



<b><u>Decision Ref:</u></b>	2020-0202
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

##### **Background**

This complaint relates to two mortgage loan accounts held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's private dwelling house.

The Complainant drew down mortgage loan account ending **2077** in the amount of €450,000 for a term of 35 years/420 months in **February 2005**. The letter of loan offer dated **31 December 2004** and signed and accepted by the Complainant on **24 January 2005** (the "**Loan Offer**") refers to the applicable interest rate as a fixed rate of 2.75% for 1 year after which the rate will revert to the Provider's variable rate "*unless borrower(s) avail(s) of another interest rate option then on offer by the [Provider]*".

In **November 2005**, the Provider, on the request of the Complainant, transferred €400,000 of the mortgage loan balance in respect of mortgage account ending **2077** to a 5 year fixed interest rate at 3.82% under a new mortgage account ending **2150**. The balance remained on the 1 year fixed rate under mortgage account ending **2077**.

### The Complainant's Case

The Complainant submits that when he requested that €400,000 of his mortgage loan balance under mortgage account ending **2077** to be transferred to a 5 year fixed rate of 3.82%, the Provider did not request that he complete or sign any documentation to open the second mortgage account ending **2150**. The Complainant states that the Provider transferred the €400,000 portion of his mortgage balance subject to the fixed rate options to a separate account for “administrative purposes” and “treated that account [ending **2150**] as if it was a separate home mortgage, without, of course, any separate facility documentation”. The Complainant states that he understood the transfer to be for a temporary term of 5 years and “at no time did [he] specify [he] would like to open a second mortgage account”. The Complainant details that he can see why the Provider “needed a second administrative account” to facilitate his request. In this regard, the Complainant assumes that this is “due to limitations of [the Provider’s] system not to be able to apply different rates to the same mortgage account”. Nonetheless, the Complainant maintains that the Provider never explained that account ending **2150** is a “permanent account”, particularly with reference to the Provider’s letter dated **20 December 2005** confirming that €400,000 had been transferred.

The Complainant submits that when the 5 year fixed rate period on mortgage account ending **2150** expired in **November 2010**, the portion of his mortgage account in that account should have been transferred back to the original mortgage account ending **2077**. The Complainant submits that the Provider did not highlight to him that he would “not have the option of moving the 5 year fixed rate portion balance back to [his] home mortgage account” and further that his request to transfer the balance in this manner “would mean [his] mortgage would be split for the lifetime of the 35 year term”. The Complainant states that he had an expectation that once the “temporary 5 year term” applying to a portion of his mortgage had ended, he would be given the choice to move the outstanding balance back to his original mortgage account. The Complainant states that “once the 5 year period ended there was no justification or clause [the Provider] ha[s] produced to justify the continued use of a second administrative account, let alone to treat it differently to my single mortgage application and sole premises (..) it was loaned against.”

The Complainant submits that the Provider did not offer him a tracker rate on the expiry of the 5 year fixed rate on mortgage account ending **2150** which the Complainant claims he was entitled to. The Complainant states that he “naturally assumed that at the end of the 5 year fixed rate period the balance remaining on that fixed rate portion of my mortgage would be transferred back to my home mortgage account, which has contractually been on a tracker rate since 2006, before [the Provider] chose to stop offering tracker mortgages in 2008”. The Complainant states that he contacted the Provider by telephone on an

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unknown date and was told that he could not move the balance on mortgage account ending **2150** back to mortgage account ending **2077** as the Provider no longer offered tracker rates. The Complainant goes on to say that *“it was only considering the recent tracker issues that it came to my attention and understanding that my account was not treated fairly.”*

The Complainant contends that he has been left at a financial disadvantage as a result of the Provider’s failure to close the *“operationally administrative account”* ending **2150** after the 5 year fixed rate period and move the balance back to the original mortgage account ending **2077**, given the number of years the balance of account ending **2150** has not had the tracker rate applied in the same manner as the original mortgage account.

The Complainant is seeking the following:

- a. Compensation;
- b. A refund of the interest that he has overpaid on mortgage account ending **2150**, which at the time of making his complaint he estimated to be at €15,000; and
- c. The balance of mortgage account ending **2150** transferred back to mortgage account ending **2077**, which remains on a tracker interest rate.

### The Provider’s Case

The Provider states that by way of letter dated **21 November 2005**, the Complainant requested to move €400,000 of his outstanding mortgage balance onto a 5 year fixed rate of 3.6% (APR) leaving the balance of the mortgage on a rate of 2.75% while noting the nominal rate of 3.82% (which was the 5 year fixed rate applicable at the time). The Provider submits that in order to facilitate the Complainant’s request, it *“necessitated the opening of a separate Mortgage Loan Account”*. The Provider states that it complied with the Complainant’s request and opened mortgage account ending **2150** on **7 December 2005** and this was confirmed to the Complainant by way of letter dated **20 December 2005**. The Provider explains that it was *“operationally necessary”* to open a second mortgage account to *“facilitate splitting the mortgage loan account, so that a portion could be placed on a different rate”*. The Provider goes on to state that the Complainant’s request *“did not involve the drawdown of any additional funds or underwriting approval, it is a mechanism used to facilitate the instruction to split the mortgage loan account so that differing rates for differing periods could be applied.”* The Provider submits that the Complainant was not treated any differently as a result, save as he had instructed. At the same time, the Provider states that the reduced balance on mortgage account ending **2077** remained on a 1 year fixed rate up until **4 March 2006** at which point a tracker rate of 3.2% (ECB + margin of 0.95%) was applied on foot of written instructions from the Complainant dated **15 February 2005**. The Provider further submits that the general terms and

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conditions applicable to both mortgage account ending **2077** and mortgage account ending **2150** formed part of the original Loan Offer.

In circumstances where the 5 year fixed interest rate period was due to expire on **8 December 2010** in respect of mortgage account ending **2150**, the Provider submits that it issued the Complainant a **rate options letter** dated **18 November 2010** offering the Complainant LTV variable rates of 3.09%, 3.29% and 3.49% and fixed rate options for 1, 3, 5 and 10 year terms. It details that its letter informed the Complainant that in the absence of an instruction from him regarding his choice of interest rate, the Provider's standard variable rate of 3.25% would be applied. The Provider submits that the standard variable rate of 3.25% was applied to mortgage account ending **2150** as of **8 December 2010** as no response was received from the Complainant to the rate options letter. The Provider states that it subsequently applied a 3 year fixed rate of 3.89% to mortgage account ending **2150** on **22 March 2011** on foot of a written request from the Complainant on **15 March 2011**. The Provider submits that the Complainant's written request also stated that he did not want to *"modify" his "other mortgage account on the same property which is a tracker."*

The Provider submits that in **late 2008** it withdrew tracker interest rates for new and existing customers not already on a tracker interest rate *"because they no longer made economic sense as any tracker rate it would have offered would have been prohibitively expensive"*. The Provider further submits that *"there was no indication or guarantee that a tracker rate would be offered on expiry of the fixed rate periods"* in respect of loan account ending **2150**. In this regard, the Provider relies on **condition 3.2** of Part 4 of the general terms and conditions of the Loan Offer and its letter of **18 November 2010** which outline what is to occur at the end of any fixed rate period. The Provider further submits that mortgage account ending **2150** was never on a tracker interest rate and the Complainant *"does not have a contractual entitlement at the end of his fixed rate period to be offered any specific tracker interest rates or any historic interest rate of any nature which was previously offered by [the Provider]."* The Provider states that it is satisfied that the general terms and conditions of the Loan Offer in respect of both mortgage accounts ending **2077** and **2150** are sufficiently clear and transparent as to what is to occur at the end of a fixed rate period, being either the application of a further fixed rate of interest or the standard variable rate.

The Provider wrote to the Complainant in **November 2010** as set out above seeking his instructions upon the expiry of the 5 year fixed interest rate period. The Provider states that it *"acts on the instructions of customers and as such, cannot simply amalgamate the accounts, without the consent or instruction of the customer. There is no record of the Complainant requesting the accounts to be amalgamated."* The Provider maintains that had the Complainant requested that the two mortgage loan accounts ending **2077** and

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**2150** be amalgamated at the end of the 5 year fixed interest rate period in 2010, *“there would have been no option for the portion of the loan that was on the fixed rate to convert to a tracker interest rate, as [the Provider] had withdrawn the Tracker Rate in [late] 2008.”*

The 3 year fixed interest rate period in respect of mortgage account ending **2150** expired on **24 March 2014**. The Provider submits that it issued a **rate options letter** dated **13 February 2014** to the Complainant offering him LTV variable rates of 4.09%, 4.29% and 4.49% and fixed rate options for 1, 2, 3 and 5 year terms. It details that its letter informed the Complainant that in the absence of an instruction from him regarding his choice of interest rate, the Provider’s standard variable rollover rate of 4.4% would be applied. The Provider submits that the standard variable rate of 4.4% was applied to mortgage account ending **2150** as of **24 March 2014**, in circumstances where no response was received from the Complainant. Again, the Provider submits that the tracker rate was not available as an option as the tracker rate had been withdrawn, however, the Complainant was entitled to choose from the various rate options on offer by the Provider at that point in time when the fixed rate period expired.

### **The Complaints for Adjudication**

The complaints for adjudication are as follows:

- a. The Provider wrongfully failed to transfer the balance of mortgage account ending **2150** back to mortgage account ending **2077** at the end of the 5 year fixed period in **November 2010**; and
- b. The Provider wrongfully failed to offer the Complainant a tracker interest rate for mortgage account ending **2150** at the end of the 5 year fixed period in **November 2010**.

### **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 Complainant was 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.

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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 **29 April 2020**, 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.

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

1. E-mail from the Complainant to this Office on **18 May 2020**;
2. E-mail from the Provider to this Office on **2 June 2020**; and
3. E-mail from the Complainant to this Office on **3 June 2020**.

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, I set out below my final determination.

In order to determine this complaint it is necessary to consider the terms and conditions of the Complainant's mortgage loan and the details of certain interactions between the Complainant and the Provider from **November 2004** to **December 2005** in order to establish how the Complainant's mortgage account was split into two separate accounts. It is also necessary to consider certain interactions between the Complainant and the Provider between **2010** and **2011**.

The Complainant approached the Provider in **November 2004** seeking mortgage finance in the sum of €450,000.

The Complainant in his post Preliminary Decision submissions dated **18 May 2020** outlines that the "*primary focus*" of his negotiations with the Provider in **late 2004**, before the Provider issued a loan offer, was achieving "*the low home tracker rate, requiring a less than 60% loan to value ratio, which was a key rate objective for [him] to achieve in order to meet [his] monthly mortgage obligations.*" The Complainant further submits that "*this*

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lower home tracker rate was the only product option set out in the Provider's Repayment Illustration, dated **5 November 2004**" given to him by the Assistant Manager of one of the Provider's branches with whom the Complainant negotiated the terms of his home mortgage. The Complainant submitted the **Repayment Illustration** into evidence. The Provider in its post Preliminary Decision submissions dated **2 June 2020** details that Repayment Illustrations "were provided to customers on request during the application process in order to provide indicative information in relation to estimated monthly mortgage loan repayments on various rates". The Provider further outlines that;

*"In the case of the Complainant, the Illustration dated **5 November 2004** reflected a mortgage loan amount of €336,000, over a 35 year term, and also provided details of monthly loan repayments based on a 1 Year Fixed interest rate of 2.75%, thereafter converting to the Variable interest rate of 3.3%. The Illustration also provided details of repayments based on a Tracker interest rate of 2.95% assuming a >60% Loan to Value ratio. The information provided in the Illustration was provided "for illustration purposes only" and was not a formal offer of a mortgage loan."*

I have considered the Repayment Illustration dated **5 November 2004** which the Complainant has submitted in evidence. I note that the Repayment Illustration details as follows:

Product	Interest Rate	APR	Repayment Amount (€)	Cost Per 1,000 (€)	Repay Amt with PPP (€)
1 Year Fixed New	2.750%		1,245.88	3.71	1,305.06
Then Variable Rate	3.300%	3.304%	1,346.28	4.01	1,410.23
(Total Interest €228,225.14, Total Repayment €564,225.14)					
<b>Other Product Options</b>					
Tracker Home <60% Ltv	2.950%	2.984%	1,282.78	3.82	1,343.71
(Total Interest €202,765.46, Total Repayment €538,765.46)					

The Repayment Illustration then states;

*"This information is provided for illustrative purposes only and is based on the accuracy of information provided. This information is valid as at today's date only. It does not constitute an offer of a mortgage."*

The evidence does not support the Complainants submission that the tracker rate was the "only product option" set out in the Repayment Illustration. From the extract above there

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were clearly two product options referred to, that is, a 1 year fixed rate, thereafter moving to a variable rate and a tracker rate with a <60% LTV. Regardless of the product options discussed it is important for the Complainant to be aware that the Repayment Illustration dated **5 November 2004** did not amount to a formal offer of a mortgage by the Provider to the Complainant and was solely provided for illustrative purposes. This was recorded in the Repayment Illustration itself.

The Provider approved a mortgage loan and issued a formal letter of **Loan Offer** dated **31 December 2004**.

The particulars of offer of the mortgage loan as set out in **Part 1** of the **Loan Offer** are as follows;

*Mortgage Loan Amount: €450,000*  
*Loan Term: 35 years/420 months*  
*Loan Type: Annuity*  
*Application Interest Rate: 2.75% Fixed, for 1 years after which the rate will revert to the Bank's Variable Interest Rate, unless borrower(s) avail(s) of another interest rate option then on offer by the Bank. (Rates include margin of 0.00%). APR 3.303%*  
*Amount of Monthly Repayment instalment (at Offer Date): €1,668.51*

**Condition 3.2 of Part 4** of the **General Terms and Conditions** of the Loan Offer outlines what is to happen at the end of any fixed rate period and reads as follows;

*"3.2 Further fixed interest rate options/choice*

*The Bank in its sole discretion, at the end of any fixed interest rate period, may provide any further fixed interest rate period, but if it elects not to do so or the Bank offers the Customer a fixed interest rate choice at the end of any fixed interest rate period and the Customer fails to exercise this choice then the Mortgage Loan will convert to a variable interest rate Mortgage Loan."*

**Condition 3.5 of Part 4** of the **General Terms and Conditions** of the Loan Offer outlines as follows;

*"3.5 Variable Interest Rate Mortgage Loan*



*In the case of a variable interest rate Mortgage Loan the interest applicable, at any time, will vary according to the prevailing rates set generally by the Bank from time to time, subject to these conditions.”*

The Complainant signed the **Acceptance and Consent** attaching to the Loan Offer on **24 January 2005** in the presence of his solicitor noting that he accepted the terms and conditions of the Loan Offer. I note that the Provider’s submissions state that the Complainant signed and accepted the Loan Offer on **21 January 2005** however my reading of the Loan Offer is that it was signed and accepted by the Complainant on **24 January 2005**.

Mortgage loan account ending **2077** was drawn down on **1 February 2005** and the interest rate applied was a 1 year fixed interest rate of 2.75%. The Provider issued a letter to the Complainant on **1 February 2005** confirming the loan drawdown. The letter states that the Complainant would be advised of his interest rate options before **1 February 2006** and interest instruction would be required prior to that date.

The Complainant submits in his post Preliminary Decision submissions dated **18 May 2020** that the *“loan offer documentation provided by the [Provider] and signed by [the Complainant] on **24 January 2005** was incomplete and makes no reference to the agreement reached between [the Complainant] and the [Provider’s] Branch on the market rate tracker and variable rate options available to [the Complainant] for [his] mortgage.”* The Complainant further states that by the Provider offering him *“a late take up of the 1-year fixed discounted incentive rate as the initial rate. This delayed the application of the full market rate tracker and variable rate options agreed between [him] and [the Provider’s] Branch. The Provider also failed to reflect those agreed options in the mortgage loan documentation.”*

The Provider in its post Preliminary Decision submissions dated **2 June 2020**, states that it *“is satisfied that the Complainant was aware of the Bank’s different interest rate options prior to accepting the Letter of Offer. There is no reference to a Tracker interest rate in the Complainant’s Letter of Offer and Mortgage Loan Account ending **2150** was never on a Tracker interest rate.”*

It is important for the Complainant to understand that despite any negotiations he may have had with the Provider in **late 2004**, the interest rate options that the Complainant was contractually entitled to avail of are those as set out in the Loan Offer which he signed and accepted on **24 January 2004** in the presence of his solicitor. That is a 1 year fixed interest rate with the potential for a further fixed rate if the Provider decided to offer such a rate, or alternatively, if no choice is made available, or the Complainant did not exercise a choice, then the loan would convert to a variable interest rate loan. That variable interest

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rate loan was one that would “*vary according to the prevailing rates set generally by the Bank from time to time*”. The variable interest rate in the Complainant’s mortgage loan documentation was not a tracker interest rate.

If the Complainant was not satisfied with the interest rate options offered in the Loan Offer or the terms and conditions attached to the Loan Offer, or if it was “*incomplete*” and did not reflect what he believed was “*negotiated and agreed*” during the application process, then the Complainant was under no obligation to sign and accept that Loan Offer. However the Complainant did so, and by consequence, is bound by the Loan Offer and the associated terms and conditions as outlined in that Loan Offer.

By way of letter dated **21 November 2005**, the Complainant wrote to the Provider requesting the following:

*“I wish to move €400,000 of my outstanding mortgage onto [the Provider’s] 5 year fixed rate of 3.6% (APR) leaving the balance of my mortgage on [the Provider’s] 2.75% introductory Mortgage rate.”*

The Complainant also noted “*3.82% nominal rate*” in handwriting on the typed letter.

In order to facilitate the Complainant’s request, the Provider submits that it was necessary to open a new separate mortgage account ending **2150** so that the €400,000 portion could be placed on a different interest rate in accordance with the Complainant’s written instructions. The balance remaining on account ending **2077** continued on the 1 year fixed rate of 2.75% until expiry on **1 February 2006**. The Provider states in its submissions that the opening of the second account was “*operationally necessary*” to facilitate the Complainant’s request to place €400,000 on a different rate, and the request did not involve the drawdown of any additional funds or underwriting approval.

By way of letter dated **20 December 2005** (the “**First Letter**”), the Provider outlined to the Complainant that €400,000 had been transferred from account ending **2077** to a fixed interest rate as requested by the Complainant. The top of the First Letter contains the name of the property over which the loan is secured, the second loan account number ending **2150** and details the loan amount of €400,000. The First Letter states as follows:

*“I refer to your Home Mortgage and advise that €400,000.00 has been transferred from [account ending **2077**] to a fixed interest rate, as requested, the details of which are:-*

- *Term is –years/410months; Final Payment due on 07/02/2040.*
- *Interest rate, 5 Year Fixed, to 08/12/2010, is 3.82% (APR 3.513%) including interest adjustment of 0.00%.*

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- *Monthly repayments, based on the above interest rate, of €1,745.96 commence on 09/01/2006, and are fixed for the fixed interest period.*
- *An additional charge, dependent on the level of rates at the time, may arise in the event you prepay/ opt-out of the fixed interest rate arrangement (see example over page).*

*Interest is calculated on the daily outstanding balance of your loan, is debited to your mortgage quarterly, in arrears, on/about 15<sup>th</sup> March, June, September and December on Annuity Mortgages and monthly, in arrears, on/about 15<sup>th</sup> of each month on "Interest Only" Mortgages. Your account statement and interest certificate for the tax year to the 31<sup>st</sup> of December will be furnished to you in January of each year.*

*You will be advised of your interest rate options before 08/12/2010 and interest instruction will be required prior to that date.*

*Thank you for taking a Home Mortgage from [the Provider]. I look forward to a mutually satisfactory relationship.*

*In this connection, feel free to contact your local Branch or this Office, should you have any query on the above or indeed at any time should you require assistance with any aspect of your mortgage."*

It is clear from the above that the First Letter details that the remaining term of the loan is 410 months with the final payment due on **7 February 2040**. This is in line with the general terms and conditions of the Loan Offer. The First Letter further states that the Complainant will be advised of his interest rate options before **8 December 2010** and interest instruction will be required prior to that date.

By way of a second letter dated **20 December 2005** (the "**Second Letter**"), the Provider outlined to the Complainant that the balance on the original mortgage account ending **2077** had been reduced to €43,760.57 as €400,000 had been transferred to a fixed interest rate as requested by the Complainant. The top of the Second Letter again contains details of the property over which the loan is secured (being the same as the First Letter), the original loan account number ending **2077** and details the loan balance amount of "€43,760.57 dr".

The Second Letter states as follows:

*"I refer to the above home loan and confirm that the balance has been reduced to €43,760.57, as €400,000.00 has been transferred to a fixed rate as requested, please see enclosed letter.*

*I confirm that your revised monthly repayment, based on the fixed rate of 2.75%, is €164.42. Your next repayment is due on the 28/12/2005. This loan will expire on the 30/01/2040.*

*I trust the above is to your satisfaction. Please do not hesitate to contact this office should you have any further queries."*

The Second Letter clearly notes that the loan will expire on **30 January 2040**.

It appears that the Complainant did not contact the Provider on foot of receipt of the First Letter and/or the Second Letter to query the contents of either letter.

The evidence shows that two separate statements of account dated **30 December 2005** in respect of each of the two mortgage account numbers issued to the Complainant. In particular, the statement of account in relation to mortgage account ending **2150** shows the opening balance of €400,000 having been applied together with the new fixed rate of 3.82%. The statement of account in relation to mortgage account ending **2077** shows an entry at **7 December 2005** indicating that €400,000 was moved to account ending **2150**.

The Complainant in his post Preliminary Decision submissions dated 18 May 2020 states that;

*"There was no request to me to authorise the transfer of the amount, a massive €400,000 and the bulk of my home mortgage, to a new, and what turned out to be, a permanent second mortgage account. Indeed, considering the large rounded amount of €400,000 involved, [the Provider] could have opted to provide the fixed rate option through an interest rate swap (sic) agreement which would have been administered without any transfer of the loan amount from my home mortgage account. When I learned that a second account was set up, I understood, and was given no evidence to the contrary, that to implement the 5-year fixed rate option, [the Provider] needed for administrative purposes to relocate part of my mortgage loan to a temporary account and would automatically transfer the balance on that account back to my 35-year mortgage account."*

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The Provider in its post Preliminary Decision submissions dated **2 June 2020** outlines;

*“The instruction received from the Complainant dated **21 November 2005** was complied with by the Bank, while effectively splitting the Complainant’s Mortgage Loan Account into two separate accounts, it did not in any way alter the Letter of Offer and the general terms and conditions of the Complainant’s Mortgage Loan. The same Mortgage Loan terms and conditions continued to apply to both Mortgage Loan Accounts ending **2150** and **2077**.”*

It is clear that the Provider was acting on the Complainant’s instructions of **21 November 2005** by applying the fixed interest rate to €400,000 of the Complainant’s mortgage loan. I accept that the Provider did not specifically explain or make it clear to the Complainant that his request to transfer the €400,000 portion to a different fixed rate necessitated the opening of a second mortgage account, because this was the mechanism that the Provider had available to implement the Complainant’s instructions. However it is important to note that the evidence shows that the transfer of the €400,000 portion to the second mortgage account ending **2150**, while effectively splitting the mortgage loan into two separate mortgage accounts, did not alter the general terms and conditions of the Complainant’s mortgage loan. The same mortgage loan terms and conditions continued to apply to both mortgage loan accounts from that time.

The evidence shows that prior to the expiry of the 1 year fixed rate period in respect of account ending **2077**, the Provider issued a letter to the Complainant dated **19 January 2006** noting the following:

*“The fixed rate period on your above home mortgage expires on 01/02/2006 and I should be obliged for your further instructions as to the rate you wish to avail of from that date. In the absence of any reply the appropriate standard Variable rate (plus the existing agreed adjustment of 0.00%) will be applied but may subsequently be revised at your request to any available rate option in the future.”*

The letter of **19 January 2006** also outlines a sample of the interest rates on offer from the Provider at that time, which included tracker rates, as detailed below:

<b><u>Rate</u></b>	<b>%</b>
Tracker Home Mortgage Ln> 250k	3.350
Tracker3 Home Mortgage <60%LTV	3.200
Tracker3 Home Mortgage >60%LTV	3.500
Variable Rate	3.500
1 Year Fixed	3.840
3 Year Fixed	3.980

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5 Year Fixed	4.300
10 Year Fixed	4.600"

The Complainant sent a fax dated **15 February 2006** to one of the Provider's local branches on or around **20 February 2006** requesting the Provider to amend the rate on mortgage account ending **2077** to a tracker rate "*for less th[a]n 60% of the loan value.*"

The Provider submits that the Complainant's instructions dated **15 February 2006** were not received by its home mortgages unit until **2 March 2016** (it is assumed that this is a typographical error in the Provider's submissions and it is accepted that the date should read **2 March 2006**). The Provider wrote to the Complainant on **4 March 2006** noting that a tracker rate of 3.20% (including a margin of 0.95% over ECB) had been applied to mortgage account ending **2077** as of **4 March 2006**. I note in the Provider's submissions that there was a slight delay in acting on the Complainant's instructions (from **20 February 2006** to **4 March 2006**). This matter is not the subject of this complaint, however, I understand from the Provider's response dated **26 August 2018** that it was separately investigating the matter to ascertain if there was a detriment to the Complainant given the standard variable rate applicable at the time was 3.5 % while the tracker rate to be applied was 3.2%.

It is important for the Complainant to note that he was allowed to choose from the various rates, to include tracker rates, outlined in the Provider's letter of **19 January 2006** in respect of mortgage account ending **2077** because those were the rates on offer at that time, albeit that he had no contractual entitlement to a tracker rate. In this regard, I accept that the Provider complied with Part 1 of the Loan Offer which states that at the end of the 1 year fixed period the Complainant can avail of "*another Interest rate option then on offer by the [Provider]*". It should be noted that **Condition 3.2** of the general terms and conditions of the Loan Offer, as outlined above, makes no reference to the entitlement of a tracker rate at the end of a fixed interest rate period or at any other time.

It is important to note that the application of the tracker interest rate of 3.20% (including a margin of 0.95% over ECB) was with respect to mortgage account ending **2077** only. At this time, mortgage account ending **2150** remained on the fixed interest rate that had been applied at the Complainant's request in **November 2005**. Mortgage loan account ending **2150** which the Complainant refers to as the "*temporary administrative account*" was never in fact on a tracker interest rate.

With respect to mortgage account ending **2150**, I note from the evidence that, prior to the expiry of the 5 year fixed period on **8 December 2010**, the Provider wrote to the Complainant on **18 November 2010** to set out its interest rates then available for selection. The Provider's letter detailed as follows:

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*“The fixed rate period on your above mortgage loan expires 8/12/2010 and I should be obliged for your further instructions as to the rate you wish to avail of from that date. In the absence of any reply [the Provider’s] current Standard Variable Rate of 3.250%, APR 3.2940% with monthly repayments of €1630.06 (plus the existing agreed adjustment of 0.00%) will be applied. This may later be changed with our agreement, to another available rate. The payments quoted below do not include any PPP cover which you may have taken out upon drawdown of the mortgage loan.”*

The letter dated **18 November 2010** offered the Complainant LTV variable rates of 3.09%, 3.29% and 3.49% and fixed rate options for 1, 3, 5 and 10 year terms. The letter also stated that if the Complainant required any further information he should contact his local branch for details on all mortgage interest rate options. In circumstances where the Provider did not receive a response from the Complainant, mortgage loan account ending **2150** was placed on the Provider’s standard variable rate of 3.25% on **8 December 2010**. This was in accordance with **Condition 3.2** of part 4 of the general terms and conditions of the Loan Offer which outlines that at the end of any fixed interest rate period, the Provider, in its sole discretion, may offer the Complainant a further fixed interest rate period but if the Complainant did not select a further fixed interest rate, then the loan would convert to a variable interest rate mortgage loan. In accordance with **Condition 3.5** a variable interest rate was one which would vary according to the prevailing rate generally set by the Provider. It did not provide any entitlement to a tracker mortgage rate of interest.

The Complainant takes issue that the Provider failed to transfer the balance of mortgage account ending **2150** back to mortgage account ending **2077** at the end of a 5 year fixed period in **November 2010**. The Provider submits that it acts on the instructions of customers and as such, *“cannot simply amalgamate accounts, without the consent or instruction of the customer”*. I accept that there is no evidence to suggest that the Complainant requested that both mortgage accounts be amalgamated at the end of the 5 year fixed period in **November 2010**. There was no obligation on the Provider to transfer the balance back in the absence of any instruction or request from the Complainant.

It appears from the Complainant’s submissions that the Complainant is of the view that the transfer of the balance on mortgage account ending **2150** back to mortgage account ending **2077** at the end of a 5 year fixed period in **November 2010**, would or should have resulted in an obligation on the Provider to apply a tracker interest rate of 3.20% (including a margin of 0.95% over ECB) to the entire loan from that point in time. Even if it was the case that the Complainant had requested for the balance of the mortgage loan that was the subject of the 5 year fixed rate (mortgage loan account ending **2150**) to transfer back to mortgage account ending **2077**, I do not accept that there would have been an

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obligation (contractual or otherwise) on the Provider to apply the tracker interest rate, that had been applied to part of the mortgage loan some 4.5 years earlier, to the balance of the loan at this time.

The second matter to be determined is whether the Provider wrongfully failed to offer the Complainant a tracker rate for mortgage account ending **2150** at the end of the 5 year fixed period in **November 2010**.

It is important to point out that the manner in which the different interest rates were applied to the two mortgage accounts stems from the terms and conditions of the original mortgage loan which continued to apply to both mortgage loans, the Complainant's own written instructions and the interest rates available to him at the different points in time at which the various interest rate periods expired. It is clear to me that the Complainant was offered a tracker rate in respect of mortgage account ending **2077** prior to the end of the 1 year fixed rate period on **1 February 2006** because various tracker rates were on offer at that point in time, as outlined in the Provider's letter of **19 January 2006**. The Complainant himself elected to transfer €400,000 of his mortgage loan to a 5 year fixed rate of 3.82% by letter dated **21 November 2005** under mortgage account ending **2150**. That particular fixed interest rate period expired on **8 December 2010**, at which point tracker rates were no longer being offered by the Provider. As outlined above, the Provider acted in accordance with **Condition 3.2** of part 4 of the general terms and conditions of the Loan Offer at that time with respect to the mortgage loan and applied a variable rate.

The evidence shows that the Provider received a letter from the Complainant dated **15 March 2011** as follows:

*"As discussed at 15.50 with the mortgage team, can I please lock in my mortgage account [ending **2150**] on the above property to the current 3 year fixed rate of 3.89%. Currently the account is on a standard variable rate.*

***Please do no[t] modify my mortgage account on the same property which is a tracker."** [my emphasis]*

It is clear from the Complainant's letter of **15 March 2011** that, at that point in time, the Complainant continued to treat both mortgage accounts differently by applying different rates to both mortgage loan accounts. The Provider states that it has no record or recording of the telephone call on **15 March 2011**, however it is evident that the Provider acted on the Complainant's written instructions by applying a 3 year fixed rate of 3.89% to mortgage account ending **2150** on **22 March 2011**. The Provider outlined this change to the Complainant by way of letter on the same date detailing the following;

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*“With reference to your recent request, I confirm that a fixed interest rate of 3.89% (including the existing interest adjustment of 0.00%) will apply to your mortgage loan from **22 March 2011** for a period of 3 years. The Monthly repayment for the period of the fixed interest rate will be €1,759.36 and will be revised on its expiry in accordance with the rate then applicable.”*

The Complainant in his post Preliminary Decision submissions dated **18 May 2020** states as follows;

*“In effect the valuation [the Complainant] provided [the Provider] secured the tracker rate LTV of less than 60% in 2006 on [the Complainant] 35 year mortgage on the full 450,000, yet today [the Complainant] temporary administrative account [account ending **2150**] has a LTV of less than 80%, my current rate today on my temporary administrative account [account ending **2150**] is 3.150%....This in effect means [the Provider] have applied different rules concerning value and their implied rates to my single 35-year mortgage, if I have a single mortgage account it should be treated the same, different rules cannot be applied to a single mortgage concerning its value. A property has a single value.”*

The Complainant in his post Preliminary Decision submissions dated **3 June 2020**, outlines that the Provider has “chosen to completely ignore the fact [the Complainant] secured [his] tracker rate on providing a single valuation and proving [the Complainant] had a LTV of less than 60% on a single mortgage application and single dwelling.”

The Complainant submitted his mortgage loan statement showing the application of the variable rate of 3.150% to his mortgage loan account ending **2150** and what he submits is an extract from the Provider’s rates as of **18 July 2020**. The Complainant appears to be submitting that the mortgage loan should be on the lower “LTV Variable Rate >50%<=80%” of 2.95% on the basis of the 60% valuation obtained on mortgage loan account ending **2077**. I note the Provider has not commented on this matter in its post Preliminary Decision submissions dated **2 June 2020**.

The issue with respect to the loan to value and the applicable variable rate that the Complainant submits should have applied to his mortgage loan is not a matter that formed part of the investigation of this complaint and has only been raised by the Complainant in his post preliminary decision submissions in respect of this complaint. In these circumstances, I am of the view that it is not appropriate to make a determination on this issue in this Legally Binding Decision.

For the reasons outlined above, I do not accept that the Provider wrongfully failed to transfer the balance of mortgage account ending **2150** back to mortgage account ending

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**2077** at the end of the 5 year fixed period in **November 2010** or that the Provider wrongfully failed to offer the Complainant a tracker rate for mortgage account ending **2150** at the end of the 5 year fixed period in **November 2010**. The Complainant had been offered a tracker interest rate of 3.20% (including a margin of 0.95% over ECB) on mortgage account ending **2077** in **January 2006**, as that was a rate that was available at that time. There was no contractual entitlement to be offered a tracker interest rate on that mortgage at that time. By the time the fixed interest rate period that the Complainant had elected to apply to the €400,000 portion of his mortgage loan (account ending **2150**) had expired in **November 2010**, tracker interest rates were no longer available and a variable interest rate was applied to the mortgage loan, in accordance with the terms and conditions of the Loan Offer. It is clear that the reason the two mortgage loans are now on different interest rates is a matter of timing because of the different interest rates available when the various fixed rates expired.

For the reasons outlined above, I do not uphold this complaint.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

**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**

**30 June 2020**

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.