



<b><u>Decision Ref:</u></b>	2021-0013
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

#### **Background**

This complaint relates to the Complainants' mortgage with the Provider which was secured on the Complainants' private dwelling home.

The mortgage was split into two mortgage sub-accounts as follows:

- The loan amount for mortgage sub-account ending **(01)** was €250,000 and the term of the loan was 12 years. The mortgage sub-account was drawn down in **September 2006** on a fixed interest rate of 4.49%.
- The loan amount for mortgage sub-account ending **(02)** was €25,000 and the term of the loan was 12 years. The mortgage sub-account was drawn down in **September 2006** on a fixed rate of 4.49%. This mortgage sub-account was redeemed on **15 October 2018**.

#### **The Complainants' Case**

The Complainants submit that they received correspondence from the Provider dated **10 July 2008** which stated that the fixed interest rate period on their mortgage account was due to expire and would change to the Provider's "*Standard Variable Rate*" from **1 August**

**2008.** They submit that the two interest rate options outlined in the letter were “**Option 1.** - Flexible Mortgage – where the ECB rate could change and the rate above this was not specified” and “**Option 2.** - Fixed Rate”.

They outline that the Provider’s letter further stated “that if the bank did not hear from us before the end of July 2008 that the fixed rate we were on would automatically revert to the Standard Variable Rate. This, to us looked like Option 1, which could ‘vary’. We let it go at the time as we had not wanted to remain tied into the Fixed Rate and assumed that we were automatically put onto Option 1 by default.” The Complainants state that “As a result we selected an option without fully understanding the options. Also we did this by default as we were under duress to make a decision without understanding the implications of our decision.”

The Complainants submit that “We realised, years later, that the communication was quite ambiguous and confusing.” They state that the Provider’s letter of **10 July 2008** lacked transparency “in differentiating between a Flexible Rate of Interest and a Variable Rate of Interest ... Given that there are just two products to choose from in the letter, we feel justified in interpreting the Flexible Mortgage as being one and the same as the Standard Variable Rate Mortgage. [The Provider] do not explain how a Variable Rate of Interest differs from a Flexible Rate of Interest so as to better allow a customer to make an informed decision.” The Complainants further submit that “it now appears to us that [the Provider’s] letter of 10 July 2008 contains three products: Standard Variable Rate, Flexible Rate and Fixed Rate. Standard Variable Rate is not presented as a separate Option.”

The Complainants submit that the “Flexible Mortgage and the Variable Rate mortgage share all the same features except for an understanding of how the [Provider] determines how the rate is arrived at.” They state that the Complainants “are not ‘insiders’ in the banking industry and did not appreciate the subtle differences between ‘flexible’ and ‘variable’ rate and assumed that they were one and the same.”

In addition the Complainants outline that the Provider’s letter of **10 July 2008** was “sent out in the middle of the summer holiday season, when most people are away on holidays. [The Provider’s] letter to us, dated 10 July 2008, was sent over the weekend arriving after our departure on the 13<sup>th</sup> of July 2008. By the time we opened the letter upon our return home during the August Bank holiday weekend, [the Provider] had already put us on their ‘Standard Variable Rate’ by default. There was no indication in the letter that the Bank would permit us to reverse their default decision. As a result of this action by [the Provider] we felt unable to question this decision as we had not been able to respond within the given time.”

The Complainants submit that the Provider's letter to them dated **10 July 2008** does not comply with the provisions of the **Consumer Protection Code 2006**. They submit that there is *"an onus on the lender to provide the information relating to their changes and not on the customer to have to request it"*.

The Complainants contend that they never received the letter which the Provider has stated was issued to the Complainants on **22 August 2008**. They assert that *"We note the absence of a signature on the letter as well as the absence of the [Provider] header and footer on the page. Without prejudice to the above, we note that the letter (which we did not receive) contains specific figures for the Standard Variable interest rate (SVR) and the monthly repayment. No such figures are contained in the letter of July 10<sup>th</sup> 2008, either for the SVR or for either of the other rates. In the absence of being given actual figures, it was not possible to determine where any advantages or disadvantage to us would sit, meaning that it would have been impossible for us to determine where any advantage or otherwise lay."*

The Complainants further submit that the Provider's letter of **22 August 2008** *"appears to be an effort by [the Provider] to put on record an attempt to "make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer.""*

The Complainants state that *"We believe that we were misled into accepting the 'Standard Variable Rate' by default and as a result suffered significant financial penalties by having to pay additional and avoidable interest repayments in excess of €30,000 over and above the repayments made to [the Provider]. This incident smacks of sharp practice by [the Provider] and it is for these reasons we believe that we have been impacted negatively and are seeking a redress."*

### **The Provider's Case**

The Provider outlines that during the application stage of their mortgage, the Complainants availed of the services of a third party broker. It states that therefore *"In accordance with the Bank's agreement with mortgage brokers at that time, the Bank was prohibited from contacting broker customers directly until such time as the customers' mortgage account was drawn down. Given this, the Bank is not in a position to confirm or comment on any advice given to the customers by their broker during the application stage of their mortgage and in particular any information provided by the broker regarding the loan type, interest rate or what would transpire at the end of the initial fixed interest rate periods."*

The Provider details that the Complainants have one mortgage which was split into two separate mortgage sub-accounts ending **(01)** and **(02)** which were drawn down in **September 2006** as follows;

- Mortgage sub-account ending **(01)** was drawn down for the amount of €225,000 for a term of 12 years subject to a two year fixed interest rate of 4.49%
- Mortgage sub-account ending **(02)** was drawn down for the amount of €25,000 for a term of 6 years subject to a two year fixed interest rate of 4.49%.

The Provider details that what would transpire at the end of the fixed interest rate periods in **July 2008** was outlined in **General Condition 2** and in the **Special Conditions** of the Complainants' **Offers of Advance** both dated **1 September 2006**, which stated that the mortgage sub-accounts would automatically revert to the Provider's Variable Home Loan Rate or the Provider may offer a further fixed rate for such a period and at such a rate as the Provider may decide. The Provider submits therefore that the Complainants "*were from the outset of their mortgage on notice of the fact that a decision would have to be made by them with regard to their "interest rate" options in July 2008.*"

The Provider states that there was no reference to a tracker rate in either **Offer of Advance** and such a reference or a specific condition would have been necessary for a tracker interest rate to apply. It outlines that **General Condition 2** of the **Offers of Advance** did not state that a tracker interest rate would be made available to the customers on expiry of the fixed interest rate period. It further details that **General Condition 2** did not state that the Variable Home Loan Rate is linked to the European Central Bank (ECB) base rate, rather it stated that the variable home loan rate can be amended at any time. It states that by comparison a tracker interest rate is linked to the ECB base rate and so would only rise and fall in line with movements in the ECB base rate, which cannot be changed by the Provider.

The Provider details that the Complainants signed and accepted the two **Offers of Advance** on **15 September 2006** and in doing so confirmed that they accepted their mortgage on the conditions contained in the Offers of Advance. It states that their solicitor also confirmed by witnessing the Complainants' acceptance, that the nature and the conditions of the mortgage were explained to the Complainants.

The Provider states that tracker interest rate products were available from the Provider from **late 2001** until **late 2008** when they were withdrawn from the market. It submits that it never offered a tracker interest rate as a default rate upon expiry of a fixed interest rate.

The Provider details that in line with **General Condition 2**, it wrote to the Complainants 21 days prior to the expiry of their initial fixed interest rate period, on **10 July 2008**. It states

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that this letter was known as a **Product Expiry letter** and advised the customers of the expiry of the fixed rate period and that *“Any borrowings you have on this Fixed Rate will change to our Standard Variable Rate from 01 August 2008.”*

The Provider states it *“acknowledges that neither of the customers’ Offer of Advance contained the term “Standard Variable Rate” as referred to in the Bank’s letter to the customer on 10 July 2008. However, the [Provider] Variable Home Loan Rate and the Bank’s Standard Variable Rate are the same i.e. a rate which can be amended at any time.”*

The Provider details that its letter also outlined the alternative interest rate options available to the customers at that time. It states that one of these options was a Flexible mortgage *“which tracks the European Central Bank base rate and although the base rate may change the margin you pay is fixed for the life of the loan”*. The other option was a Fixed Rate mortgage. The Provider states that *“As a tracker interest rate product is linked to the European Central Bank (ECB), we believe the [description] of the Flexible Mortgage option as quoted above ... clearly referred to a tracker interest rate product. Given the above, the Bank is satisfied that the difference between the Bank’s Standard Variable Rate and the Flexible Mortgage Option was clear and transparent in our letter dated 10 July 2008.”*

The Provider states that the Complainants did not select an alternative interest rate option or contact the Provider to discuss the options outlined in this letter, and as a result both mortgage loan sub-accounts rolled onto the Provider’s Variable Home Loan Rate which was the Provider’s standard variable rate i.e. the default rate outlined in the Complainants’ **Offers of Advance**. The Provider states that there was no entitlement on the Complainants’ part to default to a tracker interest rate and it does not consider that the Complainants could have formed any reasonable expectation of defaulting to a tracker rate at the end of the fixed rate period on each of their mortgage sub-accounts in **July 2008**.

The Provider outlines that it sent a letter to the Complainants on **22 August 2008** confirming that their mortgage sub-accounts had rolled onto the Provider’s Standard Variable Rate and to confirm their revised gross monthly repayment. The Provider states that its records show that this letter was issued and the Provider is unable to provide an explanation as to why the Complainants did not receive this letter. It states that the Complainants received the Provider’s letter of **10 July 2008** which was issued to the same correspondence address.

The Provider details that it invited the Complainants to discuss their options in both the letter of **10 July 2008** and the letter of **22 August 2008**. It further states that it *“considers it reasonable to believe that if any customer had any concerns about any correspondence*

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*they received in respect of their mortgage that an attempt at clarification would have been sought.”*

The Provider submits that the Complainants were free to seek to change the interest rate applying to their mortgage sub accounts at any time, *“However all interest rate products were subject to credit criteria, eligibility and terms and conditions.”* It submits that the Provider’s staff *“were not authorised to provide advice or recommendations to customers as to what interest rate option to select. Bank staff were trained to provide information in relation to the various interest rate options that were available when such information was requested. However, the decision in relation to which interest rate option to select rested with the customers, based on their own requirements.”*

The Provider states that it *“does not accept any assertion of a failure in our duty of care to the customers in question. The Bank outlined the available interest rate options and invited the customers to contact the Bank regarding same but the customers did not make such contact.”*

The Provider details that the Complainants’ mortgage sub-account ending **(02)** was redeemed on **15 October 2018**.

### **The Complaints for Adjudication**

The complaints for adjudication are;

- (a) The Provider misled the Complainants in respect of their rate options due to ambiguous and confusing language used in its letter dated **10 July 2008**; and
- (b) The Provider did not afford the Complainants a sufficient period of time within which to consider and select a rate option in **July 2008**.

### **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.

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

A Preliminary Decision was issued to the parties on **24 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.

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

1. Letter from the Complainants to this office dated **07 December 2020**; and
2. Letter from the Provider to this office dated **17 December 2020**

Copies of these additional submissions were exchanged between the parties.

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

Before dealing with substance of the complaint, I note the 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 only 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 letter, 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 investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint. If you have any complaint to make in relation to the advice given by your Broker, any such conduct must form the basis of a separate 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.

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainants' mortgage sub-accounts. It is also necessary to consider the details of certain interactions between the Complainants and the Provider when the initial fixed interest rate period expired in **2008**.

The **Offer of Advance** dated **01 September 2006** relating to mortgage sub-account ending **(01)** detailed as follows;

*"1. Amount of Credit Advanced: 225.000.00 Eur*  
*2. Period of agreement: 12 years 0 months*  
...  
*Interest Rate: 4.4900%*  
...  
**WARNING**  
...  
**THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME"**

The **Offer of Advance** dated **01 September 2006** relating to mortgage sub-account ending **(02)** detailed as follows;

*"1. Amount of Credit Advanced: 25,000.00 Eur*  
*2. Period of agreement: 6 years 0 months*  
...  
*Interest Rate: 4.4900%*  
...  
**WARNING**  
...  
**THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME"**

The **Special Conditions** attached to each **Offer of Advance** detail as follows;

*"The [Provider] Home Loan fixed rate of interest applicable at the date of this letter is 4.4900 % per annum and this rate will apply until 31 July 2008. At the end of the fixed rate period the loan will automatically revert to the [Provider] Variable Home Loan Rate and [the Provider] may offer to continue the Advance at a Fixed Rate of Interest for such a period and at such a rate as it may decide.*

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*In the event of the Applicant electing to accept such an offer (if any), he/she must do so in writing, and the agreement must be signed by all parties to the mortgage advance. If no such offer is made by [the Provider] or if any offer is made by [the Provider] and not accepted by the Applicant(s) [the Provider] Variable Home Loan Rate shall apply from 1 August 2008 and thereafter but otherwise in accordance with General Condition 2 of the [Provider's] General Conditions Relating to Advances by [the Provider] House Mortgages Section enclosed herewith, which varies the Interest Rate, and the mortgage conditions incorporated in the mortgage, and the said General Conditions relating to the Advances shall be construed accordingly."*

**Condition 2** of the **General Conditions** attached to each **Offer of Advance** details as follows;

*"Interest is calculated on the balance outstanding on the home loan at the close of business each day from the date of negotiation of the home loan cheque until the home loan is repaid. Interest so calculated is charged on the last day of the calender [sic] month in which negotiation of the home loan cheque takes place and on the last day of each calender [sic] month thereafter until the home loan is repaid. Interest charged to the home loan is included in the outstanding balance on which interest is calculated.*

*The outstanding balance on which interest is calculated will include any overdue repayments and other sums outstanding. Overdue repayments and other sums outstanding will be included in the outstanding balance from the date on which they are debited to the home loan account until the date on which they are discharged. If redemption of the home loan takes place mid month the amount required to redeem the loan will include interest from the first day of the month in which redemption takes place to the date of redemption. **The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [Provider] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper.** Interest is calculated on a compound basis. **[My emphasis]***

*Drawdown date of your mortgage will be the date on which your mortgage cheque is negotiated. If drawdown date is before the date on which direct debits are raised in any given month the first repayment will be on the 1<sup>st</sup> of the month following the month in which drawdown takes place and will be interest only on the amount drawdown from the date of drawdown until month end. This repayment will be in addition to the number of repayment instalments shown on the schedule of important information.*

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*If drawdown date is after the date on which direct debits are raised in any given month interest will be charged on the last day of the month on the amount draw down from date of drawdown until month end. This interest will be added to your first normal repayments on the 1<sup>st</sup> month following the month which follows the month in which drawdown takes place. In this case the total number of repayments will be as shown under the number of repayments instalments in the schedule of important information.*

*APR calculations assumes that drawdown of the loan will take place on the 15<sup>th</sup> of the month following the month in which the Offer of Advance issues.”*

The Complainants signed the **Acceptance and Authority** relating to each mortgage sub-account on **15 September 2006**, in the presence of their solicitor, on the following terms;

*“1. I/We the undersigned accept the within Offer of Advance on the terms and conditions set out above and overleaf and in the Bank’s standard form of Mortgage.”*

It is clear from both **Offers of Advance** that the Provider offered the Complainants a fixed interest rate of 4.49% which would apply to the mortgage sub-accounts until **31 July 2008**, after which the interest rate would revert to the Provider’s “*Variable Home Loan Rate*”. Each **Offer of Advance** clearly sets out the nature of this variable rate to be one which may be increased or decreased by the Provider at any time. The Offers of Advance do not contain any reference to the ECB rate. The particulars of each **Offer of Advance** including the applicable interest rate, were accepted by the Complainants by signing the **Acceptance and Authority** which was also signed and witnessed by the Complainants’ solicitor who, by doing so, confirmed that he/she had explained the nature and contents of the Offer of Advance to the Complainants.

I note that **General Condition 2**, as quoted above, is somewhat lengthy and deals with a number of other matters related to the mortgage loan aside from the nature of the Home Loan Interest Rate which was applicable to the mortgage loan. The section that I have emphasised above in **General Condition 2**, when taken together with the warning in the **Important Information** section of the **Offer of Advance**, outlines the **Home Loan Rate** to be one which may be adjusted by the Provider at any time. I do not accept the Complainants’ submission that there was ambiguity or a lack of clarity about the nature of the “*Variable Home Loan Rate*”. There was no real basis for the Complainants to reasonably expect that the term “*Variable Home Loan Rate*” to relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate. The Complainants were offered a variable rate which could be increased or decreased by the Provider at any time.

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I note from the evidence that prior to the expiry of the fixed rate period on **31 July 2008**, the Provider wrote to the Complainants on **10 July 2008**. The letter detailed as follows;

***“Your mortgage is changing – its time to explore your options***

...

*The Fixed Rate on your mortgage is due to expire on 31 July 2008. Any borrowings you have on this Fixed Rate will change to our Standard Variable Rate from 01 August 2008. This is a great opportunity to look at your options as your decision now could save you money.*

***Option 1: Flexible mortgage*** – this is one of our most popular mortgages. The flexible mortgage tracks the European Central Bank base rate and although the base rate may change, the margin you pay is fixed for the life of the loan.

- You can make overpayments/lumps to reduce the interest you pay and/or your term
- You can apply for a six month payment break
- No redemption charge for paying off your mortgage early

***Option 2: Fixed Rate mortgage*** – if you’d like the peace of mind of knowing your interest rate will stay the same for a fixed length of time. Simply choose the fixed rate term that suits you now. And remember, that at the end of your fixed rate period you will have the flexibility to explore your options again.

*Just call our dedicated team on [phone number]. We are here to make the process of choosing your new mortgage rate simple and hassle free. If we don’t hear from you before the end of July 2008 your current rate will automatically revert to the standard variable rate. This could mean an increase in your monthly repayments so now is the time to act.*

*We would to take this opportunity to thank you for your continued business and we look forward to offering you another great deal on your mortgage.”*

This letter detailed that if no response was received the interest rate would roll to the Provider’s “Standard Variable Rate”. I understand that the Standard Variable Rate is the same as the “Variable Home Loan Rate”.

The Provider should have used the same terminology as contained in the Complainants’ mortgage loan documentation when referring to rate choices and options in subsequent

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correspondence with the Complainants. This would ensure that there can be no confusion as to interest rate options (contractual or otherwise) being offered by the Provider.

That said, and having considered the mortgage loan documentation, it is clear to me that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the discounted variable rate period. It appears that the Provider, in line with its own commercial discretion and policy at the time, offered the Complainants the option of a tracker interest rate on the mortgage loan. It is important for the Complainants to understand that while tracker rate options may have been available as a product option from the Provider at the time, the Complainants were not contractually entitled to be offered a tracker interest rate.

The Complainants, in their post Preliminary Decision submission dated **07 December 2020**, detail as follows;

*“As you will be aware the jurisdiction of the FSPO is very wide – described in the High Court as operating from the principle of ex aequo et bono – which is basically good conscience as opposed to strict law.*

*In fact, under the legislation, you are entitled as FSPO to disregard strict law to give effect to fairness.*

*We do not seek to rely on the principle of contract law, as you mistakenly state. We are not claiming under contract.*

*As a matter of fact, the bank wrote to us on the 10<sup>th</sup> of July 2008 clearly stating that the fixed rate on our mortgage would change to the standard variable rate from the 1<sup>st</sup> of August if they did not hear from us before that date. We were offered 2 options – a flexible mortgage rate and a fixed mortgage rate. We had already decided not to remain on the fixed mortgage rate and we understood that by not contacting the bank we opted for the flexible option. This is because we failed to properly understand the subtle legal difference between the words ‘variable’ and ‘flexible’, which in English mean the same thing.”*

While I acknowledge that the Complainants are not making any specific claim under contract law, it is important for the Complainants to understand that I must review and consider the Complainants’ mortgage loan documentation, in particular the Offers of Advance agreed between the parties, in order to ascertain whether the Complainants had any entitlement, contractual or otherwise, to a tracker rate and if so, whether the Provider incorrectly failed to offer a tracker interest rate to the Complainants. A review of the loan documentation is essential in the interest of fairness for all parties as the loan

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documentation sets out the terms and conditions agreed by the parties. In circumstances where it has been determined that the Complainants did not have a contractual entitlement to a tracker interest rate, the Provider was not obliged to offer a tracker rate to the Complainants in **July 2008** or at any stage during the term of their mortgage. However the Provider, in exercising its commercial discretion and on foot of its policy at that time, decided to offer a tracker interest rate to the Complainants in **July 2008** as part of its flexible mortgage product option which is distinct from the Provider's standard variable rate.

I note that the letter that issued to the Complainants on **10 July 2008** operates as a prompt to the Complainants to contact the Provider to discuss the products available. It is unclear to me why the Provider did not set out the margin above the ECB rate that was available to the Complainants in writing as well as the repayments applicable to each rate option to the Complainants in the letter of **10 July 2008**.

The Complainants, in their post Preliminary Decision submission dated **07 December 2020**, detail as follows in respect of the above paragraph;

*"In the letter of the 10<sup>th</sup> of July 2008 there were **no details** about interest rates, no information on the margin above the ECB base rate, or sample monthly repayments based on Standard Variable Rates, Fixed Rates or Flexible Rates. The bank could have made this clear by reference to actual figures.*

*We therefore refute your conclusion..."*

The Complainants, in their post Preliminary Decision submission dated **07 December 2020**, also detail as follows;

*"In our submission we made reference to the Consumer Protection Code 2006, which you don't seem to have taken into consideration.*

*The Consumer Protection Code of 2006, states that "A regulated entity must ensure that all information it provides to the consumer is clear and comprehensible and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."*

*For us, as lay persons, we assumed that flexible meant variable and operated under that impression to our detriment."*

I am well aware of the obligations of financial service providers under the **Consumer Protection Code 2006** and I have carefully considered the Complainants' submissions in

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this regard. I acknowledge that the Provider's **Product Expiry Letter** dated **10 July 2008** did not specify the particular interest rates on offer but rather the types of mortgage products available to the Complainants on expiry of the fixed interest rate. However, I am of the view that the Provider set out the nature of these product types in a "*clear and comprehensible*" manner. The Product Expiry Letter dated **10 July 2008** describes the flexible mortgage product as one that "*tracks the European Central Bank base rate and although the base rate may change, the margin you pay is fixed for the life of the loan*" and describes the fixed interest rate product as one that will "*stay the same for a fixed length of time*", both of which are distinct from the Provider's default standard variable rate. Therefore, the Complainants ought to have been aware that, if they had opted to select the "*Flexible mortgage*" the margin would be fixed for the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank rate.

I accept that the Product Expiry Letter contained sufficient detail about the mortgage product options available upon expiry of the fixed interest rate period, such that the Complainants could have made an informed decision as to which mortgage product best suited their needs at the time or indeed they could have made further enquiries if they were in doubt. Therefore, I accept that the Provider has satisfied its obligations under **Chapter 2 of the Consumer Protection Code 2006**.

The Complainants, in their post Preliminary Decision submission dated **07 December 2020**, further detail as follows;

*"The Consumer Protection Code 2006 also states that a regulated entity "must give notice to affected consumers at least one month in advance of the amendment being introduced" We did not get a month to consider this offer."*

*You, as FSPO, have the jurisdiction to look beyond the technical and legal and to find according to fairness. In this case the bank through its use of misleading or vague language caused us to act to our detriment and we seek redress for that."*

The Provider, in its post Preliminary Decision submission dated **17 December 2020**, detail as follows;

*"The Bank would like to clarify that the relevant provision of the Consumer Protection Code 2006 as referred to above by the customers reads in full as below and relates to a general provision of banking products and services.*

*It is clear that this relates to a regulated entity amending the “range of services it provides” rather than a change in interest rate. Therefore, the point being made by the customers is not applicable in this case.*

*“**Provision 14.** Where a regulated entity intends to amend or alter the range of services it provides, it must give notice to affected consumers at least one month in advance of the amendments being introduced.””*

I have considered the Provider’s obligations under the **Consumer Protection Code 2006** and I accept that **Provision 14**, as outlined above, relates to an amendment or alteration in the range of services provided by the Provider as opposed to a notification of change in interest rate after the expiry of a contracted fixed interest rate period and therefore is not applicable in this instance. Since the inception of the mortgage loan sub-accounts in **2006**, the Complainants were on notice of the fact that a fixed interest rate would apply until **31 July 2008** and thereafter the loans would automatically revert to the Provider’s variable home loan rate unless another rate of interest was made available by the Provider and accepted by the Complainants.

It is not disputed between the parties that the Complainants did not respond to the Provider’s letter in **July 2008** and therefore did not seek to apply a tracker mortgage rate. In the absence of any written instruction detailing otherwise, the Provider applied the standard variable rate to the mortgage sub-accounts on **01 August 2008**. I accept that in circumstances where the Complainants failed to exercise their choice, the Provider’s Home Loan Rate was applied in accordance with **General Condition 2** of the Complainants’ mortgage loan agreement. The Home Loan Rate, in the Complainants’ mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

The Complainants have submitted that they were away on holidays at the time the Provider’s letter was issued to them on **10 July 2008**, and by the time they returned the mortgage sub-accounts had already defaulted to the standard variable rate. The Complainants could have contacted the Provider at that time if they had a query in relation to the applicable interest rate on their mortgage loan account, however that does not mean that the Provider was obliged to offer them any particular rate. Had the Complainants contacted the Provider on their return from holiday in **August 2008**, or at any other time, it would then have been a matter for the Provider to decide within its commercial discretion to accede to a request for a particular interest rate product outside of those that the Complainants were contractually entitled to. However it is not in dispute that the Complainants did not contact the Provider.

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In relation to the timing of the letter, I do not believe it is reasonable to expect the Provider to know when its customers take their holidays.

The Provider has submitted in evidence a letter to the Complainants dated **22 August 2008** which details as follows;

*“We wrote to you recently to advise that the product on one or more of your mortgage accounts was expiring.*

*As we have not received any response from you, any accounts on an expiring product have been transferred to our Standard Variable Rate, currently 6.10%.*

*The revised gross monthly repayment to your mortgage is 2591.39 Euro. If applicable this figure will be reduced by any tax relief at source (TRS) applied to your account.*

*If you would like to discuss the options available to you, please contact our Mortgage Services Team on [Phone number].*

*I would like to take this opportunity to thank you for your mortgage business to date.”*

The Complainants assert that they did not receive the letter of **22 August 2008**. However, I note it is not disputed that the Complainants received the Provider’s letter of **10 July 2008** which was sent to the same correspondence address.

As outlined above, the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan account and accordingly there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan sub-accounts at the end of the initial fixed interest rate period in **July 2008**. However, in accordance with its own policy at that time, the Provider did offer the Complainants the option of a tracker interest rate in **July 2008**. In circumstances where the Provider did not receive a response to this correspondence to indicate that the Complainants wished to avail of a tracker mortgage rate, the Complainants’ mortgage loan account defaulted to the Provider’s standard variable rate on **1 August 2008** in accordance with the terms and conditions of their mortgage loan.

For the reasons set out in this Decision, I do not uphold this complaint.



**Conclusion**

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

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



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

18 January 2021

**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.**