



<u>Decision Ref:</u>	2020-0465
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to apply a tracker rate at a point in time CBI Examination Failure to offer appropriate compensation or redress CBI Examination Failure to apply the correct tracker rate as part of the Examination
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account that was previously held by the Complainant with the Provider. The mortgage loan was secured on the Complainant's principle private residence.

The Letter of Approval which was signed on **20 December 2006** outlined the Loan Type as "*1 Year Discount Tracker (ECB + MAX 0.69%) Home Loan*". The Loan Amount was €696,000 and the term was 30 years. The mortgage loan was redeemed by the Complainant in **February 2009**.

The Complainant's mortgage loan account was considered by the Provider under the Provider's mortgage redress programme.

An offer was made to the Complainant by the Provider on **11 August 2015** as part of the mortgage redress programme in relation to admitted failures of the Provider regarding the Complainant's mortgage loan account, as follows;

“Explaining our failure:

On 01/12/2008, you broke from the fixed interest rate period which applied to your mortgage account at that time. This break took place before the scheduled maturity date of the fixed interest rate period.

*In breaking from your fixed interest rate period early, you lost a contractual right to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period. **However at the time you broke from your fixed interest rate period, we did not inform you that you would be unable to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period.**”(Emphasis in original)*

In the offer made to the Complainant in **2015**, the Provider proposed to compensate the Complainant as follows;

“In respect of your mortgage account, we note that the account was closed on the 03/02/2009. As this date was before the scheduled maturity date of the fixed rate period on which your mortgage was on (01/03/2010), it does not appear as if you were financially impacted by this failure. Nevertheless we propose to pay you compensation as this failure should not have occurred.

This compensation payment will include a payment of €1,000 in recognition of our failure in this matter together with €400 (including VAT) which you may use to pay for independent advice if you choose to seek advice in respect of this letter. You have full discretion as to the use of this money.”

A Payment Authorisation Form was signed by the Complainant accepting the Provider’s proposal above in relation to the compensation payment on **27 August 2015**.

In **November 2015**, the Complainant submitted an appeal to the Provider’s Independent Appeals Panel. On **16 February 2016**, the Appeals Panel decided that the Complainant had been partially successful in her appeal. In determining the appeal the Panel outlined as follows:

“Reasons for Decision

- *It had not been shown that [the Complainant] lost her contractual entitlement to avail of a tracker rate when she broke from the one year discounted tracker period early to move to a three year fixed rate.*

- *The Panel agreed that when [the Complainant] broke from her one year discounted tracker period early to move to the fixed rate, she did not lose her contractual entitlement to avail of a tracker rate in the future.*

The Panel noted the Bank's indication that by deciding to enter into a three year fixed rate period, it was clear to the Bank that [the Complainant] would not be reverting to a tracker interest rate at the end of the one year discounted tracker period.

- *It was further noted that [the Complainant] was entitled to be offered a tracker rate at the expiry of the three year fixed rate period. The Panel agreed that [the Complainant] lost her entitlement to a tracker mortgage in December 2008 when she broke the fixed rate and the Bank's application of Redress is in line with the Mortgage Redress Programme guidelines.*
- *It has not been shown that the other financial and non-financial damages claimed by [the Complainant] were caused by the Bank's failure(s) and/or would not have occurred but for the Bank's failure(s).*
- *It had been shown that had [the Complainant] retained her mortgage with the Bank there would have been a lower capital balance than on [the Complainant's] current mortgage, held with the [new Provider]*

As such it was agreed, subject to the acceptance by [the Complainant] of the Panel's decision, that the Bank be instructed to:

- Refund [the Complainant] the difference in the capital balance of the mortgage loan had [the Complainant] retained her mortgage loan with the Bank during the period from the expiry of the fixed rate on 1 March 2010 to today's date and had the relevant tracker rate of ECB + 3.25% been applied to the mortgage.*
- Refund €500 in relation to fees incurred from the engagement of [named representative], upon receipt of the associated invoice(s).*

It was agreed that these payments would be in addition to the Redress and Compensation Offer."

The Complainant rejected the decision of the Provider's Independent Appeal Panel.

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As the Complainant had been through the Provider's internal appeals process and rejected the offer of the Appeals Panel this office was in a position to progress the investigation and adjudication of the complaint.

The conduct complained of that is being adjudicated on by this office is as follows;

- (a) The Provider has failed to restore the Complainant's mortgage loan to the appropriate tracker rate and from the appropriate point in time, and
- (b) The Provider has failed to offer adequate redress and compensation to the Complainant as a result of the Provider's failure in relation to her mortgage loan account.

The Complainant's Case

The Complainant's mortgage loan account was drawn down on **8 February 2007**, pursuant to the terms of a Letter of Loan Approval dated **4 December 2006**. The letter of approval detailed that the interest rate applicable was a one year discounted tracker rate of ECB + 0.69%, with the option to convert to the applicable tracker rate when the discounted tracker interest rate expired.

The Complainant submits that "*due to rising interest rates*", on **23 March 2007** she opted to break from the one year discounted tracker rate and convert the mortgage loan account to a three year fixed rate of 4.95%. She states that she was not informed by the Provider that her entitlement to revert to the tracker rate at the end of the discounted tracker rate period would be lost by breaking the discounted tracker rate in **March 2007**. She submits that therefore she made the decision to break from the discounted tracker rate in circumstances where she was not made aware by the Provider of key information with regard to the impact of that choice.

The Complainant states that she contacted the Provider by phone on **6 November 2008** to enquire about breaking from the "*exceptionally high*" fixed rate to revert back to the tracker rate and was advised by the Provider that this was not possible as she no longer had an entitlement to the tracker rate. She submits that consequently, she had "*no choice*" but to break the three year fixed rate to convert the mortgage loan account to a more competitive variable rate of 5.30% on **1 December 2008**. The Complainant submits that due to the "*crippling mortgage repayments*" on her mortgage loan account, she ultimately had "*no choice*" but to "*move*" the mortgage to an alternative Provider. The Complainant's mortgage loan account with the Respondent Provider was redeemed on **3 February 2009**.

The Complainant submits that the Provider has sought to rely on her intention at the time she opted to break from the discounted tracker rate in **March 2007**, by submitting that it was clear that she understood that by opting for a three year fixed rate that she would not revert to the tracker rate in **February 2008**.

She asserts that her intent in breaking the discounted period is irrelevant for the purposes of the mortgage redress programme. She submits that there was an obligation on the Provider to furnish her with all material information when she broke from the discounted period in **March 2007** and this was not done. She states *“At no time was I advised by [the Provider] that by breaking the discounted tracker period I would lose my entitlement to revert back to my tracker on 14 February 2008. If I had been advised of this I would have not broken the discounted tracker period and would have remained as a customer with [the Provider].”* She submits that the Provider has misinterpreted the purpose of the mortgage redress programme, that is, to place customers back in the position they would have been in if the failure had not occurred.

The Complainant submits that the sum of €1,000 offered by the Provider in **August 2015** in compensation for its failure as part of the MRP, is unacceptable. The Complainant is seeking a minimum sum of €15,000 as compensation for the hardship that she has suffered as a result of the Provider's failure. She states that the stress she has suffered has been compounded by both the length of time that it has taken to resolve this matter and the responsibility of raising a young family during this period.

The Complainant submits that the Provider has not offered her any redress or compensation in respect of the loss of her tracker interest rate mortgage. She states that in order to restore her to the position that she would have been in under the mortgage redress programme, her mortgage loan with the Provider should be restored on a tracker interest rate with a margin of ECB + 1.25%. She submits that this is the tracker rate that would have applied to her mortgage loan account on the expiry of the initial discounted tracker rate period in **February 2008**. The Complainant in later submissions details that she is entitled to a tracker interest rate of ECB + 0.9%.

The Complainant submits that the relevant maturity date for the purposes of calculating the Provider's redress and compensation offer under the MRP should be **14 February 2008**, being the date on which the initial one year discounted tracker rate would have expired if she had not broken from it in **March 2007**. She states that the Provider's offer of redress and compensation is incorrectly based on a maturity date of **March 2010**, being the date on which the three year fixed rate period would have matured if she had not converted the mortgage loan account to a variable rate in **December 2008**. The Complainant does not accept that the redress and compensation offer should be based on the tracker rate of 3.25% which the Provider states was the prevailing tracker rate in

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March 2010. She states that *“The difference in the rate paid and what should apply (ECB plus 1.25%) since February 2008 to the 30th of November 2015 is €78,528 culminating in the increased cost per month for [the Complainant] of approximately €1,032 per month.”*

The Complainant contends that, pursuant to the terms and conditions of the Letter of Loan Approval, she had a contractual entitlement to switch to a fixed rate only on the expiry of the discounted tracker rate period, and therefore she lost her contractual entitlement to the tracker rate when she opted to break from the discounted period in **March 2007**. The Complainant refers to **Special Condition E** and **Special Condition H** of the Letter of Loan Approval in this regard. She submits that **Special Condition E** and **Special Condition H** of the Letter of Approval are in conflict, which gives rise to ambiguity in the mortgage contract, and consequently **Special Condition E** should take precedence over **Special Condition H**, in accordance with the *contra preferentum* rule endorsed in the High Court case of Irish Life and Permanent v Financial Services Ombudsman, which found that such provisions should be construed in favour of the consumer. The Complainant submits that while **Special Condition H** states that the applicant may switch to a fixed rate, it does not say that this can be done at any time, or that it takes precedence over **Special Condition E**; whereas **Special Condition E** clearly states that the applicant can switch to a fixed rate, but only on the expiry of the discounted tracker period.

The Complainant submits that the Provider *“seeks to argue that Special Condition H overrides Special Condition E as in their view it allows me to fix at any point in the period of the mortgage”* and in support of this argument the Provider relies on the **European Standardised Information Sheet** (“ESIS”). The Complainant outlines that the ESIS states that the Complainant can switch to a fixed rate at any time, however, it goes on to state that the Complainant can only fix the mortgage on the expiry of the discounted tracker rate period. She further submits that that the ESIS only states that the ECB rate may vary and does not refer to varying the margin. She states that accordingly, based on the ESIS and the indicative table contained therein, the margin should be fixed and not variable as stated by the Provider. She further submits that the Provider has previously strenuously argued that the ESIS has no legal basis.

The Complainant submits that in circumstances where it is decided by the Ombudsman that she did not lose her entitlement to the tracker rate when she broke early from the initial discounted tracker rate period in **March 2007**, but only when she broke early from the three year fixed rate period in **November 2008**, then the alternative date which should apply for the purposes of calculating the redress and compensation is the date she broke from the fixed rate on **1 December 2008**, at which time she submits the tracker rate was 1.68%.

The Complainant states that the word “*expiry*” is not defined in any of the mortgage loan documentation, and accordingly she asserts that the Provider has no basis for its argument that the relevant expiry date of the fixed rate period is the natural expiry date in **March 2010**.

The Complainant submits that “*expiry*” is defined as “*the end of the period for which something is valid...to come to an end; to terminate; to become void*”. She submits that the fixed rate period expired by both parties’ mutual consent on **1 December 2008**, when she switched the mortgage loan account from the fixed rate to the standard variable rate. She states that no breakage fees or penalties were levied on her by the Provider at that time. She refers to the case of *Irish Life and Permanent plc v the FSO and Christy Thomas and Joseph Thomas*, where the court ruled as follows;

“...the Bank contend that these words (“...on expiry...”) necessarily mean – or perhaps imply – that the commitment subsists only for so long as the borrower does not switch during that period, because otherwise the fixed rate period would not have “expired”.

...Given the huge implications for the customer, if a key clause of this kind is to bear this sophisticated construction, it behoves the Bank to spell this out in plain language for the benefit of all customers, and not simply those who have either an amateur or professional interest in the niceties of the law relating to the construction of contracts who might otherwise be able to glean this vital piece of information unaided.”

The Complainant states that the *contra preferentum* rule of contractual interpretation dictates that the meaning of the word “*expiry*” should be construed in favour of the consumer.

In respect of the tracker rate of ECB + 3.25% which was used by the Provider for the purpose of calculating its redress and compensation offer under the mortgage redress programme, the Complainant submits that the Provider never informed her of any changes to the margin despite the fact that she was a customer of the Provider until **January 2009**. She submits that while the Provider correctly notified her of the changes to the ECB rate by way of newspaper advertisements, it never notified her of the changes to the margin. The Complainant submits that increases to the “*Appropriate Rate*” cannot take effect until such notification is made. She submits that the Provider did not notify her of changes to the margin which occurred while she was still a customer of the Provider prior to **January 2009**. She states that the Provider argues that she was no longer a customer after **January 2009** and accordingly it had no obligation to notify her of changes to the margin. She submits that the reason she was no longer a customer was due to the

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“acknowledged failures” of the Provider, and accordingly the Provider should not be permitted to *“benefit”* from its own failures by applying a tracker interest rate of 3.25% to her redress and compensation offer.

She states that the Provider has argued that the margin is a variable component of the interest rate which can increase during the life of the mortgage, and therefore, it has no basis for arguing that the relevant sections of the **Mortgage Conditions 2002** do not apply. The Complainant relies on **conditions 1.10, 4.13 and 4.14** of the **Mortgage Conditions 2002**.

The Complainant submits that a previous Finding of the Financial Services and Pensions Ombudsman deals with an issue that is *“identical”* to the one she has set out in her submissions to this office. She states that it was set out in that Finding that *“increases in interest rates were not adequately communicated”* to the customer by the financial service provider and *“the Ombudsman found it was unreasonable to demand the additional payment so late in the life of the loan, given these failures to notify the customer of the interest rate increases”*. The Complainant submits that *“this is very similar to my case where the changes in the margin rate applied to my tracker loan (which was increased to 3.25%) was not notified to me”*.

The Complainant states that as part of its offer of redress and compensation under the mortgage redress programme, the Provider calculated that she has overpaid the capital balance on her mortgage by approximately €5,000.00, and overpaid interest of approximately €500.00, as a result of transferring her mortgage to an alternative Provider.

The Complainant submits that the customer appeals programme in its decision dated **16 February 2016**, directed a refund of the overpaid capital of €5,000.00 only. The Complainant submits that she is entitled to a refund of both the capital and the interest which has been overpaid as a result of taking out a mortgage with another Provider. She further submits that the Provider’s calculation of the overpaid capital and interest was based on the incorrect tracker interest rate of 3.25% which prevailed in **March 2010**. The Complainant states that she has incurred significant professional fees as a result of having to engage financial advisors to have the issues regarding the interest rate being applied to her mortgage loan account addressed.

The Complainant submits that the Provider has not explained in any detail why the Provider deemed some people who broke from a discounted tracker mortgage to be impacted and redressed them but have not done so in her case. She outlines that *“even if [the Provider is] successful in defending my complaint, the amount due is €7,664 of redress (including €500 for payment to [named representative]).”*

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The Complainant has submitted as follows;

“HOW DO I WANT [THE PROVIDER] TO PUT THINGS RIGHT

I would like the following:

- *My tracker mortgage reinstated and the correct tracker rate.*
- *Full redress of all interest and capital over payments based on the correct tracker rate to date.*
- *Appropriate compensation for the stress and hardship suffered over the last 9 years.*
- *Financial advisors costs to be paid in full by [the Provider].”*

The Provider’s Case

The Provider submits that the Complainant made her application for mortgage facilities through her chosen Broker on **14 November 2006**. It submits that on **4 December 2006** the Provider issued a Letter of Loan Approval to the Complainant for a 1 Year Discounted Tracker (ECB + Max 0.69%) Home Loan. The mortgage was for €696,000 at a rate of 3.94% (APR 4.40%) to be repaid over a term of 30 years. It states that the discounted 1 year tracker interest rate of ECB + 0.69% equated to a rate of 4.19% at the time of drawdown on **8 February 2007**. The discounted tracker rate period was due to expire on **8 February 2008**.

The Provider submits that the Complainant signed an interest rate options form requesting a three year fixed rate of 4.95% on **7 March 2007**, less than one month after drawing down her mortgage. It outlines that it acceded to this request and correspondence was issued to the Complainant on **23 March 2007** detailing that a three year fixed rate had been applied to the mortgage account. It states that by way of letter dated **6 November 2008**, the Complainant sought to break out of that fixed rate period early in favour of moving to a variable rate. It submits that it acceded to that request and accordingly moved the mortgage account to a variable rate of 5.30% on **1 December 2008**. It submits that no fixed rate exit fee was paid by the Complainant, because for a time in **2008** the Provider experienced an issue with a mortgage calculator formula used to calculate break fees, as a result of which some customers were charged less than the applicable fee and others were charged no fee.

The Provider submits that subsequently, as a result of an investigation by the Central Bank the Provider identified a failure in connection with the management of certain mortgage loan accounts, including the Complainant’s mortgage loan account. The Provider submits that the failure that occurred with regard to the Complainant’s mortgage loan account was

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the Provider's failure to inform the Complainant that by breaking early from the fixed rate period in **December 2008**, she would lose her entitlement to a tracker rate in the future.

The Provider states that the mortgage redress programme was implemented in **2015** and the purpose of the Provider's redress and compensation offer pursuant to the mortgage redress programme was to return the Complainant's mortgage loan account to the position that it would have been in had the failure not occurred and to compensate the Complainant for the failure. It submits that in its letter of **11 August 2015** the Provider's failure was explained to the Complainant and that details of the redress and compensation proposal were given to the Complainant. The Provider submits that the Payment Authorisation Instruction Form enclosed with its letter of **11 August 2015** was signed by the Complainant.

The Provider states that an appeal was submitted by the Complainant to the customer appeals panel in **November 2015** and it replied to the Complainant's submission in **January 2016**. A decision was reached by the customer appeals panel on **16 February 2016** to partially uphold the Complainant's appeal on the basis that it had been shown that had the Complainant retained her mortgage with the Provider there would have been a lower capital balance than on the Complainant's current mortgage held with the third party Provider. Therefore the customer appeals panel awarded the Complainant additional compensation. The Complainant rejected the CAP decision.

The Provider is of the view that the compensation paid to the Complainant is adequate and reasonable. It states that the amount of €1,000 was an appropriate level of compensation to be given to the Complainant and that an additional amount of €400 was also provided to enable the Complainant to avail of independent advice if she wished.

The Provider submits that the purpose of the mortgage redress programme is to return customers' accounts to the position they would have been in had the failure not occurred. The Provider submits that the failure in this case occurred at the time the Complainant broke early from her fixed rate on **1 December 2008**, and this is the time from which the redress has been applied to the Complainant's account. The Provider submits that the Complainant's account was closed on **3 February 2009** and therefore the Provider states that it can only redress the account, which is, put it back in the position it would have been in, until the date of its closure. The Provider states that no balance adjustment or refund of overpayments were due to the Complainant under the mortgage redress programme on this basis.

The Provider submits that the sum of €78,528 which is sought by the Complainant in redress and compensation is based on a tracker rate of ECB + 1.25% and is calculated from

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the date that the discounted tracker rate period would have matured on **14 February 2008**.

It rejects the Complainant's submission that the relevant maturity date for the purposes of calculating the Provider's redress and compensation offer to her under the mortgage redress programme is **14 February 2008**, on the basis that the Complainant did not lose her contractual entitlement to avail of a tracker rate in the future at this time. The Provider refers to its "*Lending Interest Rates*" document applicable on **4 February 2008**. It submits that the tracker rate that would have applied to the Complainant's mortgage in **February 2008**, assuming the initial one year discount period had reached its expiry, was the "*Tracker rate of LTV<80% loan €500k+*" which was a tracker rate of 4.90% (comprised of an ECB rate in February 2008 of 4.00% + 0.90%).

The Provider submits that when the Complainant made the decision to break from the discounted tracker rate in **March 2007** she was "*in possession of all the information regarding her mortgage*". The Provider submits that it was "*manifestly clear*" to the Complainant that she would not be reverting to a tracker rate on **14 February 2008** at the end of the 1 year discounted tracker period. The Provider submits that the intention of the Complainant at the time she broke from the discounted tracker period is relevant, and it is entirely reasonable for the Provider to refer to her decision to move to a fixed rate only one month after drawing down her mortgage. It states that it is clear that by moving to the fixed rate in **March 2007** the Complainant made a decision to have certainty in respect of her mortgage repayments. It submits that "*it is a necessary (but not sufficient) condition in order for the Complainant to prevail in her complaint to the FSPO that she demonstrates to the satisfaction of the FSPO that she would have acted differently if the Bank's failure had not occurred.*"

The Provider states that its failure to inform the Complainant that she would be unable to avail of a tracker rate in the future occurred on **1 December 2008**, being the date on which she broke from the 3 year fixed rate, and the relevant date from which any redress should be provided is **1 March 2010**, being the date on which this fixed rate period would have matured. The Provider outlines that when the Complainant exited the one year discounted tracker rate in **March 2007**, less than one month after drawdown of the loan, and switched to the three year fixed rate, she did not lose her contractual entitlement to a tracker rate, because she was entitled to a tracker rate at the end of the 3 year fixed rate period in accordance with **Special Condition H** of her Letter of Loan Approval. It submits that for those reasons, it does not accept that the Complainant should be redressed from the date on which she broke from her discounted tracker period as she would have been contractually entitled to a tracker rate at the end of the three year fixed rate in **March 2010**. The Provider submits that when the Complainant exited the fixed rate period early

on **1 December 2008**, she lost her contractual entitlement to avail of a tracker rate at the expiry of the fixed rate period.

The Provider does not accept that there is any conflict between **Special Condition E** and **Special Condition H** in the Letter of Loan Approval. It submits that it is clear from these Special Conditions that the Complainant was entitled to switch to a fixed rate at any point during the lifecycle of the mortgage, including at the end of the initial discounted tracker period. The Provider submits that **Special Condition E** described what would occur on the expiry of the one year discounted tracker period which applied when the Complainant initially drew down her mortgage loan. Specifically, it provided that the Complainant would have *“the option of switching to a fixed rate (if available) or to the tracker mortgage rate applicable at the time of expiry of the discounted period”*. The Provider submits that **Special Condition E** is simply concerned with what options were to be made available at the end of the one year initial discounted period, and the Complainant’s argument that it somehow limits or overrides **Special Condition H**, seemingly because the Special Conditions do not use the word *“Notwithstanding...”*, is a *“strained and contrived one which has no substance”*. The Provider submits that **Special Condition H** *“separately entitled the Complainant to switch to a fixed rate (if available) at any point during the lifecycle of her mortgage. It further provided that on expiry of such fixed rate period, she could choose to move to a tracker mortgage rate”*. The Provider details that pursuant to **Special Condition H**, it was contractually obliged to offer the Complainant a tracker rate on the expiry of the fixed rate period which was *“...appropriate to the balance outstanding on the loan...and as may be varied thereafter in accordance with variations to the ECB rate.”* It submits that the terms and conditions of the Complainant’s mortgage loan agreement, signed and accepted by her, do not contain or provide for a specific price promise or any particular tracker rate which would apply at the end of the fixed rate period.

The Provider does not accept that there is any conflict in the summary of the loan offer provided to the Complainant in the **European Standardised Information Sheet** (“ESIS”). It submits that in the Complainant’s case, the ESIS outlined that the interest rate applicable to her loan would not exceed 0.69% over the ECB rate for the first 12 months of the loan. Following this, the Complainant would have the option to either move to a fixed rate, or to move the tracker rate then applicable to the amount of the loan originally advanced. It states that the ESIS also made clear to the Complainant that the option to apply for a fixed rate product, if available, could be exercised by her at any time, including during the discount period, and she did not have to wait until that 12 month period expired. The Provider submits that while the ESIS is not legally binding it further indicates that the interpretation contended by the Complainant is without merit, something which it submits is apparent from an ordinary reading of the relevant Special Conditions in any event.

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The Provider submits that its lending interest rates effective from **1 February 2010** were on display at its branches. It states that this document sets out the applicable Home Loan Rates for existing customers, including the tracker rate LTV<80%, which comprised an ECB rate of 1.00% + 3.25%.

The Provider states that in circumstances where the Letter of Approval dated **4 December 2006** did not provide the Complainant with a set rate or a set percentage over the ECB rate, the tracker rate margin of ECB + 3.25% would have been the tracker rate appropriate to the balance outstanding on the Complainant's mortgage loan in **March 2010**. Regarding the manner in which the tracker rate of ECB + 3.25% which prevailed in **March 2010** was calculated, the Provider outlines as follows;

"The calculation of that margin is based on a commercial decision, made by the Bank, and is dependent on market conditions taking into account factors such as:-

- 3.6.1 wholesale lending;*
- 3.6.2 deposit interest rates;*
- 3.6.3 interest paid on deposits; and*
- 3.6.4 the Bank's competitive position."*

The Provider states that the tracker rate of ECB + 3.25% which applied at the expiry of the Complainant's three year fixed rate period is appropriate, bearing in mind the above factors together with the changed financial and banking climate which existed in **March 2010** when the Complainant's three year fixed period would have expired.

The Provider does not accept the Complainant's contention that if **14 February 2008** is not accepted as the relevant maturity date then **1 December 2008** should be considered the relevant maturity date, on the basis that this was not the expiry date of the three year fixed rate period.

The Provider does not accept that the High Court decision in *Irish Life & Permanent plc v Financial Services Ombudsman & Others* is in any way relevant to the Complainant's complaint. It notes for the avoidance of doubt, that the High Court does not support the interpretation of the word "expiry" being advanced by the Complainant. The Provider submits that there is in fact no authority in the form of any High Court decision supporting the interpretation which is advanced by the Complainant. It states that in each of the four complaints which were the subject of the High Court's decision, the then Financial Services Ombudsman directed that the Provider offer to apply the relevant applicable tracker rate to the customers' mortgage loans with effect from the date on which their fixed rate periods would have expired, if the customers had not broken early from their fixed rate periods. It submits that the High Court affirmed the Ombudsman's findings in relation to

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two of the complaints adjudicated on by the Ombudsman, including the direction that the Provider offer the Complainants tracker rates from the dates on which the relevant fixed rate periods would have expired.

It submits that the High Court remitted the two other complaints to the Ombudsman for fresh adjudication, however this was due to the Ombudsman's findings on an entirely separate issue.

The Provider submits in respect of its notification of rate changes to the Complainant that it did not have any obligation to notify the Complainant of changes to its appropriate or applicable tracker margin when she was on a different interest rate product or at points in time when she was not entitled to avail of a tracker rate. It does not accept the Complainant's contention that she ought to have been notified of rate changes even during the period that she was no longer a customer of the Provider.

The Provider notes that the Complainant submits that a recent decision of the Financial Services and Pensions Ombudsman deals with an issue which is identical to the one which she has outlined in her complaint. It states that it is not appropriate or necessary to address the issues that are the subject of a previous decision from this office in the context of responding to the Complainant's separate and unrelated complaint. The Provider submits however that for the avoidance of any doubt, it does not accept that the issues which are outlined in that decision are the same as the issues raised by the Complainant in this complaint. The Provider submits that **clauses 1.10, 1.11, 4.13 and 4.14** in its **2002 Mortgage Conditions** are not relevant to the Complainant's complaint and/or to the tracker rate to which she had an entitlement at the expiry of the fixed rate period. It submits that the complaint that is the subject of the previous decision refers to a variable interest rate term loan and there is no reference to a tracker interest rate entitlement in the decision. The Provider submits that the relevant Special Conditions, namely, **Special Conditions E and H**, of the Complainant's loan agreement provide the Complainant with a tracker interest rate entitlement and set out the timing of that entitlement either at the end of her initial discount rate period or at the expiry of any fixed rate period.

The Provider notes that the previous decision refers to newspaper adverts regarding increases in variable interest rates. It submits however that the reference to the "*Appropriate Rate*" in the Provider's **2002 Mortgage Conditions** and the advertising of an increase of that "*Appropriate Rate*" in the national newspapers at **clause 4.14** of the 2002 Mortgage Conditions are not relevant to the tracker rate provided to the Complainant in **Special Conditions E and H** in her loan agreement with the Provider. It submits that the term "*Appropriate Rate*" as defined in the definitions section of the Mortgage Conditions is a term, used generically to refer to whatever initial rate is contained in the Letter of

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Approval. It states that the interest rate specified in the Letter of Approval, may be changed from time to time and as notified in the manner outlined in clause 4.14.

The Provider submits that the Complainant has sought to include in evidence some documentation which relates to a third party customer of the Provider who has no connection to the Complainant's mortgage account or complaint. It submits that irrespective of whether that other customer has provided consent to the sharing of the documentation, it is not appropriate, relevant or indeed necessary for such documentation to have been included in respect of the complaint. The Provider submits that it does not intend to engage with the Complainant regarding another customer's mortgage account, nor would it be appropriate for it to do so. The Provider states that in its letter of **12 February 2016** to the customer appeals panel in response to the Complainant's appeal, it already explained that for reasons of customer confidentiality and in compliance with its data protection obligations it is not in a position to comment on or respond to any references to another customer's mortgage account. It is the Provider's position that it is not appropriate or necessary for the third party customer's documentation to be considered as part of this complaint, regardless of whether that customer's consent was obtained.

The Provider's position is that the decision of the customer appeal panel regarding the adjustment of the Complainant's capital balance is correct. The Provider submits that it is prepared to review the mortgage application submitted by the Complainant subject to the usual lending criteria and additional supporting documentation being provided by the Complainant. It states that if the Complainant's mortgage application is successful, the tracker rate which would be available to the Complainant for the mortgage loan would be ECB + 3.25%, being the prevailing rate at the time the fixed interest rate period would have matured in **March 2010**.

The Complaints for Adjudication

The complaints for adjudication are;

- a) The Provider has failed to restore the Complainant's mortgage loan to the appropriate tracker rate and from the appropriate point in time, and
- b) The Provider has failed to offer adequate redress and compensation to the Complainant as a result of the Provider's failure in relation to her mortgage loan account.

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.

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 24 November 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

At the outset, there are a number of preliminary matters that need to be addressed with respect to the submissions made by the Complainant and the documentary evidence submitted as follows:

The Complainant has submitted an extract from a mortgage loan agreement between the Provider and another customer, in addition to correspondence exchanged between the Provider and that customer. I will not consider the contents of that loan agreement extract or the related correspondence, on the basis that this has no bearing whatever on the investigation of this complaint and I will, therefore, not be taking any of that material into account in arriving at my decision.

The Complainant has also made submissions in relation to the manner in which the Provider has treated other customers' mortgage loans as part of the mortgage redress programme. The Complainant appears to confuse the role of this office and that of the

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Central Bank of Ireland. This office has no role in the Provider's mortgage redress programme. The outcome of the mortgage redress programme with respect to another customer is not relevant to this complaint, which relates to allegations of failures on the Providers part with respect to the Complainant's mortgage loan account.

For this reason, I will not be assessing or commenting on the Complainant's submissions with respect to the outcome of the Provider's mortgage redress programme as it relates to third parties who are unconnected with the Complainant's complaint. This complaint will be decided on its own merits. I will only consider the Provider's conduct as it relates to the Complainant and this complaint.

The Complainant has made submissions in relation to a previous decision of this office. I undertake independent investigations and adjudications of complaints between individual complainants and financial service providers. In the consideration of this complaint, I have had regard to all documentary evidence submitted by the parties and contained on this complaint file relating to the conduct of the Provider in relation to this complaint to reach my decision in this matter. It is not appropriate for me to consider documents contained on other complaint files or conclusions reached with respect to those documents. Each complaint submitted to this office, including this complaint, is considered on its own facts and merits, by reference to the submissions made by the parties and evidence submitted to support those submissions relevant to this complaint.

In order to adjudicate on the Complainant's complaint it is necessary to review and set out the relevant provisions of the Complainant's loan documentation and details of certain interactions between the Complainant and the Provider.

The **Letter of Loan Offer** dated **04 December 2006** details as follows:

<i>"Loan Type:</i>	<i>1 Year Discount Tracker (ECB + MAX 0.69%) Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 940,000.00</i>
<i>Loan Amount:</i>	<i>EUR 696,000.00</i>
<i>Interest Rate:</i>	<i>3.94%</i>
<i>Term:</i>	<i>30 year(s)</i>
<i>Monthly Instalments (After Payment Holiday)</i>	<i>EUR 3,345.59"</i>

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

"....

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D. *The interest rate applicable to this tracker mortgage loan may be varied from time to time by [the Provider] provided the interest rate will not exceed 0.69% over the European Central Bank Refinancing Rate (the "ECB Rate") for the first 12 months (the "Discount Period") from the date of issue of the loan.*

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, the interest rate applicable to this loan will not be more than 0.69% over the ECB Rate as varied by the ECB.

E. *On expiry of the discount period the applicant will have the option of switching to a fixed rate (if applicable) or to the tracker mortgage rate applicable, at the time of expiry of the discount period, to the amount of the loan originally advanced.*

In the absence of instructions from the applicant(s) at the expiry of the discount period, the interest rate will switch to the tracker mortgage rate applicable, at the time of expiry of the discount period, to the amount of the loan originally advanced and as may be varied thereafter in accordance with variations to the ECB rate. Where the ECB rate is varied, whether during the discount period or at any time thereafter, the revised interest rate will apply not later than one calendar month from the date provided by the ECB as the date on which the ECB rate will take effect.

F. *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.*

G. *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.*

H. *The Applicant may switch the rate on the loan to a rate (if available) fixed for a certain period. On the expiry of the fixed rate period and where the applicant chooses the option of a tracker mortgage rate, the interest rate applicable to the loan will be the tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period. In the absence of instructions from the*

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applicant at the expiry of the fixed rate period, the interest rate will switch to the tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period and as may be varied thereafter in accordance with variations to the ECB rate.”

General Condition 5 of the **General Mortgage Loan Approval Conditions** outline;

- “5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified in the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*
- 5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*
- ...*
- 5.4 Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to variable rate loan agreement which will carry no such redemption fee.”*

The Provider’s **Mortgage Conditions 2002** attaching to the Letter of Approval outline as follows;

- 1.1 In these Conditions “the Mortgage” means the Mortgage Deed or other document in which the Conditions are incorporated.*
- ...*
- 1.10 “The Appropriate Rate” means the rate or rates of interest per centum per annum for the Advance as specified in the Letter of Approval, or such increased or reduced rate or rates of interest as may from time to time be payable on the Advance and any Additional Advance under the terms hereof”.*
- 1.11 Where the Appropriate Rate includes a differential “Basic Rate” means the rate at which interest would be charged if no differential applied, and where more than one rate type of Advance is secured where the context so requires it refers to the Basic Rate for each type of Advance.”*

4. INTEREST

- 4.1 Interest will be charged by [the Provider] at the Appropriate Rate after as well as before any judgment.*

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....

- 4.13 *[The Provider] may from time to time increase or reduce the Appropriate Rate (and may do so where the Appropriate Rate includes a differential by increasing or reducing either or both of the relevant Basic Rate and the differential).*

A reduction in the Appropriate Rate may be made without notice or formality and so as to take effect from such date as [the Provider] may determine but [the Provider] reserves the right not to permit a reduction in the Monthly Repayment.

- 4.14 *An increase in the Appropriate Rate shall not come into force unless or until notice of the increase has been either:*

4.14.1 *served on the Mortgagor in writing or*

4.14.2 *advertised in a national newspaper, provided always that the advertisement need only specify the fact of an increase, the date on which it becomes effective and that details may be obtained from any branch office of [the Provider]."*

Page 1 of the European Standardised Information Sheet details as follows;

"This document does not constitute a legally binding offer.

The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions."

....

Nominal Rate *The interest rate is 3.94 percent*

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

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a variable rate. An administration fee of EUR100 is payable when switching from a variable to a fixed rate product. The option to apply for a fixed rate product does not apply in respect of [name] loans.

There is no lock-in periods or penalties associated with this product.

The interest rate applicable to this loan is a variable rate loan but will not exceed 0.69% over the European Central Bank Refinancing Rate (the "ECB Rate") for the first 12 months (the Discount Period") from the date of issue of the loan.

On expiry of the Discount Period you may exercise an option to contract for a fixed rate period (if applicable) or to move to the Tracker Mortgage Rate, applicable at the time of expiry, to the amount of the loan originally advanced. The ECB Rate may be varied by the European Central Bank from time to time.

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **20 December 2006**. The Acceptance of Loan Offer states as follows:

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

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

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."

The Letter of Approval dated **04 December 2006** provided for an interest rate of 3.94%, as the ECB rate at the time was 3.25%. However by the time the mortgage loan was drawn down on **08 February 2007** the tracker rate was 4.19% (ECB 3.5% + 0.69%), as the ECB rate had increased by 0.25%. This is in accordance with **Special Condition D**, which provides

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that, the interest rate applicable to the mortgage loan account for the first 12 months from the date of issue of the mortgage loan would not exceed 0.69% over the ECB rate. This period is referred to as the “Discount Period” in the mortgage loan documentation.

Special Condition E outlines what was to occur after the expiration of the 12 month “Discount Period”. **Special Condition E** provides that on expiry of the “Discount Period”, the Complainants would have the option of switching to a fixed rate, if available, or the option of the “*tracker mortgage rate applicable, at the time of expiry of the discount period, to the amount of the loan originally advanced*”. It was outlined that in the absence of instructions from the Complainant at the expiry of the “Discount Period” the interest rate would switch to the “*tracker mortgage rate applicable, at the time of expiry of the discount period, to the amount of the loan originally advanced*”.

The Discount Period applicable to the Complainant’s mortgage loan did not apply for the 12 months envisaged by the Special Conditions to the Complainant’s mortgage loan, as the Complainant contacted the Provider to amend the rate applicable to the mortgage loan. The Complainant submits the rationale seeking to amend the interest rate was “*due to rising interest rates*”. I understand that the Complainant contacted the Provider by telephone on **01 March 2007** to request fixed interest rate options. This is not in dispute between the parties.

A chain of internal email correspondence between representatives of the Provider in the Business Development & Retention Unit from **01 March 2007** has been submitted in evidence which outlines as follows:

- 01 March 2007 at 12:50

“Can you please send out 2 yr fixed 4.91% and 3 yr fixed 4.95%

*Waiving €100 fee” **[emphasis in original]***

- 01 March 2007 at 14:03

“Hi [name]

Can you agree to waive fee?”

- 01 March 2007 at 14:03

“Approved”

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The Provider wrote to the Complainant by letter dated **01 March 2007**, as follows:

“Further to our recent communication, I am attaching a list of our current fixed rate options. You indicated that you are interested in availing of our three year fixed rate of 4.95%. Please tick the rate you would like and return to:

....

I trust this is to your satisfaction and should you have any queries, please do not hesitate to contact Mortgage Servicing at [number]”

The Rate Options Form which accompanied the letter details as follows:

“Please tick the option you want

Account Number: [number]

Approximate repayment

		eur €
Current Rate	4.19%	€3,999.49
1 Year fixed rate Mortgage currently	4.99%	€3,732.02
2 Year fixed rate Mortgage currently	5.15%	€3,800.34
3 Year fixed rate Mortgage currently	4.95%	€3,715.03
5 Year fixed rate Mortgage currently	5.15%	€3,800.34
7 Year fixed rate Mortgage currently	5.15%	€3,800.34
10 Year fixed rate Mortgage currently	5.15%	€3,800.34

....

- *The above figures only give you an idea of your revised monthly repayment, and may change.*
- *We will send you details of your actual repayment shortly*
- *If you choose a fixed rate, the standard fixed rate conditions will apply*
- *The above fixed rates are valid for 7 working days”*

The Complainant wrote to the Provider by letter dated **07 March 2007** which outlined as follows:

“I refer to your letter of 1 March 2007 in respect of the above. I wish to avail of the 3 year fixed rate of 4.95% and attach the signed form as requested.

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I currently have agreed a 3 month payment holiday and would be obliged if you could advise if it would be possible to extend it to a 4 month payment holiday. If so, I would be obliged if you could put in place and forward any forms that I need to sign. If not, can you confirm that, as discussed with your colleague, the 3 month payment holiday arrangement would remain in place”.

The letter enclosed the signed Rate Options Form on which the Complainant selected the 3 year fixed rate option of 4.95%.

The Provider wrote to the Complainant by letter dated **23 March 2007** which confirmed the application of the 3 year fixed interest rate to the mortgage loan.

The Complainant submits that she could only fix the interest rate on the mortgage loan at the end of the Discount Period under **Special Condition E**, and thus the Provider failed to inform her in **March 2007** that she was losing the entitlement to a tracker interest rate on her mortgage loan at this time and by consequence a tracker interest rate should have been re-applied to her mortgage loan from **08 February 2008**. This is the point in time when the Discount Period, as provided for in **Special Condition D** of the **Special Conditions**, would have ended had the Complainant not applied a 3 year fixed interest rate to the mortgage loan in **March 2007**. The Complainant initially submitted that the tracker interest rate available on **08 February 2008** was ECB + 1.25% and then later in her submissions to this office outlined that the rate was ECB + 0.90%.

The Provider has submitted into evidence a copy of a “**Lending Interest Rates**” document, which is outlined to be effective from the start of business on **4 February 2008**. It details that the Home Loans at that time were as follows;

<i>“Maturity rates applicable to Existing Home Loans</i>	<i>RATE</i>	<i>APR</i>
<i>Post 10/12/07 (unless otherwise stated in loan documentation)</i>		
<i>Tracker Rate LTV <60% loan <€200K</i>	<i>4.95%</i>	<i>5.1%</i>
<i>Tracker Rate LTV <60% loan €200K+</i>	<i>4.75%</i>	<i>4.9%</i>
<i>Tracker Rate LTV <80% loan <€500K</i>	<i>4.95%</i>	<i>5.1%</i>
<i>Tracker Rate LTV <80% loan €500K+</i>	<i>4.90%</i>	<i>5.0%”</i>

The tracker rate which would have been applicable to the Complainant’s mortgage loan account in **February 2008**, assuming the Discount period had expired was 4.90% (ECB + 0.90%). The Provider accepts this, however disputes that there was a failure to inform the Complainant that she was losing the entitlement to a tracker interest rate on her mortgage loan at this time, as **Special Condition H** contained an entitlement to a tracker interest rate at the end of the fixed interest rate period.

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Special Condition H to the mortgage loan sets out that the Complainant “*may*” switch the rate on the loan to a “*rate fixed for a certain period*” and then continues to indicate what the Complainant was contractually entitled to on “*expiry*” of the fixed rate period. That is, on the expiry of the fixed rate period the Complainant could chose the option of the tracker mortgage rate “*appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period*”.

In the event that the Complainant did not give an instructions as to the applicable rate on the expiry of the fixed interest rate period, then in accordance with **Special Condition H** the tracker mortgage rate “*appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period*” would also be applied.

In these circumstances, I cannot accept the Complainant’s submission that the Provider failed to advise her in **March 2007**, that she was losing the right to a tracker interest rate on her mortgage loan at the time. Any such advice would have been incorrect, the Complainant had a right to a tracker interest rate at the expiry of the fixed interest rate period that she applied to the mortgage loan in **March 2007**, by virtue of **Special Condition H**. I do not accept the Complainant’s submission that **Special Condition H** was in any way “*overridden by*” **Special Condition E** nor that there was any ambiguity between **Special Condition E** and **Special Condition H**.

I note that both parties refer to the information provided in the **European Standardised Information Sheet** regarding the interpretation of the **Special Condition E** and **Special Condition H**. Under the **European Voluntary Code of Conduct on Pre-Contractual Information for Home Loans**, the Provider must provide certain standard pre-contractual information to borrowers by means of a personalised European Standardised Information Sheet. The purpose of a European Standardised Information Sheet, is to enable the borrower to make an informed decision on whether or not to accept a loan offer from the Provider, by comparing the credit available from the Provider to what is available on the market. The European Standardised Information Sheet is not a legally binding document and has no bearing on the interpretation of the Special Conditions in the Complainant’s mortgage loan.

Special Condition E and **Special Condition H** are clear and they deal with two different circumstances. **Special Condition E** deals with the interest rate options on the expiry of the Discount Period. The 12 month Discount Period never came to expire as the Complainant requested a fixed interest rate within the first month of that period. **Special Condition H** deals with option to switch the rate to a fixed rate and the interest rate options, on the expiry of the fixed rate period.

The evidence clearly shows that the Complainant drew down the mortgage loan on **08 February 2007**. On **01 March 2007** the Complainant sought fixed interest rate options and on **07 March 2007** the Complainant elected for a 3 year fixed interest rate to be applied to the mortgage loan. The Provider acted on the Complainant's instructions and applied the fixed interest rate to the mortgage loan on **23 March 2007**.

I understand that the Complainant contacted the Provider by telephone to change the rate applied to her mortgage loan on **6 November 2008**. This office has not been provided with audio evidence of this telephone call. In this regard, the Provider submits that *"due to a number of constraints, including technical limitations of the Bank's historical telephone system, which is no longer in use, the Bank is not currently in a position to locate any call that may have been made by the Complainant on 6 November 2008."*

It is most disappointing that the Provider is not on a position to furnish a copy of the audio recording of this call. However, it is not in dispute between the parties that a telephone call took place and the content of the telephone call is not material to matter as to whether the Complainant had a contractual entitlement to apply a tracker interest rate to her mortgage loan at this time. The Complainant submits as follows:

"I contacted [the Provider] to see if I could break my 3 year fixed period and revert back to my tracker. I was advised that it was not possible and that I had no entitlement to a tracker mortgage"

The Complainant wrote to the Provider by letter dated **6 November 2008**, which outlined as follows:

"I refer to my discussions on 6 November with your Mortgage Service call centre. I wish to change my mortgage from the current 3 year fixed rate of 4.95% to the LTV<80% variable rate of 5.3% (which came into effect on 7 November 2008). I would be obliged if you could confirm if I can avail of this rate and if so send me the requisite documentation (if any) that I need to sign."

The Complainant's mortgage loan was amended to a variable rate of 5.30% with effect from **1 December 2008**.

The Provider submits that the Complainant was not entitled to a tracker interest rate at the time she broke from the 3 year fixed interest rate period. The Provider however acknowledges that it failed to inform the Complainant that she would be unable to avail of a tracker mortgage rate in the future which the Provider submits occurred on **01 December 2009**. This was the failure that the Provider identified as part of the mortgage redress programme.

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The Complainant submits that, she was entitled to the application of a tracker rate of 1.68%, when she broke from the fixed interest rate period on **1 December 2008**. The Complainant submits that this represented the *“expiry by consent”* of the fixed interest rate period.

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

With respect to the Complainant’s mortgage loan the *“expiry”* within the meaning of Special Condition H, meant the expiry of the *“certain”* three year period which was to apply at that time between **23 March 2007** and **22 March 2010**.

I note that the **Conditions relating to fixed rate loans** in the **General Mortgage Loan Approval Conditions**, were stated to be *“applied”* when the fixed interest rate instruction took effect from **23 March 2007**. I note that **Condition 5.4** of those conditions outlines that the Provider and the Complainant *“shall each have the option at the end of each fixed period to convert to a variable rate loan agreement will carry no such redemption fee.”* It appears to me that **Condition 5.4**, also does not apply in the circumstances of a break in a fixed interest rate period.

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

As such, it appears to me that when the Complainant contacted the Provider on **06 November 2008**, there was no contractual obligation on the Provider to offer the Complainant a tracker interest rate at that time.

The Complainant was seeking to vary the terms of the mortgage loan during the 3 year "*certain period*" of the fixed interest rate and it was a matter for the Provider to decide firstly whether it wished to accede to that request and if so, secondly what interest rate products it wished to offer to the Complainant. In the circumstances, it appears that the Provider elected to offer a variable interest rate, and the Complainant accepted this offer and instructed that a variable rate be applied by letter dated **6 November 2008**.

It is of course disappointing that the Provider has since admitted that there were certain failures in the information given to the Complainant in **December 2008**. That said, I note that the Provider has accepted its failure and offered compensation to the Complainant in relation to this failure.

Therefore, in the circumstances of this particular complaint, there was no obligation on the part of the Provider to offer the Complainant a tracker rate on the Complainant's mortgage loan when the Complainant broke from her fixed rate on **1 December 2008**. In these circumstances, I am of the view that if the Provider's representative informed the Complainant in the telephone call on **6 November 2008** that she could not apply a tracker rate to her mortgage loan at that time, that piece of information given was correct.

The evidence shows that the Complainants redeemed the mortgage loan with the Provider on **03 February 2009** by way of cheque for €691,996.63 and took out a new mortgage loan with another financial service Provider at the time. This new mortgage pursuant to the terms of a Letter of Loan Offer dated **9 January 2009** detailed that the applicable interest rate was "*3.750% Variable*". The Letter of Loan Offer was signed and accepted by the Complainant on **16 January 2009**. The Complainant drew down the loan of €666,000 on **03 February 2009**. It appears from the statement that has been submitted in evidence that the Complainant made a redemption payment of €330,000 on the new mortgage loan on **19 February 2010**.

As the Complainant had redeemed the mortgage loan with the Provider, the fixed interest rate that applied to the Complainant's mortgage loan with the Provider never reached the expiry of the fixed interest rate period on **23 March 2010**.

As detailed earlier in the background section of this Decision, the Provider wrote to the Complainant in relation to the mortgage redress programme and outlined its failure in **August 2015** and offered the Complainant a compensation payment of €1,000. The Provider detailed in the letter that it did not appear as if the Complainant had been "*financially impacted*" by its failure.

The Provider during the customer appeals process and in response to the complaint to this office has stated, that it is prepared to review the mortgage application submitted by the

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Complainant's then representative in November 2015 and that the mortgage application would be subject to the Provider's lending criteria and subject to receipt of documentation being provided to support the application. In this regard the Provider submits that the tracker interest rate that would be available to the Complainant would be the tracker rate of ECB + 3.25%, which is the rate the Provider submits would have been available in **March 2010**.

The Complainant disputes the application of a tracker interest rate of ECB + 3.25%. In this regard the Complainant refers to the notification requirements as contained in Clauses **4.13** and **4.14** of the Provider's **Mortgage Conditions 2002** which attached to the Letter of Approval and submits that the Provider did not notify her of the change in the tracker interest rate margin to 3.25% in **February 2010** or at any time until she made her appeal to the customer appeals panel in **2015**, then the Provider cannot backdate it to **February 2010**.

I do not accept the Complainant's submission as it entirely fails to take account the fact that the mortgage loan that was held with the Provider is no longer in existence. The Complainant redeemed that mortgage loan on **03 February 2009**. The act of redeeming the mortgage loan brought the mortgage loan contract to an end. The Provider was under no obligation from the point in time that the mortgage loan was redeemed to write to the Complainant and give notice of rates that would or could have been applicable to the redeemed mortgage loan at various points in time, had it not been redeemed. I do not accept that the Provider was in breach of the above the Provider's **Mortgage Conditions 2002** which attached to the Complainant's Letter of Approval.

A copy of the Provider's "**Lending Interest Rates**" effective from **1 February 2010** has been furnished in evidence to this office, which details as follows;

"Home Loan Rates for Existing Business

LTV Variable applicable to existing Home Loans

Since 01/02/2010. LTV Tracker Maturity Rates

Applicable to existing Home Loans since 31/08/09

Tracker Rate LTV <80%

Tracker Rate LTV >80%

RATE

APR

4.25%

4.3%

4.25%

4.3%"

It appears to me that the applicable tracker rate that ought to have applied, had the fixed interest rate period reached expiry of the certain period in **March 2010**, would have been 4.25% (ECB + 3.25%).

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This was the “*tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period*”, in accordance with **Special Condition H** of the Complainant’s mortgage loan.

The Complainant submits that the tracker interest rate of ECB + 3.25% “*bears no resemblance to a tracker*” and described it as an “*artificially inflated margin*”. The Complainant refers to definitions of “*Tracker Mortgage*” and “*Tracker Mortgage Loan*” as contained in the Provider’s **Mortgage Arrears Resolution Guide**, and submits that the percentage over the ECB Rate should be set in the mortgage loan documentation and thereafter cannot be exceeded during the term of the loan. There is no obligation on a Provider to set a specific tracker interest rate margin in the mortgage loan documentation from the outset. The Provider was free to exercise its commercial discretion in making a loan offer to the Complainant providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainant to decline that offer if she was dissatisfied that the terms and conditions did not specifically contain a guaranteed tracker interest rate margin on expiry of the Discount period under **Special Condition E** or expiry of a fixed interest rate period under **Special Condition H**. The Complainant signed the mortgage loan having confirmed that his solicitor had “*fully explained*” the terms and conditions of the mortgage loan to her.

Having carefully considered the evidence, it appears to me that the Complainant was very cognisant of the interest rate that applied to the mortgage from the date of drawdown until the date of redemption. This is evidenced by her communications with the Provider in **March 2007** and in **December 2008** when she contacted the Provider requesting to amend the interest rate applicable to the mortgage. I note that the Complainant opted to break from the discounted tracker rate in **March 2007** “*due to rising interest rates*”. She then opted to break from the fixed rate of 4.95% in **December 2008** on the basis that the interest rate was “*exceptionally high*”. Ultimately she opted to redeem the mortgage in **February 2009** with the Respondent Provider in order to avail of a variable rate of 3.75% with another Provider. The variable rate which applied to the mortgage loan with the new provider of 3.75% was lower than all of the interest rates that had applied to the mortgage loan since **23 March 2007**: the fixed interest rate of 4.95% applied to the mortgage loan between **23 March 2007** and **30 November 2008**, the variable interest rate of 5.30% that applied from **01 December 2009** and the variable interest rate that applied to the loan of 4.55% from **02 January 2009** to **3 February 2009**. The decision to redeem the mortgage loan in **February 2009** was one made by the Complainant by her own volition.

The variable rate which applied to the mortgage loan with the new provider of 3.75% was also lower than the tracker interest rate of 4.25% (ECB + 3.25%), which would have been offered had the fixed interest rate period reached expiry of the certain period in **March 2010**.

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I note that the Complainant submitted that *“even if [the Provider] are successful in defending my complaint, the amount due is €7,664 of redress (including €500) for payment to [named representative]”*. In response the Provider submits that its *“position is that the decision of the CAP regarding the adjustment of the Complainant’s capital balance is correct.....and for the reasons outlined previously, the Bank agrees with the CAP’s decision.”*

I understand from the Acceptance Form for CAP Decision that if the Complainant accepted the decision it was in full and final settlement or alternatively the Complainant could reject the decision, which she duly did in the circumstances of this matter and proceeded with her right to make a complaint to this office. By doing so, my understanding is that the offer as part of the CAP Decision is no longer available to the Complainant.

However having regard to the responses made by the Provider to this complaint to this office it appears to me that the Provider remains willing to implement the decision of the customer appeals panel, that is:

- (i) *Refund [the Complainant] the difference in the capital balance of the mortgage loan had [the Complainant] retained her mortgage loan with the Bank during the period from the expiry of the fixed rate on 1 March 2010 to today’s date and had the relevant tracker rate of ECB + 3.25% been applied to the mortgage.*
- (ii) *Refund €500 in relation to fees incurred from the engagement of [named representative], upon receipt of the associated invoice(s).*

Furthermore the Provider remains willing to review the mortgage application submitted by the Complainant’s representative in November 2015 and that the mortgage application would be subject to the Provider’s lending criteria and subject to receipt of documentation being provided to support the application. If the application was successful the tracker interest rate applicable to the mortgage loan would be ECB + 3.25%. I accept that the offer to implement the decision of the customer appeals panel and the offer to review the mortgage application are reasonable offers of redress and compensation by the Provider.

I do not accept that the Provider has failed to restore the Complainant’s mortgage loan to the appropriate tracker rate and from the appropriate point in time, or that the Provider has failed to offer adequate redress and compensation to the Complainant as a result of the Provider’s failure in relation to her mortgage loan account.

In light of all the foregoing and, in particular, the Provider’s offer of redress and compensation, I do not uphold the complaint.

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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

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

16 December 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.