



<u>Decision Ref:</u>	2019-0352
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan was secured on the Complainants' Principal Private Residence. The Provider has transferred its interest in the mortgage loan to another regulated lending institution.

The Complainants' Case

The Complainants were issued with a mortgage loan offer dated **24 July 2006** with a tracker interest rate. The particulars of the mortgage loan offer detail that the basis of the interest rate applicable was *"1% over ECB Main Refinancing Op Rate 0.55% 2Yr Disc"*.

The Complainants applied a three-year fixed interest rate to the mortgage loan account in July 2007. On the expiry of the fixed interest rate period in **July 2010**, a variable interest rate *"1.5% over the ECB rate"* was applied to the mortgage loan.

The Complainants submit that the mortgage loan offer dated **24 July 2006**, provides for a tracker interest rate of ECB + 1% following the expiry of the initial two-year discounted period. They refer to *"Condition 3"* of the *"Section 2.6 Additional Conditions"* of the mortgage loan offer, which sets out that *"...On the expiry of the Discount Period you will be*

charged interest on your mortgage at a Variable Tracker Rate based on 1% over ECB Main Refinancing Op Rate (the "ECB Tracker Rate")".

The Complainants submit that they did not agree to the transfer of their mortgage to the Provider's variable interest rate in 2010 either in writing or by telephone. The Complainants have requested that the Provider furnish them with the signed copy of the fixed rate offer letter which the Provider states was returned by the Complainants on **2 August 2007**. The Complainants have further requested that the Provider furnish them with *"a copy of the letter signed by us, in June 2009 agreeing to revert to a standard variable rate"*.

The Complainants are seeking the following;

- (a) That their mortgage loan account be restored to the original tracker interest rate from the date of expiry of the fixed interest rate period in July 2010; and
- (b) That the Provider give them redress and compensation for overpayments on their mortgage loan account.

The Complainants further submit that their mortgage loan was sold to an alternative financial service provider in September 2018 without their permission or consent.

The Complainants have submitted that €20,200 is a *"rough calculation"* for overcharged interest, compensation, penalties and distress.

The Provider's Case

The Provider submits that the Complainants were not offered the option of reverting to their original tracker interest rate on the expiry of the fixed rate period in 2010, for the following reasons;

- (a) The fixed rate offer letter issued to the Complainants on **11 July 2007** clearly stated that the standard variable rate would apply to the mortgage loan account after the fixed rate period expired.
- (b) The Provider ceased offering tracker mortgages in **November 2008**, and therefore a tracker rate was not available when the fixed rate period expired on **30 June 2010**.

The Provider submits that the tracker rate of ECB + 1.00% was offered to the Complainants in the offer of mortgage loan agreement dated **24 July 2006**. A discount of 0.55% was to apply during the initial two year discounted period, meaning that the applicable interest rate during the discounted period was 0.45% above ECB. The Provider states that if the

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Complainants had not opted to fix the interest rate on their mortgage during the discounted period, the interest rate that would have applied at the end of the two year discounted period would have been the tracker rate of ECB + 1.00%.

The Provider states that it does not hold any record of advising the Complainants that the mortgage would return to a tracker rate when the fixed rate period ended. The Provider submits that it never offered a fixed rate product, which reverted to a tracker rate, and that all fixed rate products offered by the Provider reverted to the standard variable rate at the end of the fixed rate period. The Provider submits that it is satisfied that it was sufficiently clear and transparent in July 2007 as to the effect of applying the fixed interest rate to the Complainants' entitlements to a tracker interest rate, or a particular tracker interest rate margin, on their mortgage loan account.

The Provider states that the fixed rate offer letter makes no reference to a tracker rate. The Provider has acknowledged that it does not hold a signed copy of the fixed rate offer letter that issued to the Complainants on **11 July 2007**. It submits that its internal notes indicate that the signed fixed rate offer letter was received by the Provider on **2 August 2007**. It further submits that on receipt of the signed fixed rate offer letter on 2 August 2007, it issued a "switch confirmation letter" to the Complainants. The Provider states that it is satisfied that the unsigned copy of the fixed rate offer letter that it does hold on file, is the same as the signed copy that was returned to the Provider by the Complainants, as the details it contains match with the Provider's file notes, and because the Provider has no evidence to suggest that any other fixed rate offer letter was issued to the Complainants between **11 July 2007** and **2 August 2007**. The Provider further submits that the interest rate offered to the Complainants in the unsigned fixed rate offer letter reflects the rate products that were available at that time.

The Provider acknowledges that the first-named Complainant contacted the Provider in **June 2009**, to query if the mortgage would revert to a tracker rate after the fixed rate period as he was previously advised that it would. The Provider submits that the Complainant's query was referred to the Provider's relevant department, who wrote to the Complainants on **19 June 2009** to confirm that the mortgage would revert to the standard variable rate at the end of the fixed rate period.

The Provider submits that *"the term "standard variable rate" is defined in the Rate Guide that accompanied our offer letters and rate change agreements."* It further submits that the meaning of the term "standard variable rate" was communicated in a sufficiently clear and transparent manner in the Complainants' loan documentation. In this regard it submits that the fixed rate offer letter dated **11 July 2007** shows three interest rates; the current tracker rate of 4.45%, the fixed rate of 4.84% and the standard variable rate of

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5.24%. The Provider states that the standard variable rate is clearly identified as the reversion rate and is differentiated from the tracker rate.

The Provider submits that the standard variable rate applied to all mortgage loan accounts which originated prior to November 2008 contains a "*Price Promise*" which means that the variable rate will never exceed the ECB rate by more than 1.50%. It further submits that the standard variable rate which has applied to the Complainants' mortgage loan account since the fixed rate period expired on 30 June 2010 has never exceeded 1.50% above ECB.

The Provider submits that the tracker rate and the discounted period were explained to the Complainants in the "*Additional Conditions*" section of the Complainants' loan offer letter dated **24 July 2006**. The Provider further submits that it is satisfied that the term "*variable tracker rate*" was clearly explained to the Complainants. It refers to "*Section 2.6.2*" of the Additional Conditions section of the loan offer letter, which states as follows;

*"The Rate of Interest is linked to the European Central Bank Main Refinancing Operation Rate (the "ECB Rate") which fluctuates from time to time. In the event of an increase or decrease in the published European Base Rate * we will required up to one month from the date of such increase or decrease to fully implement any amendment to our rate.*

****ECB means the European Central Bank main re-financing operations minimum bid rate."***

The Provider submits that it is satisfied that it communicated the difference between the standard variable rate and the variable tracker rate to the Complainants in a clear and transparent manner. In this regard, it submits that the variable tracker rate is described in the original mortgage loan offer letter as having a fixed margin of 1% over ECB; however, the standard variable rate is described as "*fluctuating from time to time*" with no reference to a fixed margin over ECB.

The Provider submits that the sale/transfer of the mortgage loan account was unambiguously permitted under Section 8.1 of the Terms and Conditions which formed part of the Complainants' Offer of Mortgage Loan, and therefore the Provider did not require additional consent from the Complainants prior to entering into the sale.

The Provider submits that the Complainants' obligations in relation to the mortgage loan account were being met as at the date of transfer and there were no outstanding arrears. The Provider further submits that it sold its Irish residential portfolio to an alternative

financial service provider in 2018 and therefore the status of the subject mortgage loan account was not a determining factor in the decision to sell the loan.

The Complaint for Adjudication

The conduct complained of is that;

The Provider failed to revert the Complainants' mortgage loan account to the tracker rate of ECB + 1% on the expiry of the fixed period in July 2010.

The Provider sold the Complainants' mortgage loan to an alternative Provider in September 2018 without their consent.

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 **14 August 2019**, outlining my preliminary determination 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.

Following the issue of my Preliminary Decision, the following submissions were received from the parties:

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1. Letter from the Provider to this Office dated 04 September 2019
2. E-mail from the Complainants to this Office dated 08 September 2019

Copies of these additional submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office, my final determination is set out below.

Before dealing with the substance of the complaint, I will deal with the jurisdiction of this Office to deal with the matters complained of. In their submissions the Complainants refer to the sale of their mortgage loan to an alternative Provider. As this complaint is against the Respondent Provider only, it is the conduct of the Provider in relation to these matters which has been investigated and dealt with in this Decision. The conduct of the entity which purchased the loan has not been investigated and does not form part of this adjudication.

The Complainants also refer to the Respondent Provider's failure to obtain their consent under GDPR to transfer their details to third parties. By letter dated **12 November 2018**, the Complainants were advised of the parameters of the investigation by this Office in the following terms;

"With respect to any issue you may have which relates to an alleged breach of data protection legislation, please be advised that the Office of the Data Protection Commissioner is the more appropriate body to raise such concerns with"

The issues the Complainants have outlined regarding the transfer of their data to third parties do not form part of this investigation and adjudication for the reasons set out above.

I will now deal with the matters, which fall within the jurisdiction of this office.

In respect of the sale of the loan **Section 8.1** of the **Terms and Conditions**, which formed part of the Complainant's Offer of Mortgage Loan, dated 24 July 2006, states as follows;

"By accepting this Offer, you hereby irrevocably and unconditionally consent to the Bank at any time or times hereafter transferring, assigning, disposing whether absolutely, by way of security or otherwise, mortgaging or charging or transferring as part of a securitisation scheme or otherwise, the Mortgage and/or the benefit of the Mortgage and/or any collateral or ancillary security (including, without limitation, any insurance policy or policies of life or endowment assurance) and the

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monies hereby secured (collectively "Transfers" and any one a "Transfer") to any third party or body..."

The Complainants submit in their post Preliminary Decision submission dated 08 September 2019, that they did not receive a copy of the Terms and Conditions leaflet "at any stage during our contract" and that the "first time" they "saw" this document was when the Provider's response to the Complainants' complaint to this office issued to the Complainants.

The **Offer of Mortgage Loan** dated 24 July 2006 details that the Home Loan is "subject to the terms set out overleaf and on the conditions contained in the enclosed Terms and Conditions leaflet dated 20th December 2005".

The **Borrowers Signed Acceptance of the Offer of Mortgage Loan**, details amongst other things, as follows;

"(A) I/We accept the Offer of Mortgage Loan on the terms herein and set out in the terms and conditions leaflet dated 20th December 2005.

...

(G) I/We confirm that I/We have read and understand and accept the Consumer Credit Act Warnings and Notices set out above and the Terms and Conditions applicable to this Offer Letter."

The Complainants signed this document and a solicitor witnessed their signatures on 03 August 2006. In circumstances where the Complainants signed the Borrowers Signed Acceptance accepting the Offer of Mortgage Loan and confirming that they had read, understand and accept the terms and conditions, including the terms set out in the terms and conditions leaflet, in **August 2006**, I cannot accept the Complainants' current position that they never saw the terms and conditions leaflet at all.

It is clear from Section 8.1 of the Terms and Conditions that the Provider did not require the consent of the Complainants prior to the sale of the mortgage. I further note that there were no outstanding arrears on the Complainants' mortgage loan account at the date of transfer and the Provider has stated that they were meeting their obligations in relation to the mortgage loan account. It appears to me that the conduct complained of, that is, the application of an incorrect interest rate to the mortgage loan account since June 2010, had no bearing on the sale of the loan.

With regard to the application of interest, the issue to be determined is whether the Provider failed to revert the Complainants' mortgage loan account to the tracker rate of

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ECB + 1% on the expiry of the fixed interest rate period in July 2010, resulting in the Complainants paying excess interest on the mortgage loan account since 2010.

In order to ascertain if the Provider did apply an incorrect interest rate to the Complainants' mortgage at the end of the fixed rate period in **June 2010**, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also relevant to set out the interactions with the Complainants in **July 2007** when the Confirmation of Interest Rate Amendment was signed.

I note the particulars of the Offer of Mortgage Loan dated **24 July 2006** detail that the basis of the interest rate applicable was "1% over ECB Main Refinancing Op Rate 0.55% 2Yr Disc".

I note that the Additional Conditions section of the Offer of Mortgage Loan dated 24 July 2006 detail as follows;

"2.6 Additional Conditions

- 2 The rate of Interest is linked to the European Central Bank Main Refinancing Operation Rate (the "ECB Rate") which fluctuates from time to time. In the event of an increase or decrease in the published European Base Rate * we will required up to one month from the date of such increase or decrease to fully implement any amendment to our rate.*

**ECB means the European Central Bank main re-financing operations minimum bid rate.*

- 3 24 Month Discount Rate*

The interest rate outlined in the Particulars of Offer is the Discount Rate which is available to you. The Discount Rate is available for a period of 24 months from drawdown (the "Discount Period"). On the expiry of the Discount Period you will be charged interest on your mortgage at a Variable Tracker Rate based on 1% over ECB Main Refinancing Op Rate (the "ECB Tracker Rate")...From the date of withdrawal of the Discount Rate interest will be charged on your mortgage at the then prevailing ECB Tracker Rate applicable to your loan."

It is clear to me that the Offer of Mortgage Loan envisaged a two year discounted tracker rate of ECB + 0.45% and thereafter a tracker interest rate of ECB + 1% applying to the Complainants' mortgage loan.

While the Complainants have not detailed in their submissions that they requested a fixed interest rate in July 2007, I understand that this is not in dispute between the parties.

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The Provider submits that the Complainants contacted the Provider on **9 July 2007** in respect of the interest rate on the mortgage loan account and subsequently requested to fix the interest rate on the mortgage loan account on **10 July 2007**.

I note that the Provider's Final Response letter to the Complainants dated 30 January 2018, details as follows;

"You spoke with the Bank on 09 July 2007 regarding the interest rate on your mortgage and on 10 July 2007 you requested to fix the interest rate on your mortgage at 4.84% for a period of 3 years. A Fixed Rate Offer Letter was issued to you on 11 July 2007. The Offer Letter stated "On the expiration of the Fixed Rate period you will revert to the Bank's Standard Variable Rate which is presently 5.24%, which fluctuates from time to time." Our internal notes indicate that the signed Offer Letter was received into our offices on 02 August 2007 and the mortgage switched to the fixed interest rate of 4.84% effective from 01 September 2007; however, due to the age of this document we do not hold a copy."

The Provider submits that it holds internal notes indicating that it spoke with the first-named Complainant on **9 July 2007**, **10 July 2007** and **17 July 2007**. This office requested recordings/transcripts of telephone conversations between the parties in relation to this matter. I note that the Provider submits that it is unable to provide recordings of the telephone conversations with the Complainants that took place in July 2007 or June 2009, however, no explanation for this has been provided, which is most disappointing.

I note that when the Complainants' request to fix the interest rate was actioned in **July 2007**, a letter was issued to advise them of the changes effected to their loan.

A copy of the letter from the Provider to the Complainants dated **11 July 2007** has been supplied in evidence, in which the Provider explained the following;

"Further to your recent request, I am pleased to confirm that [the Provider's] Fixed Interest Rate can be offered on your existing mortgage account.

I attach two formal Amendment Confirmations to this letter amending your existing facility to reflect the changes in the interest rate and terms applying to your mortgage facility agreement. The remaining terms and conditions of your loan are unaffected by this offer and continue to apply in full. You must sign and return one of the Amendment Confirmations to [the Provider] if you wish to accept this offer...If you accept this offer, the interest rate on your loan will be amended to a Fixed Interest Rate until 30th June 2010 known as the Fixed Rate period. On the

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completion of the Fixed Rate Period your loan rate will revert to the Bank's standard variable rate."

I note that the Confirmation of Interest Rate Amendment was enclosed with the Provider's letter of **11 July 2007** and sets out as follows;

"[The Provider] is pleased to offer you an amendment to the interest rate applying to your existing Home Loan in the amount set out at (1) below. This Offer is supplemental to your Facility Letter(s) entitled the Letter of Offer of Housing Loan Funds addressed to you from [the Provider] ("the Bank") and shall be construed as a "Facility Letter" for the purposes of the Bank's Mortgage Conditions. We confirm that the remaining Terms & Conditions of your existing facility remain unchanged...

<i>Current Interest Rate</i>	<i>4.45%</i>
<i>.....</i>	
<i>Amended Fixed Interest Rate</i>	<i>4.84%</i>
<i>.....</i>	
<i>Date Fixed Rate Ends</i>	<i>30th June 2010</i>
<i>.....</i>	

On the expiration of the Fixed Rate period you will revert to the Bank's Standard Variable rate which is presently 5.24% which fluctuates from time to time."

I note that the Provider does not hold a signed copy of the Confirmation of Interest Rate Amendment, however, it submits that it received the signed copy on 2 August 2007 and that their internal notes support this. The Complainants have requested that the signed document should be furnished to them. This office has also requested that it be submitted in evidence. It is disappointing that the Provider does not hold a signed copy of this Confirmation of Interest Rate Amendment. However, I accept that the Provider has furnished sufficient supporting evidence to support their submission that the signed copy of the Confirmation of Interest Rate Amendment was furnished to the Provider on **2 August 2007** and that the unsigned copy furnished to this office is the document that was signed by the Complainants.

In this regard, I note that the Internal Notes shows the following entries;

11/07/2007

"....DOCS ISSD FOR FXD RATE 4.84%"...

17/07/2007

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"CLIENT RANG TO FOLLOW UP FIXED DOC. SPOKE TO [REDACTED]; TO SEE IF POSTAL STRIKE STILL ON GOING. ADVISED IT WAS LAST THURS; & FRI SO SHOULD BE DELAY. HE WILL RING AGAIN END OF WEEK IF STIL; HASN'T RECEIVED."

02/08/2007

..."DOCS RCVD, A/C SWITCHED, CONF SENT."

I note that a copy of a letter from the Provider to the Complainants dated **2 August 2007**, has been supplied in evidence, in which the Provider explained the following;

"4.84% To 30/06/2010

We write to confirm that your mortgage has been transferred to the above product".

I will first consider the effect that the Confirmation of Interest Rate Amendment had on the Offer of Mortgage Loan, in particular, with respect to the interest rate to apply to the mortgage loan on the expiry of the fixed interest rate period in June 2010.

I note that the Confirmation of Interest Rate Amendment details that it was *"supplemental to your Facility Letter(s) entitled the Letter of Offer"* for the purposes of the Bank's *Mortgage Conditions* and *"that the remaining Terms & Conditions of [the] existing facility remain unchanged"*. I further note that as quoted above the letter dated **11 July 2007** that enclosed the Confirmation of Interest Rate Amendment detailed that it *"reflect[s] the changes in the interest rate and terms applying to your mortgage facility agreement. The remaining terms and conditions of your loan are unaffected by this offer and continue to apply in full."*

I accept that the Confirmation of Interest Rate Amendment and the letter of **11 July 2007** made it clear to the Complainants that in signing the Confirmation of Interest Rate Amendment that they were making changes to the terms and conditions of their Offer of Mortgage Loan. However, I do not accept that the nature of those changes or the specific terms and conditions that were being amended were set out in adequate detail to the Complainants. This is so in particular with respect to the interest rate applicable at the end of the fixed interest rate period on **30 June 2010**.

I note that the Confirmation of Interest Rate Amendment details, as follows;

"On the expiration of the Fixed Rate period you will revert to the Bank's Standard Variable rate which is presently 5.24% which fluctuates from time to time."

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I am not satisfied that the “*Standard Variable Rate*” was defined in the Complainants’ mortgage loan documentation (Offer of Mortgage Loan or the Confirmation of Interest Rate Amendment) such that the Complainants could have been aware that this was an entirely different rate to the “*Variable Tracker Rate*” detailed in the Offer of Mortgage Loan. Further I am not satisfied that it was made clear to the Complainants that the effect of signing the Confirmation of Interest Rate Amendment was that the Additional Conditions of the Offer of Mortgage Loan at 2.6 (numbers 1 to 3), as quoted above, would no longer apply to the Complainants’ mortgage loan.

In its post Preliminary Decision submission of **04 September 2019**, the Provider has submitted that this office “*has imposed an obligation on the Provider to prove individual matters by reference to the Complainants rather than applying the appropriate objective test*” and that this “*amounts to an error in law*”. The Provider has also submitted that the Ombudsman has “*inappropriately shifted the burden of proof to the Provider.*”

In the interests of clarity and for the avoidance of doubt, this office has acted at all times as an independent investigator and adjudicator of this complaint. This office is required to act in accordance with the provisions of the ***Financial Services and Pensions Ombudsman Act 2017*** (the “***Act***”) and to observe fair procedures in dealing with complaints. This office has done so in its consideration of this matter and has invited both parties to provide evidence relevant to the investigation and adjudication of this complaint. This office is mindful of ***Section 12(11) of the Act*** which outlines, as follows;

“Subject to this Act, the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form.”

In the consideration of this complaint, this office has had regard to the standards expected of the Provider in its dealings with consumers and in this particular matter the interactions that occurred with the Complainants. These standards are set out in the ***Consumer Protection Code 2006 (August 2006) (the “CPC”)*** which was fully effective from 01 July 2007, and applied at the time the issues in dispute in this matter occurred.

With respect to the differentiation between a “*Variable Tracker Rate*” and a “*Standard Variable Rate*” in the Confirmation of Interest Rate Amendment itself, I note that the Provider submits that the Confirmation of Interest Rate Amendment dated **11 July 2007** shows three interest rates; “*the current [Tracker] rate of 4.45%, the fixed rate of 4.84% and the standard variable rate of 5.24%. Each of these rates are clearly different and the Standard Variable Rate is clearly stated as being the reversion rate and different to the*

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current". In this regard, the Provider submits in its post Preliminary Decision submission of **04 September 2019**;

"Furthermore, as the Fixed Rate Offer Letter and Confirmation of Interest Rate Amendment was a supplementary document to the Provider's offer letter of July 2006, the Fixed Rate Offer Letter and Confirmation of Interest Rate Amendment should have been read in conjunction with the Provider's offer letter of July 2006 which gives context to the term "current interest rate".

I do not accept that the *"Standard Variable Rate"* is clearly differentiated in the Confirmation of Interest Rate Amendment such that the Complainants could have understood sufficiently, the differences between a *"Tracker Variable Rate"* and the *"Standard Variable Rate"*, in circumstances where the tracker rate of 4.55% is simply identified as the *"current interest rate"*. There is no reference to *"Tracker Variable Rate"* in the Confirmation of Interest Rate Amendment at all. In this regard, I observe that there is no issue with the tracker interest rate definition in the **Letter of Offer** from July 2006. The issue arises by virtue of the fact that the Confirmation of Interest Rate Amendment proposed to make amendments to the rates applicable to the Complainants' mortgage loan and whether the Provider made these proposed amendments sufficiently clear to the Complainants.

The **CPC 2006**, was in effect at the time that the Confirmation of Interest Rate Amendment was issued to the Complainants in **July 2007**. I note the following provisions of the **CPC 2006**;

"Chapter 1 – General Principles

A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

...

(2) acts with due skill, care and diligence in the best interests of its customers;

...

(6) makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;

Chapter 2 – Common Rules for all Regulated Entities

Provision of Information to the Consumer

(12) 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."

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In the circumstances, I am of the view that the Confirmation of Information Rate Amendment, when read in conjunction with the Offer of Mortgage Loan or the accompanying terms and conditions were not sufficiently clear, such that the Provider made full disclosure of all relevant material information to the Complainants in accordance with the **CPC 2006**. Further, I am not satisfied that key terms with respect to the interest rate applicable at the end of the fixed interest rate period were brought to the attention of the Complainants by the Provider when the Confirmation of Interest Rate Amendment was signed by the Complainants in July 2007.

Furthermore, I note that the term “*Standard Variable Rate*” is not defined in the Offer of Mortgage Loan or the accompanying terms and conditions. In this regard, I note that the Provider outlines in its post Preliminary Decision submission of **04 September 2019**, as follows;

“It is however not surprising that the Offer of Mortgage Loan Agreement does not in its terms refer to or provide a definition of the Standard Variable Rate simply because the Standard Variable Rate had no application at the that time to the mortgage agreement between the Provider and the Complainants. Notably also the Complainants were advised by a mortgage broker and by solicitors at this time. It would have been customary for the mortgage broker to have advised the Complainants of the different product offerings available at the time, including the Tracker Rate and the Standard Variable Rate.”

On the basis of the above, it appears to me that the Provider accepts that the term “*Standard Variable Rate*” is not defined in the Offer of Mortgage Loan as it had no application to the Complainants’ mortgage loan at the time the mortgage loan was signed by the Complainants in **2006**. I have not been provided with any evidence to substantiate the Provider’s submission with respect to any advice, “*customary*” or otherwise, being given by external third parties about the differences between a “*Tracker Variable Rate*” and a “*Standard Variable Rate*” to the Complainants when the loan was taken out in 2006. Furthermore, there does not appear to me to be any relevance to any advice purportedly given at the time the mortgage loan was taken out. It would not have been possible for a solicitor or a broker to advise the Complainants at that time in 2006, of the consequences of a future event. As per the Provider’s own submission the Offer of Mortgage Loan Agreement “*does not in its terms refer to or provide a definition of the Standard Variable*”. The rate instruction letter containing the reference to the application of a “*Standard Variable Rate*” to the Complainants’ mortgage loan did not issue to the Complainants until **11 July 2007**.

The Provider submits in its response to this office dated **14 December 2018** and in further submissions made to this office that “*the term “Standard Variable Rate” is defined in the Rate Guide that accompanied our offer letters and rate change agreements.*”

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In this regard, the Provider submits in its post Preliminary Decision submission of **04 September 2019**:

“The Complainants Loan Documentation at the time of grant of the mortgage comprise the Offer of Mortgage Loan Agreement together with its enclosures which include (i) a copy of the Provider’s Notification of Fees & Charges, (ii) the Rate Guide and (iii) of course the Mortgage Deed itself. Following the requested amendment of the mortgage type to a Fixed Rate, the Fixed Rate Offer Letter and the Confirmation of Interest Rate Amendment also form part of the Complainants’ Loan Documentation.”

The Provider further submits in its post Preliminary Decision submission of **04 September 2019**, as follows;

“The Rate Guide explains in clear language what a Tracker Rate is, a Discount Rate and the Standard Variable Rate. The Rate Guide was provided to all borrowers as part of the Provider’s standard practice with each Offer of Mortgage Loan Agreement, the Fixed Rate Offer Letter and the Confirmation of Interest Rate Amendment. Contrary to the statement in the Preliminary Decision (at page 11) that no evidence has been provided that the Rate Guide was furnished to the Complainants at any time, the evidence given to the Ombudsman is that the Rate Guide was furnished as part of the Provider’s standard practice and notably it has not been denied by the Complainants that the Rate Guide was received by them. It is therefore the Provider’s submission that there is no basis, in light of the evidence available, for a finding that the Rate Guide was not provided.”

I note that the Provider is seeking to rely on the contents of the “Rate Guide”. During the investigation of the Complainants’ complaint, this office requested, amongst other things, the following evidence from the Provider;

- “(1) A copy of the signed letter of offer, including the terms and conditions relating to the mortgage loan account.*
- (2) A copy of all correspondence or documentation, in chronological sequence, between the Provider, its servants and agents and the Complainants, from July 2006 to July 2010, in relation to the interest rates on their mortgage loan account.*
- ...*
- (9) A copy of any additional documentation sought to be relied upon by the Financial Service Provider or which the Provider considers desirable to put before the Financial Services and Pensions Ombudsman by way of response to this complaint.”*

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However, a copy of the Rate Guide has not been supplied in response to the above requests or otherwise in evidence to this office. The Provider has also not provided this office with excerpts from the Rate Guide to substantiate its submission that *“the Rate Guide explains in clear language what a Tracker Rate is, a Discount Rate and the Standard Variable Rate.”* I note that the Provider has detailed that it was *“standard practice”* for the rate guide to be furnished to borrowers. This office requested certain particulars of evidence from the Provider and I have not been furnished with any documentary evidence that the *“Rate Guide”* was furnished to the Complainants at any time and in particular in July 2007. I note that there is no mention in the letter dated **11 July 2007** that accompanied the Confirmation of Interest Rate Amendment that the Rate Guide was enclosed.

The Provider submits that the Rate Guide *“comprises”* part of the Complainants’ loan documentation. In this regard, I note that the Offer of Mortgage Loan details as follows;

“[the Bank] is pleased to offer you a Home Loan in the amount set out at (1) below, subject to the terms set out over leaf and on the conditions contained in the enclosed Terms and Conditions leaflet dated 20th December 2005.”

I note that the Confirmation of Interest Rate Amendment states;

“This Offer is supplemental to your Facility Letter(s) entitled the Letter of Offer of Housing Loan Funds addressed to you from [the Provider] and shall be construed as a “Facility Letter” for the purposes of the Bank’s Mortgage Conditions. We confirm that the remaining Terms & Conditions of your existing facility remain unchanged...”

I do not accept that the *“Rate Guide”* *“comprises”* part of the Complainants’ Loan Documentation. There is no reference to the Rate Guide forming part of the Offer of Mortgage Loan signed in 2006 or the Confirmation of Interest Rate Amendment signed in 2007. Therefore, I accept that the Rate Guide does not form part of the Complainants’ loan documentation. As such, I do not accept that the Provider can rely on this document as *“comprising”* part of the Loan Documentation.

I note that the Provider further submits in its post Preliminary Decision submission of **04 September 2019**;

“In any case, as well as being set out in the Rate Guide, the meaning of the different interest rates was set out in the Provider’s marketing material which was readily available to the Complainants.”

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I have not been provided with any documentary evidence to support the Provider's position that the meaning of the interest rates was set out in "*marketing material*" that was available to the Complainants when the interest rate amendment was made in **July 2007**. In any event, I must observe that it is an untenable position for the Provider to rely on definitions contained in marketing material to support its position that the term "*Standard Variable Rate*" was defined clearly with respect to the Complainants' mortgage loan.

The Provider submits in its post Preliminary Decision submission of **04 September 2019**;

"The Provider set out the contractual entitlements and obligations that would apply and did so clearly. As a matter of law, where the specific obligations that are to apply are set out; then those are what apply. There is no obligation to exclude other extraneous matters i.e. to set out that the Tracker Rate would not apply."

As I have set out above, there was no definition of "*Standard Variable Rate*" in the Complainants' mortgage loan. As such, it appears to me that the mortgage loan documentation lacks sufficient clarity on the key question of the effect of applying the fixed interest rate to the Complainants' mortgage loan. There is nothing in the Offer of Mortgage Loan, or the Confirmation of Interest Rate that would alert a prudent borrower to the fact that he or she would not be entitled to a tracker mortgage at the end of the fixed period. Given the potential implications for the customer, the Provider should have spelled out in plain language the effect of signing the Confirmation of Interest Rate form in July 2007 to the Complainants. The **CPC 2006** obliges the Provider to make full disclosure of all material information in a way that seeks to inform the customer and to ensure that important information is provided to a customer in a clear and comprehensible manner.

I am concerned about the Provider's view that "*There is no obligation to exclude other extraneous matters i.e. to set out that the Tracker Rate would not apply*" and for that reason, I propose to refer this decision to the Central Bank of Ireland for its consideration and any action it deems necessary.

With respect to the "*Standard Variable Rate*" that applied to the Complainants' mortgage loan account from **July 2010**, the Provider submits that as the mortgage loan account originated prior to November 2008 it contained a "*Price Promise*" which means that the variable rate will never exceed the ECB rate by more than 1.50%. From this submission, it appears that the standard variable rate applied by the Provider to the Complainants' mortgage loan account was also linked to an ECB rate. Whilst I accept that this was the Standard Variable Rate applied, this submission conflicts with a later submission in the response to the evidence requested by this office, when the Provider stated that "*Our*

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Standard Variable Rate however is described as “fluctuating from time to time”, i.e. no reference to having a fixed margin over ECB.” Perhaps this confusion has come to pass because there was no definition of a “*Standard Variable Rate*” in the Complainants’ mortgage loan documentation.

I do not accept that the Provider was sufficiently clear either in its communications to the Complainants, in the Offer of Mortgage Loan, or the Confirmation of Interest Rate Amendment that the “*Standard Variable Rate*” was a different interest rate product to the “*Variable Tracker Rate*” that previously applied. The Offer of Mortgage Loan dated 24 July 2006, the accompanying terms and conditions, and the Confirmation of Interest Rate Amendment dated 11 July 2007 do not provide a definition of the term “*Standard Variable Rate*”. In those circumstances, I accept the Complainants contention that the effect of the Confirmation of Interest Rate Amendment on the Offer of Mortgage Loan with respect to the interest rates applicable to the Complainants’ mortgage loan at the expiry of the fixed interest rate period is called into question. There is an entire absence of clear documentation such that would have enabled the Complainants to have made an informed decision as to the effect of signing the Confirmation of Interest Rate Amendment on their mortgage loan in July 2007. The document is not sufficiently clear as to which terms and conditions in the Offer of Mortgage Loan were being amended nor does it specify that condition 2.6, which related to the Tracker Variable Rate would no longer apply. In those circumstances, I am of the view that in accordance with the terms and conditions, the correct interest rate that should have been applied to the Complainants mortgage account on the expiry of the fixed interest rate period is the “Tracker Variable Rate” of ECB + 1.0%.

The Provider submits in its post Preliminary Decision submission of **04 September 2019**, “*it is also relevant that in considering identical documents in other complaints the Financial Services Ombudsman (as he then was) has consistently found in favour of the Provider*”. This office is an independent investigator and adjudicator of complaints between individual Complainants and Providers. In the consideration of this complaint, this office had regard to all documentary evidence submitted by the parties and contained on this complaint file to reach its decision in this matter relevant to the Complainants’ mortgage loan. It is not appropriate for this office to consider “*identical documents*” contained on other complaint files or conclusions reached with respect to those “*identical*” documents. Each complaint submitted to this office, including this complaint, is considered on its own merits, by reference to the submissions made by the parties and evidence submitted to support those submissions.

The Provider also refers in its post Preliminary Decision submission of **04 September 2019**, to documents submitted to the Central Bank of Ireland as part of the Central Bank of

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Ireland's Tracker Mortgage Examination and to groups of customers as part of that Examination where the Provider identified that no redress was due to those customers.

I note that no underlying documentary evidence has been submitted to support those submission by reference to the Complainants' mortgage loan. In any event, this office is separate and distinct to the Central Bank and is independent in its functions. This office has considered this complaint on its own merits and on the facts and evidence related to the Complainants' mortgage loan.

The Provider submits that it is of significance that the *"Complainants have never suggested that they did not understand either that there was a difference between the Standard Variable Rate and either the Fixed Rate or the Tracker Rate or what the difference was"*. The Provider submits *"the Complainants' complaint, which is not accepted by the Provider, is that they believe they were entitled to revert to the Tracker Rate after the Fixed Rate Period."*

Having regard to lack of clear information given to the Complainant, I accept the Complainants' submission that they were of the view that the rate that would apply at the end of the fixed interest rate period was the *"Tracker Variable Rate"* and in the circumstances, this was a reasonable view to form. This view led to some interactions with the Provider in **2009**.

The Provider's internal notes record that a telephone call took place with the first-named Complainant on **9 June 2009**. The internal notes record as follows;

"17:15, [the Complainant] CLLD – ADV CUST REASON NOT RECD A LETTER RE END OF FR IS BEC; THIS IS NOT DUE TO END UNTIL JUN'10. ADV CUST NOTES SHOW WANTED;A 3YR FR. ADV NOT SHOWING THIS WILL REVERT TO TRCKER RATE AFTER;WARDS. EMAILED C/C TO CHECK IF WILL GO TO TRCKER RATE AFTER;FR ENDS AS CUST SIGNED UP TO THIS BECAUSE HE WAS ADV IT WLD.;ALSO CUST WANTING TO KNOW WHAT HIS PENS WOULD BE IF COMES OUT OF;FR EARLY. ADV APPROX MTHLY PYMT IF ON STD VAR RATE 2.5% ON CURR; BAL 204,942 OVER REM TERM 19YRS 5MNTHS C&I APPROX 1,111 EURS."

The internal notes record a further interaction with the Complainants on **18 June 2009**, as follows;

"MTG OPS – EMAIL RECD THAT CUSTOMER WANTS TO KNOW IF; MTG WILL SWITCH TO TRACKER AFTER FIXED RATE. THE MTG WILL; SWITCH TO VARIABLE RATE AFTER FIXED TERM AND CUSTOMER WILL HAVE;TO REQUEST TRACKER RATE. LTD SENT; IT IS NOT GUARANTEED THAT WE WILL SWITCH TO A TRACKER IMMED; AFTER FIXED RATE PERIOD."

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It is clear that the Complainants were checking that they would revert to the tracker rate. It is most disappointing that the Provider does not have recordings of the calls. In the absence of the call recordings, I have no reason to doubt the Complainants' recollection of these calls. Furthermore, the Provider's notes support the Complainants' recollection that the Complainants were of the view that the tracker interest rate would apply at the end of the fixed interest rate period.

The Provider wrote to the Complainants on **19 June 2009** and outlined as follows;

"We refer to your recent enquiry regarding the above mortgage.

We advise that when the Fixed Rate period ends on the above mortgage it will revert to the Standard Variable Rate."

The Provider submits that the Complainants did not "*raise any objection*" or "*complaint*" to the application of the Standard Variable Rate at this time in 2009. I fail to see the relevance of any lack of objection on the part of the Complainants following the letter of 19 June 2009, to the substance of the complaint.

In light of all the foregoing, I intend to substantially uphold the complaint that the Provider failed to apply a tracker interest rate of ECB + 1.0% to the Complainants mortgage loan account on the expiry of the fixed interest rate period from 01 July 2010.

I requested that the Provider furnish this office with a table which compared the manner in which the Complainants' mortgage loan amortised on a monthly basis between June 2010 and May 2018 on the standard variable rate and the manner in which it would have amortised if it had been on a tracker interest rate of ECB + 1.0%. In this regard, I note that the interest overpaid during this period of approximately 8 years was €6,351.80. I note that because the incorrect interest rate was applied the interest overpaid during the 8 year period varied on a monthly basis from approximately €50 to €80. I also note that the Complainants' mortgage loan was sold to a third party in September 2018 when the balance owing on the mortgage loan was €116,233.17.

In light of all the foregoing, I substantially uphold this complaint and direct pursuant to **Section 60(4) of the Financial Services and Pensions Ombudsman Act 2017** that the Provider do the following;

- (i) Repay to the Complainants the interest overpaid between June 2010 and the date of sale of the mortgage loan in September 2018, and

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- (ii) Come to an arrangement with the purchaser of the loan or any future purchasers to the effect that the tracker interest rate of ECB + 1.0% be applied to the mortgage loan account from September 2018 to the maturity of the loan in accordance with the original terms and conditions, and
- (iii) pay a sum of €2,500 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered.

Conclusion

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

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to do the following;

- (i) Repay to the Complainants the interest overpaid between June 2010 and the date of sale of the mortgage loan in September 2018, (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), and
- (ii) Come to an arrangement with the purchaser of the loan or any future purchasers to the effect that the tracker interest rate of ECB + 1.0% be applied to the mortgage loan account from September 2018 to the maturity of the loan in accordance with the original terms and conditions, and
- (iii) pay a sum of €2,500 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered (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).

Because of the Provider's contention that it does not have an obligation to inform the Complainants that they could lose their tracker rate of interest (as set out on page 17) I am referring this decision to the Central Bank of Ireland for any action it may deem necessary.

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**

09 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.