



<u>Decision Ref:</u>	2020-0427
<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 Application of interest rate
<u>Outcome:</u>	Partially 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 that is the subject of this complaint was secured on the Complainants' principal private residence.

The loan amount is €395,000 and the term of the loan is 35 years. The particulars of the Letter of Approval dated **7 July 2008** detail that the loan type was a "1yr Disc Tracker (>80% LTV) Home Loan".

The Complainants' Case

The Complainants were issued with a Letter of Approval dated **7 July 2008** with respect to mortgage loan account ending **8287**. The Complainants note that they drew down the mortgage loan account in **September 2008** "on a '1Yr Discounted Tracker' with a rate of 1.30% ECB through a Broker".

On expiry of the one year discounted rate in **September 2009**, the Complainants submit that the interest rate on the mortgage loan account "jumped from 1.30% over ECB to 3.25% over ECB". The Complainants contend that this "could not have been possible" because when they took out their mortgage "the parent rate/base rate could not have

been 3.25% over the ECB". The Complainants state that they did not receive an options letter from the Provider in **2009** and that "*nobody knowingly would sign up to this type of contract*".

The Complainants assert that the tracker interest rate that applied to their mortgage loan account in **September 2008** was discounted from a "*parent rate/base rate*", which they maintain is the interest rate that their mortgage loan account should have converted to in **2009**. The Complainants state that they contacted the Provider by telephone on **26 June 2017** to query what the "*master or parent rate was when [they] took out [their] mortgage in Sept 2008.*" They state that the Provider confirmed that the base rate in **2008** was ECB + 1.68%. The Complainants submit that after numerous calls and emails to the Provider, the Provider informed them on **20 July 2017** that it "*would not send [them] written confirmation of the base rate*" and "*would not give a reason to why [the Provider] would not post this confirmation letter to [them]*". The Complainants explain that the Provider advised them to contact their broker whom they took out the mortgage with however the Complainants state that the "*rate is nothing to do with [their] broker*" and it is the Provider "*that offer rates, not the broker*".

The Complainants are of the view that the Provider is acting in breach of the information provided under the Provider's document entitled **Housing Loans Under Consumer Credit Act 1995**. They submit that this document provides that the amount of the percentage over the ECB rate will "*depend on the amount of the loan and that percentage will not be exceeded during the term of the loan*". Consequently, the Complainants maintain that the tracker interest rate applicable to their mortgage loan account should not exceed the rate of ECB + 1.68% for the term of the loan. The Complainants accept that the **Letter of Approval** that was signed and accepted by them did not contain or provide "*a specific promise*" that a particular tracker interest rate would be made available to them "*either on expiry of the discounted rate period or at any time during the mortgage term*". However, they state that "*the offer signed by [them] also did not contain or provide a specific promise that [the Provider] would breach the HOUSING LOANS UNDER CONSUMER CREDIT ACT 1995 by exceeding [their] rate of ECB + 1.68% during the term of the plan*".

The Complainants explain that because of this increase to the incorrect rate, their mortgage loan account fell into arrears. The Complainants submit that the "*entire matter has been utterly frustrating and stressful*" for them.

The Complainants are seeking the following:

- The correct tracker interest rate of ECB + 1.68% be restored to their mortgage loan account; and

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- To be offered and paid compensation and this amount should amount to the difference between the current tracker interest rate of ECB + 3.25% and “*what the base/parent rate was in Sept 2009*”.

The Provider’s Case

The Provider explains that the Complainants’ mortgage application process began in **May 2008** when it received a loan application from a broker acting on behalf of the Complainants.

The Provider submits that a Letter of Approval was issued to the Complainants on **7 July 2008** for the amount of €395,000 at an initial rate of 5.30% (ECB + 1.30%) for the first 12 months of the loan. The Provider notes that the mortgage loan was drawn down on **29 September 2008** at an initial interest rate of 5.55% (ECB 4.25% + 1.30%).

The Provider explains that **Condition 1** of the **Special Conditions** of the Letter of Approval outlines the interest rate options that would be applicable on the expiry of this “*discount period*” in **September 2009**. The Provider notes that on expiry of the “*discount period*”, a letter issued to the Complainants in **August 2009** enclosing a rate options form which listed various interest rate options from which the Complainants could choose to include a tracker variable rate of ECB + 3.25%, a standard variable rate or a 2,5,7 or 10 year fixed rate. The Provider states that it did not receive a signed options form from the Complainants indicating their preference for a particular rate. On that basis, the Provider explains that on **29 September 2009**, in accordance with **Special Condition 1** of the Letter of Approval, the Complainants’ mortgage loan account “*defaulted*” to the then current tracker interest rate of ECB + 3.25%.

The Provider explains that it has an “*automated system*” which issues a letter to each mortgage loan customer whose loan is reaching the end of a particular rate period which “*reminds the customer that the particular interest rate period is coming to an end on a particular date*”. The Provider notes that a rate options form is attached to the letter “*outlining the rates that are currently available*” which must be “*ticked, signed and returned by the customer in order to select one of the options*”. The Provider submits that in this instance, the letter set out which one of the rates would be applied to the Complainants’ mortgage loan account if the Rate Options Form was not completed and returned to the Provider. The Provider submits that its practice at the time was “*to retain copies of such automated letters on receipt of a signed options form returned by a customer*”. The Provider explains that given the Complainants did not sign and return the options form prior to the expiry of the “*discount period*”, there was no copy retained. Nevertheless, the Provider submits that it is “*satisfied*” that an options letter and form issued to the Complainants in **August 2009** “*in accordance with its normal practice*”. The

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Provider notes that the Complainants' correspondence address has remained unchanged since the mortgage drew down in **September 2008** and it issued all correspondence to this address and *"there is no record of any post being returned as undelivered"*.

The Provider contends that the Complainants did not have a *"contractual entitlement"* to be offered any specific margin over the ECB rate at the end of the first year discount period, but rather had an entitlement to *"the appropriate rate being charged by the Bank"* at that time. The Provider explains that the calculation of that margin is based on a *"commercial decision"* made by the Provider taking into account a number of factors to include wholesale lending and borrowing rates, interest rates paid on deposits and the Provider's competitive position.

In response to the Complainants' assertions that the initial interest rate that applied to their mortgage loan account for the first 12 months was discounted from a *"base rate"* of ECB + 1.65%, the Provider asserts that this initial tracker interest rate was *"not discounted from any rate"* but rather it was an *"introductory home loan rate for new business which was lower than the Bank's other mortgage lending rates"*.

The Provider submits that **Special Condition 1** of the Letter of Approval confirmed that, for the first twelve months, the interest rate would be no more than ECB + 1.30% and, on expiry, the rate would be the *"current tracker rate applied by the Bank at that time"*. The Provider further submits that **Special Condition 1** *"did not contain a promise of a certain tracker interest rate"* upon expiry of the initial discounted period and nor did it *"state that the rate of ECB + 1.30% was "discounted from the base rate of 1.68%" as claimed by the Complainants"*.

The Provider however acknowledges that one of its agents advised the First Complainant during a telephone call on **26 June 2017** that *"the initial interest rate on the mortgage account of ECB+1.30% was discounted from the Bank's then current tracker offering of ECB + 1.68%"* which was incorrect. The Provider notes that the Complainants requested this information in writing and the Provider in turn advised the Complainants that any written confirmation required in relation to the interest rates offered during the mortgage application process would have to be referred to their broker. The Provider explains that it *"had no input into the rates offered to the Complainants at the application stage"*. The Provider has apologised to the Complainants for any confusion caused on foot of the incorrect information given by the Provider's agent and offered the Complainants an ex-gratia payment in the amount of €500.00.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to switch the interest rate on the Complainants' mortgage loan account ending **8287** to the "base rate" of ECB + 1.68% on expiry of a one year discounted rate period in **September 2009**.

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 2 November 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

Before dealing with the substance of the complaint, I note that application for the mortgage loan was submitted by the Complainants to the Provider through a third party broker. As this complaint is made against the respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this Office, by email dated **31 March 2020**, which outlined as follows;

"In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be

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investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”

Therefore, the conduct of the third party broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

The issue to be determined is whether the Provider incorrectly failed to switch the interest rate on the Complainants’ mortgage loan account ending **8287** to the “base rate” of ECB + 1.68% on expiry of a one year discounted rate period in **September 2009**. In order to determine this complaint, it is necessary to review and set out the certain interactions between the Complainants and the Provider and to set out relevant provisions of the Complainants’ loan documentation.

The Complainants completed an **Application for Credit** and a **Net Sheet** outlining their net income with a third party broker on **20 May 2008**. An **Underwriter Sign Off** sheet seeking a loan amount of €372,600 was signed by the third party broker on **20 May 2008**. It appears that the relevant supporting documents in relation to the Complainants’ loan application were sent by the third party broker to the Provider for assessment.

A **Letter of Approval** subsequently issued to the Complainants on **9 June 2008** providing for a loan amount of €358,900. I understand that the Complainants did not accept that Letter of Approval. The third party broker completed an **Amendment Request Form** that was received by the Provider on or around **30 June 2008**. This form was signed by the Complainants and outlined as follows;

“I/we wish to amend the following details of my [Provider] loan:

Property details have changed to:

[New property address]

P.P: €445,000

Loan amount: €395,000.

I/we should be obliged if you would issue me with an amended Approval in Principle/Loan Offer (delete as appropriate) taking into account the above changes.”

A further **Letter of Approval** dated **7 July 2008** issued to the Complainants. The **Particulars of Mortgage Loan** section details as follows;

“Loan Type:	1yr Disc Tracker (>80% LTV) Home Loan
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Purchase Price / Estimated Value: EUR 445,000.00

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Loan Amount:	EUR 395,000.00
Interest Rate:	5.3%
Term:	35 year(s)"

The **Special Conditions** attaching to the **Letter of Approval** detail as follows;

“Special Conditions

- 1. The interest rate applicable to this tracker mortgage loan may be varied from time to time by [the Provider] provided the interest rate will not exceed 1.30% over the European Central bank Refinancing Rate (“the ECB Rate”) for the first 12 months from the date of the advance (“the Discount Period”). [The Provider] reserves the right to alter said percentage over the ECB Rate at any time prior to drawdown.*

The ECB Rate may be varied from time to time by the European Central Bank (“the ECB”). In the event of any variation of the ECB Rate during the Discount period and subject to the above reservation, the interest rate applicable to this loan will not be more than 1.30% over the ECB as varied by the ECB. On expiry of the Discount Period, the interest rate will be such rate as may be selected by the Applicant(s) from [the Provider’s] rates then offered by [the Provider] for selection by the Applicant(s) or such variable interest rate (which may not be a tracker variable rate) as will apply in the absence of such selection. In the event of any variation of the ECB Rate, the revised interest rate for the loan will apply not later than one calendar month from the date provided by the ECB as the date on which variation to the ECB Rate will take effect.

...

- 5. The interest rate and mortgage repayment indicated in the letter of approval are based on the ECB rate applicable at the date of the letter of approval and takes into account the discount period referred to above. The ECB rate may change on or before drawdown.*
- 6. If, for whatever reason, an event occurs which fundamentally affects the use of the ECB rate as a reference rate for this loan, [the Provider], in its sole discretion, shall be entitled to use such other reference rate or other method or basis of calculation as it deems fair and reasonable and notwithstanding the use of such other reference rate or method or basis of calculation, the rate so calculated by [the Provider] shall be and apply as the reference rate applicable to this loan in place of the ECB rate.*

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7. *Where more than one tracker mortgage loan is advanced on the security, the tracker mortgage loans will not be aggregated for the purposes of applying a different rate over the ECB rate."*

The **European Standardised Information Sheet** attaching to the Letter Approval details as follows;

"Nominal Rate

The interest rate is 5.3 percent.

The interest rate may vary from time to time. Notice will be given in respect of rate increase. No notice will be given for decrease in rate.

The option to apply for a fixed rate product (if available) may be exercised by you at any time otherwise the rate will remain a variable rate.....

The interest rate applicable to this loan is a variable rate loan but will not exceed 1.30% over the European Central bank refinancing rate ("the ECB Rate") for the first 12 months from the date of issue of the loan ("the Discount Period"). On expiry of the Discount Period you may exercise an option to contract for a fixed rate period (if available) or to move to a variable rate which you may select from the then current [Provider] rates offered to you by [the Provider]."

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by their solicitor on **11 September 2008**. The Acceptance of Loan Offer states as follows;

"1. I/we the undersigned accept the within offer on the terms and conditions set out in

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval conditions*
- iii. [the Provider's] Mortgage Conditions.*

copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.

...

4. *My/our Solicitor has fully explained the said terms and conditions to me/us."*

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The Complainants have submitted in evidence a document entitled “**Important Information**” which I understand formed part of the mortgage loan documentation that issued to them.

This document contains various sections under different headings to include “*Housing Loans Under Consumer Credit Act 1995*”, “*Variable Rate Loans*”, “*Endowment Home Loans*”, “*Interest-Only Mortgages*”, “*Fixed Rate Loan*”, “*Tracker Mortgage Loans*” and “*Arrears*”. The following is detailed under the heading “*Housing Loans Under Consumer Credit Act 1995*”;

“Please note carefully the following information relating to Housing Loans within the meaning of the Consumer Credit Act 1995.

WARNING- YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP WITH PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT

The following is detailed under the heading “*Tracker Mortgage Loans*”;

“1. The interest rate applicable to Tracker Mortgage Loans is made up of European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.

2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.

3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.

4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate.”

The mortgage loan was drawn down on **29 September 2008** on an initial tracker interest rate of 5.55% (ECB 4.25% + 1.30%). **Condition 1** of the **Special Conditions** outlined above, which the Complainants confirmed was fully explained to them by their solicitor, provides that the interest rate applicable to the mortgage loan account for the first 12 months from the date of drawdown of the mortgage loan would not be more than 1.30% over the ECB rate. This period is referred to as the “*Discount Period*” in the mortgage loan documentation. Both parties accept that the rates which applied to the Complainants’ mortgage loan account during the “*Discount Period*” did not exceed ECB + 1.30%.

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Condition 1 of the **Special Conditions** also outlines what was to occur after the expiration of the 12 month “*Discount Period*”. **Condition 1** provides that on expiry of the “*Discount Period*”, the Complainants could select from the then current interest rates offered to the Complainants by the Provider or in the event that the Complainants chose not to select any such rates on offer, the mortgage loan account would move to a variable interest rate which may not be a tracker variable interest rate.

The Provider indicates that a letter together with a **Rate Options Form** issued to the Complainants in **August 2009** just before the expiry of the “*Discount Rate*” period. The Provider states that the **Rate Options Form** listed various rate options from which the Complainants could choose to include the following;

- *Tracker Variable Rate LTV>80 % (ECB+3.25%)* 4.25%
- *Variable Rate LTV>80%* 3.65%
- *2 Year Fixed Rate* 5.25%
- *5 Year Fixed Rate* 5.75%
- *7 Year Fixed Rate* 6.10%
- *10 Year Fixed Rate* 6.10%

The Provider asserts that the letter informed the Complainants which one of the above rates would be applied to their mortgage loan account if the Rate Options Form was not completed and returned by them. The Complainants maintain that they never received the letter and Rate Options Form that purportedly issued to them in **August 2009**.

The Provider has been unable to furnish a copy of the letter or Rate Options Form to this office because it failed to retain a copy of this correspondence. I note that the Provider maintains that this correspondence was generated from its automated system because the Complainants’ loan account was reaching the end of the “*Discount Period*”. I note from the evidence that it was the Provider’s practice at the time to retain copies of such automated letters on receipt of a signed Rate Options Form by a customer. It is most disappointing that the Provider has failed to retain a copy of both the letter informing the Complainants as to which of the above rates would apply in the absence of a selection by them and the Rate Options Form.

Provision 49 of the Consumer Protection Code 2006 (which was fully effective from 01 July 2007) and **Provision 11.5 and 11.6 of the Consumer Protection Code 2012**, outline as follows;

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“A regulated entity must maintain up-to-date consumer records containing at least the following

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer’s contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”

The Complainants’ mortgage loan was incepted for a term of **35 years** commencing from **September 2008** and the letter enclosing the Rate Options Form purportedly issued in **August 2009**. There is no indication that the Complainants’ mortgage has been redeemed or disposed of in any way. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. However it is unclear to this office as to why this documentation has not been held by the Provider in the absence of any explanation other than the fact that automated generated correspondence of this nature was only retained if signed and returned by a customer.

I note that the Provider does not specify as to which of the above interest rates the letter states would apply in default of selection by the Complainants. However, the Provider asserts throughout its submissions to this office that its tracker interest rate at the time was ECB + 3.25% and so the Complainants mortgage account defaulted to that rate on **29 September 2009** in accordance with **Condition 1** of the **Special Conditions** attaching to the Letter of Approval.

In this regard, it is important for the Provider to be aware that **Condition 1** of the **Special Conditions** actually states that in the absence of selection of an interest rate by the Complainants, a “*variable rate (which may not be a tracker variable rate)*” will apply [**my emphasis**]. As such, it is my view that either the “*Tracker Variable Rate LTV>80 % (ECB+3.25%)*” or the “*Variable Rate LTV>80%*” of 3.65% could have potentially applied to

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the Complainants' mortgage loan account. I accept that it was within the Provider's commercial discretion to decide as to what "default" interest would apply should a customer choose not to make a selection from the various interest rates offered by the Provider at the time. I note that the Provider has stated that the default rate in this case was the "Tracker Variable Rate LTV>80 % (ECB+3.25%)".

This office requested the Provider to furnish any documentation held by the Provider in relation to the interest rate offerings on the Complainants' mortgage loan account from **September 2008** until **September 2009**. While the Provider has been unable to furnish this office with the Rate Options Form and accompanying letter for reasons outlined above, the Provider has submitted a copy of a rate sheet entitled **Lending Interest Rates** "effective from the start of business on the 31st August 2009" and the publication date is listed as "31/08/2009". This document details the following in relation to the home loan rates on offer as of **31 August 2009** for existing business;

"Home Loans Rates for Existing Business

LTV Variable applicable to existing Home Loans since 27/07/09. LTV Tracker Maturity Rates applicable to existing Home Loans since 31/08/09

	<i>RATE</i>	<i>APR</i>
<i>Variable Rate LTV <80%</i>	3.55%	3.6%
<i>Variable Rate LTV >80%</i>	3.65%	3.7%
<i>Tracker Rate LTV <80%</i>	4.25%	4.3%
<i>Tracker Rate LTV >80%</i>	4.25%	4.3%

Fixed Rates Applicable to Existing Home Loans

	<i>RATE</i>	<i>APR</i>
<i>2 Year Fixed</i>	5.25%	4.1%
<i>5 Year Fixed</i>	5.75%	4.8%
<i>7 Year Fixed</i>	6.10%	5.3%
<i>10 Year Fixed</i>	6.10%	5.8%

[...] The rate applicable to individual customers is determined in accordance with their loan documentation."

The interest rates listed in the Provider's rate sheet published on **31 August 2009** as outlined above demonstrate the interest rates that were on offer to existing customers as of **31 August 2009**. I accept that the various interest rates offered to customers at the time was to be determined in accordance with their individual loan documentation and it was not necessarily the case that all of the above rates would be offered to customers. In relation to the Complainants. I note that the interest rate options that were purportedly

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offered to the Complainants through the Rate Options Letter issued by the Provider as outlined above, were in line with the interest rates listed in the Provider's rate sheet as of **31 August 2009**.

In circumstances where the Provider has no record of ever receiving a signed options form from the Complainants indicating their preference for a particular rate, the "*Tracker Variable Rate LTV>80 % (ECB+3.25%)*" was applied to the Complainants' mortgage loan account. The mortgage statement submitted in evidence shows that a rate of 4.25% (ECB + 3.25%) was applied to the Complainants' mortgage loan account as of **29 September 2009**. I understand that the ECB rate at the time was 1%. The evidence shows that the tracker interest rate that the Provider had available in **September 2009** of 4.25% (ECB + 3.25%) was the same tracker interest rate that the Provider states was offered to the Complainants for their mortgage loan and which was ultimately applied to their mortgage loan account as a "default" rate.

The Complainants dispute the fact that their tracker interest rate "*jumped from 1.30% over ECB to 3.25% over ECB*". The Complainants state that they contacted the Provider in "*early 2008*" to question where this rate came from but they did not lodge a complaint at the time. I do not see why the Complainants would contact the Provider in early **2008** in relation to this rate change given the mortgage loan had not even drawn down at that point. This may be a typographical error on the Complainants' part. In any event, I have not been provided with any evidence from either party to the complaint that a query of this nature was made at any time before 2017.

However, I note that the First Complainant had a number of telephone calls with a representative of the Provider between **16 June 2017** and **21 July 2017** to query what the Provider's tracker interest rate was in **September 2008** when the Complainants took out their mortgage loan. Recordings of these calls have been furnished in evidence and I have considered the content of these telephone calls.

I note that during the telephone call recording on **26 June 2017** the Provider's representative stated to the First Complainant that the tracker variable interest rate on offer to customers in **September 2008** was "*ECB + 1.68%*". The Provider's representative noted however that a discounted tracker variable rate of "*ECB + 1.3%*" applied to the Complainants' mortgage loan account on **September 2008**.

The First Complainant queried whether the tracker interest rate that applied to the Complainants' mortgage loan account "*was discounted from 1.68 to 1.3?*" to which the Provider's representative responded "*yeah exactly ... that's it.*" The First Complainant asked that this information be confirmed to him by e-mail to which the Provider's

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representative responded that it is not possible to send e-mails for “*security reasons*” but would look into sending some kind of confirmation to the Complainants by post.

Follow up telephone calls took place between the First Complainant and the Provider on **20 July 2017** and **21 July 2017**. On **20 July 2017**, the Provider’s agent again stated to the Complainant that the margin of 1.3% was discounted from the Provider’s margin of 1.68% in **September 2008**. On **21 July 2017**, the Provider’s representative explained that the Provider’s mortgage department was not in a position to issue a letter confirming this to the Complainants. The Provider’s representative explained to the First Complainant that she had sought a reason for this from her colleagues in the mortgage department however she explained that they could not give her a reason for not being in a position to issue a letter of this nature to the Complainants. It was at that point that the First Complainant indicated that he wished to proceed to lodge a complaint with the Provider.

It appears from the Complainants’ submissions that on foot of these telephone calls, the Complainants were of the understanding that their “*discounted rate of 1.30% over EBC is discounted from a master or parent rate*” and that “*Mortgage Base Rate/Parent Rate was 1.68%*”. The Provider issued a **Final Response Letter** to the Complainants on **15 February 2018** wherein the Provider stated as follows in respect of this particular issue;

“Please be advised the Bank may offer discounted introductory rates to new mortgage account customers, these interest rates may be lower than the interest rates available to existing mortgage account holders. At the time of your mortgage application in May 2008 the prevailing ECB rate was 4%. [Provider] offered a tracker rate of ECB+1.68% to existing mortgage account holders during that period. The discounted rate of ECB +1.3% was the rate offered by the Bank to new business customers during the application stage in May 2008”.

This is at odds with the information given to the First Complainant by the Provider’s representative in **June** and **July 2017** as there is no mention of the Complainants’ rate having been discounted from the tracker rate of ECB +1.68% or “*parent/base rate*”. In fact it appears that the two tracker interest rates are completely separate from one another, in that, the tracker interest rate of ECB + 1.68% was offered to existing customers at the time while the rate of ECB + 1.3% was an introductory rate offered to new business customers like the Complainants.

Therefore, I am of the view that the information provided by the Provider’s representative during the telephone calls in **June and July 2017** was not correct and understandably led to some confusion on the part of the Complainants. The Provider acknowledges that the information provided during the telephone calls was incorrect and offered the Complainants an *ex-gratia* payment of €500 in its formal response to the Summary of

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Complaint dated **26 March 2019**. I understand that the Complainants have yet to accept this offer. It is disappointing that the Provider only offered this *ex-gratia* payment in its formal response some 20 months after the matter was first brought to the Provider's attention, when this issue could have been identified and the Provider could have offered a clear explanation to the Complainants prior to the Complainants lodging a complaint with this office.

Chapter 1 -The General Principles of the Consumer Protection Code 2006 (which was fully effective from **01 July 2007**) and **Chapter 2 of the Consumer Protection Code 2012**, outline as follows;

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

- 1 acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market;*
- 2 acts with due skill, care and diligence in the best interests of its customers;*
- 3 does not recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service;*
- 4 has and employs effectively the resources and procedures, systems and control checks that are necessary for compliance with this Code;*
- 5 seeks from its customers information relevant to the product or service requested;*
- 6 makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;*
- 7 seeks to avoid conflicts of interest;*
- 8 corrects errors and handles complaints speedily, efficiently and fairly;*
- 9 does not exert undue pressure or undue influence on a customer;*
- 10 ensures that any outsourced activity complies with the requirements of this Code;*

/Cont'd...

- 11 *without prejudice to the pursuit of its legitimate commercial aims, does not, through its policies, procedures, or working practices, prevent access to basic financial services; and*
- 12 *complies with the letter and spirit of this Code.”*

Upon considering the provisions of the **Consumer Protection Code 2006** as outlined above, I find that the Provider has not acted “*with due skill, care and diligence*” in the “*best interests of its customers*” in its dealings with the First Complainant during the telephone calls in **June and July 2017**. The information provided to the First Complainant during the telephone calls on **26 June 2017** and **20 July 2017** was not accurate and as a result caused confusion on the part of the Complainants which ultimately led to the Complainants lodging a complaint with the Provider. I have no doubt that if the Provider had properly reviewed the telephone call recordings prior to issuing its Final Response Letter on **15 February 2018** it should have responded more appropriately. An error was clearly identifiable, yet this letter makes no reference whatsoever to the fact that the information provided during those telephone calls was incorrect.

From the evidence I have before me, it appears that this was not brought to the attention of the Complainants until the Provider’s formal response of **26 March 2019**, which I find does not comply with the General Principles of the **Consumer Protection Codes** as detailed above. I will deal with this further in my decision below.

The Complainants submit that the interest rate applicable to their mortgage loan account “*should not be 3.35% over ECB*” as this is “*against Housing Loans Under Consumer Credit Act 1995*”. As outlined in earlier paragraphs, the Complainants have submitted in evidence a document entitled “**Important Information**” with various headings to include “*Housing Loans Under Consumer Credit Act 1995*” and “*Tracker Mortgage Loans*” which formed part of the mortgage loan documentation that issued to them. Upon consideration of the Complainants’ submissions, it appears that the Complainants understood this document to be an extract of the **Consumer Credit Act 1995** when in fact this was not the case. The document provides “*Important Information*” and an explanation in relation to various aspects of the Complainants’ mortgage loan. The documents contains various warnings which the Provider as a “*mortgage agent*” is obliged to include in a customer’s mortgage loan documentation.

Section 128 (1) of the **Consumer Credit Act 1995** provides that;

“A mortgage agent shall ensure that-

(a) an information document,

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- (b) *an application form for a housing loan, or*
- (c) *any document approving a housing loan,*

shall include the following notice:

“WARNING

YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT””

Section 128 (2) of the Consumer Credit Act 1995 provides that;

“A mortgage agent shall ensure that, where the interest rate for a housing loan is variable -

- (a) an information document,*
- (b) an application, or*
- (c) any document approving that loan,*

shall, following the notice required under subsection (1) , include the following:

“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME”

Both of the above notices are included in the document entitled *“Important Information”* in accordance with the Provider’s obligations under the **Consumer Credit Act 1995**. The evidence indicates that the Provider has complied with its obligations under the **Consumer Credit Act 1995** by providing the above information to the Complainants in their mortgage loan documentation. The document then goes on to provide an explanation of terms such as *“Fixed Rate Loans”*, *“Tracker Mortgage Loans”* and *“Arrears”*. These definitions or explanations are completely separate from the provisions of the **Consumer Credit Act 1995**. The explanation provided in the document in respect of *“Tracker Mortgage Loans”* is outlined in earlier paragraphs. The Complainants contend that *“whatever the Parent/Base rate of our Mortgage was discounted from, that this is the rate we should be on now (or even below it) as that percentage will not be exceeded during the term of the loan as stated the Housing Loan Under Consumer Credit Act 1995”*.

The Complainants in their submissions to this office understand the *“Parent/Base rate”* to be 1.68%. It is therefore my understanding that the Complainants are of the view that the interest rate applicable to their mortgage loan account should not exceed 1.68% over the ECB rate during the term of the loan.

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While I can understand that there may have been some confusion on the part of the Complainants on foot of the description of "*Tracker Mortgage Loans*" in the "*Important Information*" document, it is important for the Complainants to understand that this document cannot be read in isolation and must be read in conjunction with the Letter of Approval and the Special Conditions in the Complainants' mortgage documentation, which the Complainants signed and accepted. It is clear that the particulars of the Letter of Approval dated **7 July 2008** and **Condition 1** of the **Special Conditions** provided that a discounted tracker variable interest rate, that would not exceed 1.30% over the ECB rate, would apply to the Complainants' mortgage loan account for the first 12 months of the loan and thereafter the Complainants would then have the option to apply a rate from the Provider's suite of interest rates then available, which in this case included a tracker interest rate of ECB + 3.25%. It is important for the Complainants to understand that there was no guarantee in the Special Conditions or any other conditions applicable to the Complainants' mortgage loan that a specific tracker mortgage margin would be made available to the Complainants at the end of the 12 month discount period.

Furthermore, there is no mention of a "*Mortgage Base Rate/Parent Rate*" of ECB + 1.68% in the mortgage loan documentation of which the initial tracker interest rate was discounted from nor is there any contractual entitlement to that rate upon expiry of the discount period.

Having considered the Complainants' mortgage loan documentation, I find that the Complainants had a contractual entitlement to a tracker interest rate which would not exceed 1.30% over the ECB Rate for the first 12 months from the date of the advance. Upon expiry of the 12 month discount period, the Complainants had a contractual entitlement to an interest rate as may be selected from the Provider's rates available for selection at the time. At the time, a tracker interest rate of ECB + 3.25% was available for selection together with a variable interest rate of 3.65% and various fixed interest rate periods which were higher than the tracker interest rate offered. For the avoidance of doubt, the Complainants had no contractual entitlement to a tracker interest rate of ECB +1.68% in **September 2009**. At no stage did the Complainants have a contractual entitlement to that rate or any particular rate. The Provider applied a tracker interest rate of ECB + 3.25% to the Complainants' mortgage loan account in **September 2009** in the absence of any selection by the Complainants.

It is my view that while the Complainants say that they were not afforded the opportunity to select from the suite of rates offered and would have never opted for a rate of ECB + 3.25% to apply to their mortgage loan account. It is worthwhile noting however that this was the most advantageous interest rate out of the suite of interest rates on offer from the Provider at the time that could have applied to the Complainants' mortgage loan account.

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In fact the ECB base rate was only 1 % in **September 2009** while it was 4.25% in **September 2008** when the mortgage loan was drawn down. It has already been established that while the various fixed interest rates on offer were much higher than the tracker interest rate of ECB + 3.25% (4.25%) the standard variable rate on offer at the time was 3.65%.

I note that the Complainants have provided mortgage statements from **2009** in evidence which shows that a rate of ECB + 3.25 % was applied to their mortgage loan account from **September 2009**. A question arises as to why the Complainants did not contact the Provider at that stage to question the applicable interest rate if it was the case that they say that “*nobody knowingly would sign up*” to that rate. The evidence shows that it was not until **June 2017** that the Complainants began to question the interest rate applicable to their mortgage loan account. I accept that the tracker interest rate of ECB + 3.25% was the correct tracker mortgage rate applicable to the Complainants’ mortgage loan account in **September 2009** and the interest rate on the Complainants’ mortgage loan account has not exceeded 3.25% over the ECB rate, as varied by the European Central Bank, since that date.

I am of the view however that there were failures on the Provider’s part in its dealings with the Complainants under the **Consumer Protection Codes** on foot of the Provider’s failure to retain certain correspondence and the incorrect information provided to the First Named Complainant during telephone calls in **June** and **July 2017** which led to confusion on the Complainants’ part. For this reason, I partially uphold this complaint.

To mark the Provider’s shortcomings, I direct that the Provider pay to the Complainants a sum of €1,500 in compensation. For the avoidance of doubt this figure **is inclusive** of the €500 previously offered by the Provider in its formal response dated **26 March 2019**.

Conclusion

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

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €1,500. For the avoidance of doubt this figure **is inclusive** of the €500 previously offered by the Provider in its formal response dated **26 March 2019**. This sum is to be paid to an account of the Complainants’ choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

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

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

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

24 November 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.**