Provider has unfairly offered the Complainants a tracker portability mortgage with an additional 1% cannot be substantiated as the Provider has not, in fact, done so.

I also note that the Complainants' state in a letter to this office that they *"also have the added stress of waiting for the ECB to put interest rates up which will add more hardship to us. We feel this is just another mess that [the Provider] have caused and we are left to suffer financially"*. It is a matter for the Complainants to decide whether they wish to accept the Provider's offer. It is important for the Complainants' to be aware that in doing so, the Provider has no control over the ECB base rate applicable to a tracker interest rate. The ECB base rate is a fluctuating rate set by the European Central Bank. The ECB rate is presently 0%, but that ECB base rate can vary upwards.

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(3) The term of 22 years on the tracker portability mortgage now offered to the Complainants is unfair, in that the term of their variable interest rate mortgage is 35 years.

The Complainants submit that they were never informed when they took out the new mortgage loan that they would “*have a split mortgage which consists [of] the tracker rate over 22yrs and the variable rate over 35yrs*”. The Complainants submit that it was their understanding that both mortgage loans would be over 35 years. The Complainants state that “*This [is] again another thing that [the Provider] failed to explain to us*”.

The Provider submits that under the Terms and Conditions of a Tracker Portability Mortgage, the maximum term a customer can avail of when availing of the portability option is the current term remaining on the primary mortgage. The Provider submits that the term is rounded up to the nearest year. The Provider submits that mortgage loan account ending 389 was issued on 20 May 2005 for a term of 35 years (420 months) and was due to end on 19 August 2038.

It is unclear how the Provider has calculated that the term of a 35 year mortgage starting in May 2005, would end on 19 August 2038. It appears to me that any such term would expire in May 2040. In any event, the terms and conditions relating to tracker portability products outline that the term for any such mortgage loan is the “*current term remaining on the primary mortgage*”. In the Complainants’ case, this is the term remaining on mortgage account ending 389 calculated from July 2014.

Whilst I accept the Complainants frustrations that if they accept the tracker interest rate offer made by the Provider in **April 2016** (which will be required to be updated to reflect current figures), that their mortgage will be split across two loans on different interest rates, for different terms. However, with respect to the tracker portability portion of the loan the Provider is entitled to make the offer for the term remaining on mortgage account 389. It is a matter for the Complainants to decide if they wish to accept that offer.

Again, I note that the tracker portability rate offering (ECB + 1.25%) on the mortgage loan currently held on account ending 638, is a more favourable offering than the rate that would have been applied had the tracker portability rate been offered in July 2014 (ECB + 1.4% + 1%). It is of course a matter for the Complainants to decide whether they wish to accept that offer and whether the considerable saving it is likely to yield is worth the inconvenience of having a split mortgage. I would expect that the Provider should issue updated figures to the Complainants in early course so that the consideration of the updated offer can be progressed as soon as possible.

Having regard to all of the above, I am of the view that this complaint is partially upheld. To mark the Provider’s shortcomings in relation to the application of the variable interest rate in 2008 and the delay in offering the tracker portability product from August 2015 to April 2016, I direct that the Provider pay to the Complainants a sum of €3,000 compensation.

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Conclusion

My Decision is that this complaint is partially upheld pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, on the grounds prescribed in **Section 60(2)(g)**.

I intend to direct pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €3,000 to an account of the Complainants choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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**

31 October 2019

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.