



<b><u>Decision Ref:</u></b>	2021-0031
<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 a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount was €296,000 and the term is 20 years. The **Mortgage Loan Offer Letter** which was signed on **23 September 2005** outlined the Loan Type as *"Fixed at 2.740% until 8 August 2006"*.

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

The Complainants state that the **Mortgage Loan Offer** dated **20 September 2005** was *"vague"* as to the type of variable interest rate that would apply to the mortgage loan account following the expiry of the initial fixed rate period. They refer to **page 1** of the Loan Offer, *"which outlines the fixed rate of 2.74% until 8 August 2006 and a variable rate of 3.55%. The word standard does not appear. The word standard with regard to variable interest rates is also notably absent in Clause 6 and Clause 7 of the Offer Letter"*. They submit that a *"tracker interest rate by its nature is also a variable rate so it is unclear from the offset what type of variable rate the Provider is offering in the Offer Letter."*

The Complainants outline that prior to the expiry of the initial fixed interest rate period they received a letter from the Provider dated **11 October 2006** which detailed the rate options available for their mortgage loan, including a tracker interest rate option of ECB + 1.25%.

They state that *"The tracker rate offered in 2006 was very high and we fixed for 3 years instead"*. On **6 November 2006** the Complainants signed a **Mortgage Form of Authorisation** ("MFA") opting to apply a three year fixed interest rate of 4.790% to the mortgage loan account. They refer to the **Acknowledgement and Agreement** Section of the **MFA** and state that *"Clause 3 dealing with tracker rates confirms that the Provider regarded tracker rates as variable rates when it is stated that "If I have applied to convert to a tracker variable rate, I agree that the interest rate applicable to the loan is a variable interest rate and may vary upwards and downwards". How is it clear to us, as customers, that the variable rate referred to here is not the same as the undefined, unspecified variable rate mentioned in our Offer Letter"*. They further state that *"The consequences of not choosing a tracker rate are **certainly not outlined**"* in **Clause 3** of the **MFA**.

The Complainants submit that prior to the expiry of the three year fixed interest rate in **2009** they received interest rate options available for the mortgage account, which did not include a tracker interest rate option. They signed an **MFA** on **14 October 2009** electing to apply a fixed interest rate of 3.600% until **25 July 2012**.

The Complainants submit that they received a further letter from the Provider dated **25 June 2012**, detailing the rate options available to them on the expiry of the fixed rate period, which again did not include a tracker rate option. They signed the **MFA** on **20 July 2012** and opted for the LTV variable rate of 4.050%. They outline that the **MFA** *"was littered with references to the tracker rate but no tracker option was afforded to us on the rate selection page"*.

The Complainants submit that they have since learned that other customers of the Provider with an *"identical"* loan offer to theirs, were offered a tracker interest rate at the end of their fixed rate period in **2012**. The Complainants want to know why they were not offered a tracker interest rate on the expiry of the fixed rate period in **2012** when other customers of the Provider were.

The Complainants state that they *"profoundly disagree"* with the Provider's contention that they were *"adequately warned"* that a tracker interest rate would not be available to them at any future point in time in circumstances where they did not elect the tracker rate option on the expiry of the fixed interest rate period in **November 2006**. They state that the *"only acceptable point articulating the possible loss of the tracker rate is found for the first time in the July 2012 MFA"*. They submit that if similar information was provided in

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the **November 2006 MFA** they *“would have chosen the tracker interest rate without question.”*

The Complainants further submit that the Provider has stated that they were not offered a tracker interest rate in **2012** because there was no provision anywhere in their Loan Offer for a tracker rate of interest. They submit that *“If this is the case, why were we offered a tracker rate on 11 October 2006?”*

The Complainants summarise as follows;

- *“The loan offer was vague in its reference to variable interest rates and the distinction between the standard variable rate and the tracker variable rate was not made.*
- *The November 2006 MFA failed outright to alert us, as customers, to the fact that the tracker interest rate would be unavailable to us going forward should we not choose it at the time.”*

The Complainants are seeking the following;

- (a) A tracker interest rate to be applied to their mortgage loan account, and
- (b) Compensation.

### **The Provider’s Case**

The Provider submits that it *“did not have a contractual obligation to offer the Complainants a tracker rate when the second and third fixed rate periods expired in October 2009 and July 2012.”*

The Provider outlines that by **Mortgage Loan Offer Letter** dated **20 September 2005**, the Provider agreed to advance a mortgage loan facility to the Complainants in the sum of €296,000 for a term of 20 years. It states that the Complainants signed and accepted the Offer Letter on **23 September 2005** and the mortgage loan account was drawn down on **19 October 2005** on a fixed interest rate of 2.74% for a period of 10 months, after which the interest rate would revert to the standard variable interest rate. The Provider states that there is *“no condition for a Tracker rate in the Offer Letter”* and if there were *“it would have appeared in the Special Conditions of the Offer Letter.”*

The Provider refers to **General Conditions 7(b)** of the Offer Letter which states that at the end of a fixed rate period the Provider shall *“have sole discretion to provide any further or subsequent fixed rate period”* or where a further fixed rate is not offered, or if the

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customer fails to exercise their choice of the available interest rates, *“the interest rate applicable to the Loan will be a variable interest rate”*.

It submits that the variable interest rate referenced in **General Condition 6(a)** of the Offer Letter is *“a rate that can be changed at the Providers discretion”*. It states that the first page of the Offer Letter sets out *“in very plain terms that the standard variable rate would apply automatically at the end of 10 months”*.

The Provider outlines that on **11 October 2006**, prior to the expiry of the fixed rate term, it wrote to the Complainants and *“listed the interest rates available to them at that time”*. It submits that this letter contained an invitation for the Complainants to contact the Provider who would be *“more than happy to discuss the various options available”*. It states that this illustrates that the Provider *“went out of its way to ensure that the Complainants had every means the Provider could make available to them to discuss their choice of rates”*.

The Provider details that a tracker interest rate of ECB + 1.25% was offered to the Complainants as *“one of seven options in the MFA”* including a variable rate option and a number of fixed interest rate options. The Provider submits that it was under no obligation to make the tracker interest rate available as an option and that it did so *“purely of its own volition”*.

The Provider submits that the contents of the **November 2006 Mortgage Form Authorisation (MFA)** are *“clear as to its effect on the question of tracker interest rates”* and the *“consequences of each choice are clearly set out in easy-to-understand clauses on page 2”* as follows;

- (a) **Clauses 1 and 2** set out the consequences of applying a fixed interest rate, namely that the interest rate shall be *“fixed from the date of expiry”* of the existing rate applicable to the mortgage loan and that in the event of early repayment of the loan *“the Borrower shall pay a funding fee”*
- (b) **Clause 3** sets out the consequences of opting to apply a tracker interest rate to the mortgage loan account, namely that the interest rate shall be no more than the agreed percentage *“above the prevailing ECB Main Refinancing Operations Minimum Bid Rate for the term of the loan”*
- (c) **Clause 4** outlines the consequences of choosing the variable rate, namely that *“the payment rate may be adjusted by the Lender from time to time”*.

The Provider asserts that the **2006 MFA** *“does not contain anything which could even remotely suggest a contractual entitlement to avail of a tracker rate at any time.”* It submits that the MFA did not provide that a tracker rate would be offered on the expiry of the fixed rate period, but rather outlined that save as set out in the form *“all the terms and conditions applicable to the Loan remain unchanged”*. It further submits that the MFA requested that the signed form be returned before **10 November 2006** and that the Provider could not hold the *“choice of rates open after this date”*. The Provider states that the *“meaning of these words could not have been plainer: if the Complainants did not tick the form to select one of the rates on offer ... the choice of rates would not be open after 10 November 2006”*. It submits that the MFA provided *“fair and reasonable information”* on the consequences of failing to choose one of the interest rates on offer. It further submits that the **2006 MFA** contained the instruction to read the form *“carefully”* prior to signing same.

The Provider states that on **6 November 2006**, the Complainants completed the **Mortgage Form of Authorisation** and opted to apply a fixed interest rate of 4.79% to their mortgage loan account for a period of three years. It states that the Complainants could have accepted the offer of the tracker rate but chose not to. It submits that by choosing one of the fixed interest rate options set out in the **2006 MFA**, the only *“reasonable conclusion”* is that the Complainants *“tacitly rejected the offer of a tracker rate.”*

The Provider outlines that on **25 September 2009** prior to the expiry of the three year fixed rate period, a suite of interest rates were issued to the Complainants which did not include a tracker rate. The Provider details that it discontinued offering tracker interest rates with effect from **late 2008** and it was *“not obliged to offer the Complainants a tracker rate of interest”* in **September 2009** given their *“lack of a contractual entitlement”*. The Provider submits that the Complainants accepted and signed the **October 2009 MFA** and chose to apply a fixed interest rate to the mortgage loan at a rate of 3.6% until **25 July 2012**.

The Provider states that the **2009 MFA** also makes it clear that, save as set out in the MFA, the *“terms and conditions applicable to the Loan remain unchanged”*. The Provider asserts that *“it clearly was not the case that by acceptance of the terms of the November 2006 MFA, any entitlement to a tracker rate would arise following the expiry of the fixed periods as chosen by the Complainants.”*

The Provider submits that on **25 June 2012** prior to the expiry of the fixed rate period, a suite of rates were issued to the Complainants which again did not include a tracker rate. The Provider outlines that the rate options made available to the Complainants included an *“Existing Variable LTV Rate PDH”* and a number of fixed interest rate options.

The Provider submits that as previously stated, it withdrew tracker interest rates from its suite of products in **late 2008** and therefore this was not an option offered to the Complainants in **July 2012**. It states that the choice of interest rates offered to the Complainants in the **July 2012 MFA** *“accurately reflects its obligations under the Offer Letter.”*

The Provider states that the Complainants chose to revert to the standard variable rate option on the expiry of the fixed interest rate period and the mortgage loan account has remained on this to date.

The Provider outlines that it did not have any specific policy in place in respect of tracker interest rate offerings to existing customers in place between **October 2006** and **July 2012**. It submits that the position at all times during the period between **October 2006** until it removed tracker interest rates from its suite of products in **2008**, was that it was at all times open for a customer to approach the Provider with a request to apply a tracker interest rate to their mortgage loan account.

The Provider submits that this is borne out by the fact that in **October 2006**, the Complainants were offered a tracker interest rate by the Provider and the Complainants opted to move to a fixed rate. The Provider submits that had the Complainants requested to move from the fixed rate applied in **October 2006** to a tracker interest rate within the time which the tracker rate remained on offer, the interest rate conversion would have been subject to a funding fee, as articulated at point 2 of the **Acknowledgement and Agreement** section of the **2006 MFA**.

The Provider asserts that there is *“no ambiguity, lack of clarity or vagueness contained in the November 2006 MFA, October 2009 MFA or July 2012 MFA when read in conjunction with the Offer Letter concerning the rate which the Complainants mortgage loan account would revert to upon expiry.”* It states that the Complainants could not have reasonably expected that their mortgage loan account would convert to a tracker interest rate upon the expiry of the three year fixed rate periods.

The Provider states that **General Conditions 6(a)** and **7(b)** are *“clear, concise and comprehensible”* and that when the Complainants signed each of the MFAs, they *“were on notice of the fact that a variable interest rate that could be amended at the Provider’s discretion, rather than a tracker interest rate, would apply to the mortgage loan account in default of an alternative interest rate being offered and/or selected upon expiry of the fixed rate period.”*

The Provider submits that it would be “*entirely unjust and unreasonable*” to project the warnings concerning the loss of tracker rates prescribed by the Central Bank of Ireland in **Provision 6.9** of the **Consumer Protection Code 2012** backwards to a letter issued by the Provider on **11 October 2006**. The Provider further submits that the provision applies only to customers who are on “*an existing tracker interest rate*” and who therefore, by necessity must start with a contractual entitlement to a tracker rate.

With respect to the Complainants’ submission that other customers of the Provider with an “*identical*” loan offer to the Complainants were offered a tracker rate at the end of a fixed rate period in **2012**, the Provider outlines that it cannot comment on another customer’s mortgage loan account which is not the subject of this complaint, pursuant to its legal, regulatory and data protection obligations.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Complainants were not offered a tracker interest rate on their mortgage loan account on the expiry of the fixed interest rate period in **July 2012**.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider’s response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

A Preliminary Decision was issued to the parties on 18 January 2021, 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.

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

At the outset I note that the Complainants submit that others customers of the Provider who had an “*identical*” loan offer to the Complainants, were offered a tracker interest rate on the expiry of a fixed interest rate period in **2012**.

I do not intend to take this submission into consideration on the basis that the terms and conditions offered by the Provider to its other customers, are not relevant to the determination of this particular complaint. Each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that other customers of the Provider were offered tracker interest rates in **2012** has no bearing on the Complainants’ interest rate entitlements.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants’ loan documentation. It is also relevant to set out the details of certain interactions between the Provider and the Complainant between **November 2006** and **July 2012**.

The **Mortgage Loan Offer** dated **20 September 2005** details as follows;

**“Part 1 – (The Statutory Loan Details)  
Important Information as at 20 September 2005**

1. Amount of Credit advanced:	€296,000.00	
2. Period of Agreement:	20 Years	
3. Number of Repayment Instalments	4. Amount of each Instalment	
10	Fixed at 2.740% until 8 August 2006	€1,347.44
230	Variable at 3.550%	€1,719.67”

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**Part 2 – (The Additional Loan Details)**

11. Type of Loan:	Repayment
12. Interest Rate:	2.740% Fixed

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*This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”*

The relevant sections of the **General and Special Conditions** to the **Mortgage Loan Offer** detail as follows;

#### **“6. Variable Interest Rates**

- a) *Subject to clause 6 (c), **at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the [Provider’s] discretion upwards or downwards.** If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty. **[Emphasis added]***
- b) *The [Provider] shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1 (c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month’s money at the Euro Inter Bank Offered Rate (EURIBOR).*

#### **7. Fixed Interest Rates**

- a) *The [Provider] may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the principal sum borrowed. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. **The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the [Provider’s] fixed rate available for the fixed period selected by the Borrower at the date of draw down.***

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b) *The [Provider] shall have sole discretion to provide any further or subsequent fixed rate period. If the [Provider] does not provide such a further or subsequent fixed rate period or if the [Provider] offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*"

The **Consumer Credit Act Notices** section of the **Mortgage Loan Offer** details as follows;

*"If your mortgage loan is at any time at a variable rate, please note:*

**THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.**"

The **Acceptance and Consents** section of the **Mortgage Loan Offer** was signed by the Complainants on **23 September 2005**, which states as follows:

*"I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the term and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."*

It is clear to me that the **Mortgage Loan Offer** envisaged a fixed interest rate of 2.74% for the first 10 months with variable interest rate to apply thereafter, or a further fixed rate at the Provider's discretion. The loan offer clearly sets out the nature of the variable rate to be one which may be increased or decreased by the Provider at any time. The loan offer does not contain any reference to the ECB rate. The Complainants accepted the **Mortgage Loan Offer** in **September 2005**, having confirmed that they fully understood the terms and conditions set out in the Offer Letter.

The Complainants have submitted that the **Mortgage Loan Offer** is "vague" with respect to the type of variable interest rate applicable to the mortgage loan, as the "word standard does not appear" in the offer letter. The section that I have emphasised above in **General Condition 6**, when taken together with the warning in the **Consumer Credit Act Notices** section of the loan offer, outlines the variable 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 rate. There was no real basis for the Complainants to reasonably expect that the term "variable 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. This is quite different to a tracker interest rate.

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Prior to the expiry of the initial fixed interest rate period, the Provider issued a letter to the Complainants on **11 October 2006** which outlined as follows;

*"I am writing to let you know that your current rate of 2.470% will expire on 10/11/2006.*

...

*To avail of your selected option, please **tick** the relevant rate on the enclosed Mortgage Form of Authorisation. Please **sign and date this form** and return it to us at [the Provider's address] before 10/11/2006. Unfortunately, we cannot hold the above choice of rates open after this date.*

...

*If we do not hear from you by 10/11/2006, your homeloan will, in accordance with your loan offer, automatically move to our standard homeloan variable rate of 4.440%."*

The **Mortgage Form of Authorisation** enclosed with the letter set out the following available interest rate options;

<b>"Description</b>	<b>Rate</b>
<i>Variable Rate</i>	<i>4.440%</i>
<i>Fixed to 31 October 2007</i>	<i>4.750%</i>
<i>Fixed to 31 October 2008</i>	<i>4.790%</i>
<i>Fixed to 31 October 2009</i>	<i>4.790%</i>
<i>Fixed to 31 October 2011</i>	<i>4.890%</i>
<i>Fixed to 31 October 2016</i>	<i>5.190%</i>
<i>Tracker Variable ECB + 1.25%</i>	<i>4.500%"</i>

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On the reverse side of the **Mortgage Form of Authorisation**, the **Consumer Credit Act Notices** section states:

*“If your mortgage is at any time at a variable rate, please note: **THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME**”*

The **Acknowledgement and Agreement** section on the reverse side of the **MFA** details as follows:

*“Please read carefully before signing this form. Where there is more than one borrower, any references to “I” or “my” are to be construed as references to “we” or “our” respectively.*

*I acknowledge that following the acceptance by the Lender of this application, the terms and conditions applicable to the Loan shall be amended/varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them. **I acknowledge and agree that: -***

- 1. If I have applied to convert to a fixed rate loan, the interest rate shall be fixed from the date of the expiry of my existing rate. The fixed rate of interest that shall apply shall be the Lender’s fixed rate available for the fixed period selected by the Borrower at the date of the expiry of the existing interest rate.*
- 2. In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower shall pay a funding fee to be calculated in accordance with the formula set out above under “Early Repayment”.*
- 3. If I have applied to convert to a tracker variable rate, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan. Any variation in interest rate shall be implemented by the Lender not later than close of business on the 5<sup>th</sup> working day following a change in the Repo rate by the European Central Bank.*

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*Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time the Repo rate is certified the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*

4. *If I have applied to convert to a Homeloan Variable rate the payment rate on the Loan may be adjusted by the Lender from time to time.*
5. *Save as set out in this Form of Authorisation all the terms and conditions applicable to the Loan remain unchanged.” [emphasis in original]*

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 fixed 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.

I accept that the MFA contained sufficient detail about the available tracker interest rate, such that the Complainants could have made an informed decision as to which interest rate to choose at the time or made further enquiries if they were in doubt. The Provider had set out in a clear and comprehensible manner that if the Complainants selected the tracker variable rate *“The interest rate shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan”*. Therefore, the Complainants ought to have been aware that, if they had opted to select the tracker variable rate the margin of 1.25% would be fixed for the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank rate.

The letter outlined that if the Complainants did not select a rate, the mortgage would *“in accordance with your loan offer, automatically move to our standard homeloan variable rate of 4.440%.”* The variable 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 did not accept the tracker interest rate and instead signed the MFA on **6 November 2006**, electing to apply the fixed interest rate of 4.79% until **30 October 2009**.

The Complainants have explained that the reasons that they did so was because the tracker interest rate offered in **October 2006** was *“very high”*. The Complainants were therefore aware of the moving nature of variable type rates and elected to apply the fixed interest rate period in **2006**, to protect themselves from the uncertainty of a variable type rate. The Complainants of their own volition decided not to choose the option of a tracker interest rate of ECB + 1.25% (4.50%) at the time and instead selected the higher fixed interest rate offered (4.79%).

The letter enclosing the MFA clearly outlined that the rate options outlined in the MFA were available until **10 November 2006** and that the Provider *“cannot hold the above choice of rates open after this date”*. The MFA further detailed that, save as set out in the MFA *“all the terms and conditions applicable to the Loan remain unchanged”*. There was no entitlement to a tracker rate outlined in the terms and conditions of the Complainants’ loan.

The Complainants have further submitted that they would have chosen the tracker rate *“without question”* if they had known they would not be offered the tracker rate again in the future. It appears to me that the Complainants have made this statement with the benefit of hindsight, based on the long term comparison between the fixed interest rates offered by the Provider and the ECB rate. It is a matter of fact that the ECB base rate ultimately began and continued to drop from **late 2008/early 2009** to **March 2016**, when it was reduced to 0%. There is no evidence that the Complainants knew or could have known in **November 2006** that the ECB base interest rate was ultimately going to reduce to 0% some ten years later such that they would have known the future financial benefit of the rate and would have chosen it *“without question”*.

Prior to the expiry of the fixed rate period, the Provider issued a letter to the Complainants on **25 September 2009**. A copy of this letter has been provided in evidence and sets out as follows;

*“I am writing to let you know that your current rate of 4.790% will expire on 30/10/2009.*

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To avail of your selected option, please **tick** the relevant rate on the enclosed Mortgage Form of Authorisation. Please **sign and date this form** and return it to us at [the Provider's address] before 30/10/2009. Unfortunately, we cannot hold the above choice of rates open after this date.

...

If we do not hear from you by 30/10/2009, your homeloan will, in accordance with your loan offer, automatically move to the variable rate of 2.700%."

The **Mortgage Form of Authorisation** set out the following interest rate options;

<b>Description</b>	<b>Rate</b>
Existing Variable Rate LTV Rate PDH	4.440%
Fixed to 25/07/2011 (PDH)	3.150%
Fixed to 25/07/2012 (PDH)	3.600%

The **reverse side** of the MFA sets out the same conditions as those outlined in the **2006 MFA** quoted above. The Complainants signed and accepted the form on **14 October 2009** and selected a further fixed interest rate of 3.600% to be applied to the mortgage loan until **25 July 2012**.

As outlined above the Complainants did not have a contractual or other 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 account at the end of the fixed interest rate period in **October 2009**.

On **25 June 2012** the Provider issued a letter to the Complainants to inform them that the fixed interest rate was due to expire on their account. A copy of the letter has been provided in evidence and states as follows;

*"I am writing to let you know that your current rate will expire on 25/07/2012.*

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*A description of our different product types and examples of the advantages and disadvantages follow. Some product types which we describe may not be available to you.*

### Tracker Variable Rate

*For a Tracker Variable Rate Mortgage, the Lender is obliged to move the variable rate in line with ECB (European Central Bank) rate changes, either increases or decreases. These increases or decreases will be applied within 5 working days of an ECB rate change.*

#### **Advantages of the Tracker Variable Rate include the following:**

- *The Lender cannot vary the Tracker Variable Rate at its discretion but must adjust the rate to follow or “track” ECB rate changes.*
- *Decreases in the rate must be applied within 5 working days of an ECB rate change.*
- *You can make lump sum payments or overpayments on your monthly repayment on your Tracker mortgage account at no cost.*

#### **Disadvantages of the Tracker Variable Rate include the following:**

- *It is a variable rate which means your monthly repayment may go up and down to reflect changes in the rate.*
- *If the ECB raises its rates, your tracker rate will automatically increase within 5 business days.*

### Variable LTV Rate

*This means your repayments are influenced by market interest rates. These can go up or down during the life of your mortgage, at the discretion of the Lender*

#### **Advantages of the Variable LTV Rate include the following:**

- *The Lender endeavours to set the rate at a competitive and attractive level.*



- *If the ECB increases its rates, it is possible that the Lender may decide not to increase the Variable LTV Rate.*
- *You can make lump sum payments, overpayments on your monthly repayment on your Variable LTV Rate mortgage account at no cost.*

***Disadvantages of the Variable LTV Rate include the following:***

- *It is a variable rate which means your monthly repayments may go up and down to reflect changes in the rate.*
- *The rate is variable at the discretion of the Lender – it does not track any ECB or other reference rate.*
- *If the ECB decreases its rates, it is possible that the Lender may decide not to decrease the Variable LTV Rate.*

***SWITCHES TO STANDARD VARIABLE RATES OR OTHER RATES***

***If you avail of a Standard Variable Rate or Other Rate, our tracker rate commitment to you is deemed to be at an end. For the avoidance of doubt, we wish to advise you that if you avail of a Standard Variable Rate or Other Rate, you will lose the ability to avail of a Tracker Rate mortgage in the future.***

**Fixed Rate**

*A fixed rate guarantees a specific rate for a fixed term. This ensures the monthly repayments are the same every month during the selected term of the fixed rate, so long as there is no other change to your mortgage account. Should you repay the loan early, or change to another rate within the agreed term of the fixed rate, you may have to pay us compensation for funding losses which we would incur.*

***Advantages of the Fixed Rate include the following:***

- *It offers you protection against any increase in variable rates during the period for which the rate is fixed.*

- Where you fix the rate for a loan, the monthly payment for the loan will remain the same for the fixed rate period, so long as there are no other changes to your mortgage account. This may make it easier for you to plan your finances.

**Disadvantages of the Fixed Rate include the following:**

- You will not get the benefit of any reduction in variable rates which occurs during your fixed rate period.
- You may have to pay us compensation for funding losses which we suffer when you (a) switch out of the fixed rate before the end of the fixed rate period or (b) pay back some or all of your mortgage loan early during the fixed rate period.

**SWITCHES TO FIXED RATES**

***If you avail of a Fixed Rate or Other Rate, our tracker rate commitment to you is deemed to be at an end and the lender's prevailing Standard Variable Rate will apply on expiry of this fixed term. For the avoidance of doubt, we wish to advise you that if you avail of a Fixed Rate, you will lose the ability to avail of a Tracker Rate mortgage in the future.***

***To avail of your selected option, please complete the enclosed Mortgage Form of Authorisation (MFA) and return it to us at [the Provider's address] before 25/07/2012. Unfortunately, we cannot hold the above choice of rates open after this date. If we do not hear from you by 25/07/2012, your home loan will in accordance with your loan offer or amended documentation, automatically move to the variable rate of Existing Variable LTV Rate PDH, a current rate of 4.05%.***

The **Mortgage Form of Authorisation** enclosed with the letter set out the following interest rate options available to the Complainants.

<b><i>"Description</i></b>	<b><i>Rate</i></b>
<i>Existing Variable Rate LTV Rate PDH</i>	<i>4.050%</i>
<i>2 Year Fixed (PDH)</i>	<i>4.990%</i>
<i>3 Year Fixed (PDH)</i>	<i>5.190%</i>

/Cont'd...

5 Year Fixed (PDH) 5.590%

10 YEAR FIXED (PDH) 6.490%

The **Acknowledgement and Agreement** section of the MFA outlines as follows;

*“PLEASE READ CAREFULLY BEFORE YOU SIGN THIS FORM.*

*By signing and returning this form properly completed you acknowledge and agree that:-*

*1. The terms and conditions of your Mortgage Loan Offer Letter are amended and varied by this form.*

*..*

**5. If the selected rate is a variable rate:-**

*5.1. the interest rate will vary at our discretion upwards or downwards;*

*5.2. the General Conditions in the Mortgage Loan Offer Letter concerning variable rates of interest will continue to operate.*

**6. If the selected rate is a tracker variable rate:-**

*6.1. the interest rate will be no more than the agreed percentage rate per annum above the European Central Bank (“ECB”) Main Refinancing Operations Minimum Bid Rate (“Repo Rate”);*

*...*

**7. Any commitment or obligation by us, in your Mortgage Loan Offer Letter or otherwise, to provide you with a tracker variable rate (as described at clause 6.1 above) for the Loan, now or in the future, will end if you select a fixed rate of interest or a non-tracker variable rate of interest by way of this Mortgage Form of Authorisation. This paragraph takes precedence over any condition of your Mortgage Loan Offer Letter concerning tracker variable rates including any Special Condition.”**

/Cont’d...

The Complainants completed and signed the MFA on **20 July 2012** opting for the variable interest rate option of 4.050%.

The Complainants have submitted that **Clause 7** of the **Acknowledgement and Agreement** section is the “*first time*” there was an “*acceptable point articulating the possible loss of the tracker rate*”. It is important for the Complainants to understand that there was no “*commitment or obligation*” on the Provider, contractual or otherwise, to provide them with a tracker variable rate option either in **July 2012** or in the future. The Complainants had no contractual or other entitlement to a tracker interest rate when the fixed interest rate period concluded in **July 2012** or at any other time.

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 account at the end of the initial fixed interest rate period in **November 2006**. However in accordance with its own policy at that time the Provider did offer the Complainants the option of a tracker interest rate in **November 2006**.

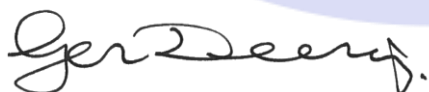
The Complainants elected not to accept the tracker rate and instead chose a 2 year fixed interest rate. The Complainants were not entitled as a matter of policy or contract to a tracker interest rate on the mortgage loan at the end of the fixed interest rate periods in in **September 2009** or **July 2012**.

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**

8 February 2021

/Cont'd...

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.

