



<u>Decision Ref:</u>	2021-0118
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

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' former principal private residence.

The loan amount was €520,000 and the term of the loan was 35 years. The Loan Offer signed on **27 June 2005** detailed that the interest rate applicable was 2.75% fixed for a period of 12 months.

The mortgage loan account was redeemed in full on **13 June 2018** when the security property was sold.

The Complainants' Case

The Complainants drew down a mortgage with the Provider in **June 2005**. They submit that it is evident from *"Part 1 of the Mortgage Loan Offer that [the Complainants] started off on a fixed rate of 2.75% moving to a variable 3.6% rate after 12 months"*.

The Complainants submit that in or around **June 2006** the Provider contacted them to inform them of the available rate options for the mortgage on the expiry of the initial fixed interest rate period.

The Complainants outline that “*after discussion with [the Provider’s] staff*” they signed a **Mortgage Form of Authorisation (MFA)** on **12 July 2006** to apply a 10 year fixed rate period of 4.99% to the mortgage loan account.

The Complainants state that the MFA they signed on **12 July 2006** “*...provides for the conversion of the fixed rate to a tracker variable interest rate of ECB plus 1.25% on the expiry of the fixed rate period. The contractual documentation is unclear as to what variable interest rates would be “offered” at the end of the fixed rate period but it is clear that it is [to] convert to a tracker variable interest rate of ECB plus 1.25% unless the parties mutually agree otherwise. [The Provider] tacitly admits to this by stating that tracker variable interest rates were pulled in [late] 2008.*”

The Complainants further outline that when they signed the MFA in **2006** “*we were told by the [Provider] staff member that at the end of the fixed rate period the mortgage would convert to a variable interest rate (tracker) of 1.25% plus the ECB rate but we may depending on a number of factors be entitled to change to a Homeloan variable rate (which in 2006 were lower than variable interest rates / tracker mortgages) or another fixed rate*”.

They further state that “*There is [Provider] public advertisements in 2006 and 2007 which state [Provider] fixed rate mortgages will automatically convert to a variable interest rate of the ECB rate plus 1.25%*” and that “*[Provider] fixed rate mortgages in 2005, 2006, 2007 and part of 2008 were automatically converting to the ECB rate plus 1.25%*”.

The Complainants submit that as per the Mortgage Loan Offer Letter dated **18 June 2005**, that **General Condition 7(b)** applies with regards to the interest rate options the Provider is contractually obliged to offer the Complainants;

“The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender 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.”

(Emphasis added as per Complainants’ submissions dated **17 January 2018**.)

The Complainants submit that in order to determine the meaning of “*variable interest rate*” **Section 3** of the **Mortgage Form of Authorisation** should be referred to;

‘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 ...’

(Emphasis added as per Complainants’ submissions dated **17 January 2018**)

The Complainants assert that the Tracker Variable Rate of ECB + 1.25% and the Homeloan Variable Rate in the **MFA**, fall under the definition of variable interest rate in **Section 3** of the Loan Offer. Furthermore, under **Section 3** and **4** of the MFA and **Section 6 Part 5 – The General Conditions** of the Mortgage Loan Offer Letter, any reference to “*a variable interest rate*” should be read as meaning a tracker variable rate.

The Complainants state that the Provider “*wishes to confuse matters by referring back to the 2005 Offer Letter dated 18 June 2006 and General Condition 6(a). This is a tactic. Neither the Offer Letter nor General Condition 6 are really relevant as the 2006 MFA and General Condition 7(b) are the applicable provisions and if there is any conflict (which there isn’t) then the 2006 MFA and General Condition 7(b) take precedence.*”

The Complainants further outline as follows in relation to **General Condition 6**;

- **General Condition 6** “*cannot be relied upon for the argument that the definition of “variable interest rate” means a Homeloan Variable Rate or a rate decided by the [Provider] in that in itself it contains wording that is confusing and contradictory but more importantly it appears to cover both Homeloan variable interest rates and tracker interest rates. The [Provider] has to date failed to show which provisions apply exclusive[ly] or partly to tracker variable interest rate because it knows that the General Conditions were drafted to cover fixed rate and variable interest rates (i.e. tracker variable and homeloan variable rates).*”
- *In addition, it is clear from the 2006 MPA that a tracker variable interest rate is a “variable interest rate” (i.e. see Section 3 of the Acknowledgement and Agreement ...). Section 4 of the Acknowledgement and Agreement ... does not refer to the “Homeloan Variable rate” as a “variable interest rate” but as a “payment rate on the Loan...” which “may be adjusted by the Lender from time to time”.*

- *General Condition 6(a) is somewhat confusing as it appears to refer to both tracker variable interest rates and homeloan variable interest because of the reference to General Condition 6(c) which sets a floor of 0.1% over the one month's money at the EURIBOR. Why would a floor be set if the [Provider] decided the rate(s). The only conclusion is because it is clear the [Provider] is referring to tracker rates which would go beneath that floor. General Condition 6(a) also provides for the situation where there may be a slight time lag between the changing the ECB rate and the application to an account that has a tracker variable interest rate. This is further evidenced in clause General Condition 6(b).*
- *If General Condition 6 does not cover tracker variable interest rates then which clauses in the General Conditions do? As stated this is somewhat of a moot point in our case as General Condition 6 isn't really relevant but it does show that the [Provider] is trying to use General Condition 6 in a misleading way rather than admitting it was to cover all kinds [of] variable interest rates and was poorly drafted."*

The Complainants outline that *"If a written agreement includes a term that is confusing or ambiguous, Contra preferentum calls for the term to be interpreted against the interests of whoever drafted that confusing or ambiguous term."* They assert that *"given the confusing nature of the documentation we would contend that the contra preferentum rule should apply that a tracker variable interest rate should be offered particularly in light of the mortgage being a long term financial product. To do otherwise would allow banks to lure in customers into fixed rate mortgages and then unilaterally force them to opt for a very high rate at the expiry of the fixed rate where they were unlikely to be able to easily change mortgage providers."*

The Complainants state that *"The [Provider] made a huge profit on the 4.99% rate we paid for 10 years"*. They detail that in **April 2016** *"well in advance of the expiry of the ten year fixed term we informed [the Provider] we wished to move to a tracker rate, there is nothing in the mortgage document that says we wouldn't be able to avail of this option"*. They submit however that the Provider failed to offer them a tracker rate at the end of the ten year fixed rate period. They state that the tracker rate of ECB + 1.25% should have been the *"default"* rate for the mortgage loan account at the end of the fixed interest rate period.

The Complainants detail that the Provider claims that it acted in accordance with **General Condition 7(b)** by offering them the available interest rate options in a **Mortgage Form Authorisation** issued in **June 2016**. They state that the Provider *"already have acknowledged we did not get [the MFA] because they sent it to the wrong address."*

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The Complainants outline that *“We did receive a MFA later in the year but [the Provider] were asking us to sign out of our right to a tracker variable interest rate in the documentation as we had contended we should revert to the lowest available commercial rate while the [Provider] investigated our contractual right to a tracker variable interest rate of ECB plus 1.25%. This in itself is acknowledgement that we had a right and the [Provider] were trying by financial pressure to get us to waive our contractual rights.”*

The Complainants submit that the Provider’s **Final Response Letter dated 19 September 2018** was *“carefully crafted in a way to be misleading rather than a representation of the contractual rights of the customer under the contractual documentation”*.

The Complainants submit that the Provider *“also trys [sic] to confuse matters by stating we were never on a tracker rate. It does not matter whether we were on a tracker rate previously or not, what matters is what [our] contractual entitlement is.”*

The Complainants state that they were *“forced”* to sell the mortgaged property in **2018** and that the Provider *“is wholly and directly responsible for the loss of the property.”* They detail that the Provider *“refused to put us on the lowest available rate (3.55%) while the tracker issue was being reviewed and kept sending documentation out that required us to explicitly sign away our tracker rate if we were to avail of the lower rate.”*

They outline that they *“have suffered a good deal of economic loss to date and naturally a large degree of significant emotional stress.”*

The Complainants want the Provider to;

- (a) Refund them for the difference in interest paid between the variable interest rate and the tracker interest rate (ECB + 1.25%), from the end of the 10 year fixed rate interest period in **April 2016**.
- (b) Pay compensation to the Complainants, in particular for the loss of the mortgaged property.

The Provider’s Case

The Provider submits that the Complainants drew down their mortgage under the Loan Offer Letter dated **18 June 2005** signed and accepted by the Complainants on **27 June 2005**. It details that the Loan Offer Letter provided for a fixed rate of interest for the first 12 months at 2.75% and thereafter a variable rate of interest.

It states that *“There is no provision whatsoever for a tracker interest rate in the Offer Letter. On the contrary, the Offer Letter makes it clear that “the interest rate chargeable will vary at the Bank’s discretion upwards or downwards”*”. It relies on **General Condition 6(a)** and **General Condition 7(b)** in support of this.

The Provider states that the variable rate of interest governed by **General Condition 6** is commonly referred to as a ‘standard variable rate’, which does not have a reference rate such as the ECB ‘Repo’ rate or EURIBOR, or an additional fixed margin, and so is not a tracker rate of interest. It details that there is nothing in the Offer Letter that modifies **General Condition 6(a)**.

It states that *“The effect of General Condition 6(a) is clear, the variable rate that applied at the end of the initial 12 month fixed rate would be a variable rate and the Provider would have discretion in varying it. This contrasts with a tracker rate that moves automatically in line with (or “tracks”) movements in the ECB Repo Rate.”*

The Provider outlines that *“General Condition 6(a) and 7(b) clearly and unequivocally state that the Provider has the sole discretion upon expiry of the fixed rate period, to provide a further fixed rate period, a choice of rates and if either of these is not selected then the mortgage will revert to a variable rate. A variable rate has been defined in General Condition 6(a) and it is clear that it does not include a tracker rate of interest.”*

The Provider states that the term *“tracker variable rate”* is not defined in the Offer Letter because *“the Complainants have no entitlement to a tracker rate of interest pursuant to contract or otherwise”*. It states that a tracker rate is a rate that tracks the interest rate set by the European Central Bank and the Provider is obliged to move the variable rate in line with the ECB Repo Rate which either increases or decreases. The Provider states that if a tracker interest rate was provided for in the Offer Letter, it would be contained in the **Special Conditions** of the Offer Letter and would set out the margin above which the tracker rate will operate above the European Central Bank Main Refinancing Operations Minimum Rate (Repo Rate) for the term of the loan.

The Provider submits that the Complainants had *“ready access to independent legal advice before they borrowed the mortgage loan because putting the security in place required by the Offer Letter would in itself have necessitated their appointing a solicitor”*. It states that they had the benefit of legal advice in respect of their obligations and operation of the terms and conditions of the Offer Letter, and if the Complainants had any doubt about the contents of the Offer Letter or definitions found therein they should have raised this with their legal representatives at the time. It states that instead both Complainants signed the Offer Letter.

The Provider does not accept the Complainants' submission that the Contra Proferentum Rule should be applied for interpreting the contractual terms of the Offer Letter. It submits that the Offer Letter *"is to be construed with reference to its object and the whole of its terms, and accordingly, the whole context must be considered in endeavouring to interpret it."* It states that the Offer Letter and in particular, **General Conditions 6(a)** and **7(b)** are *"clear, concise and comprehensible and there is no ambiguity as to the interest rate applicable to the mortgage loan account."*

The Provider states that it did not have any specific policy in place in respect of tracker interest rate offerings in relation to existing customers in place between **late 2006** and **mid-2012**. It states that *"The position is that it was at all times open between [late] 2006 and [late] 2008 for a customer to approach the Provider with a request to move their mortgage loan account to a tracker interest rate."*

The Provider submits that before the expiry of the 12 month fixed rate, it issued the Complainants with a **Mortgage Form of Authorisation ("MFA")** in **July 2006**, offering them a choice of rates to apply at the end of the fixed rate period, which were;

- | | |
|---------------------------------------|----------------|
| • <i>"HOMELoAN VARIABLE RATE</i> | <i>3.990%</i> |
| • <i>1 Year Fixed</i> | <i>4.290%</i> |
| • <i>2 YEAR FIXED</i> | <i>4.390%</i> |
| • <i>3 YEAR FIXED RATE</i> | <i>4.490%</i> |
| • <i>5 YEAR FIXED RATE</i> | <i>4.750%</i> |
| • <i>10 Year Fixed</i> | <i>4.990%</i> |
| • <i>TRACKER VARIABLE ECB + 1.25%</i> | <i>4.000%"</i> |

The Provider states that in **Clauses 1 to 4** of the MFA *"the consequence of each choice of product is clearly set out and this, in the Provider's view, made abundantly clear to the Complainants that they were rejecting the offer of a tracker rate contained in the 2006 MFA by choosing the 10 year fixed rate offered. They could not have been in reasonable doubt that that they were activating Clauses 1 and 2 of the 2006 MFA and rejecting the opportunity to activate Clause 3 of the MFA"*.

The Provider details that on **12 July 2006** the Complainants signed and accepted the MFA applying for a 10 year fixed rate at 4.99%. It states that *"By signing and accepting the 2006 MFA, the Complainants chose to change the interest rate on the mortgage loan account to a fixed interest rate for 10 years at 4.990%. This amended General Condition 5(b) in that the Provider accommodated the Complainants request (at the Provider's discretion) to vary the interest rate, from that provided in the Offer Letter"*.

The Provider states that the **2006 MFA** included the option of a tracker rate of interest of ECB + 1.25%, which was rejected by the Complainants in favour of the 10 year fixed rate. The Provider further submits that *“the ECB Repo Rate was on an upward trajectory in July 2006”*. It states that the rate change to the 10 year fixed rate was implemented on **27 July 2006** and the Provider issued a **Product Switch Letter** to the Complainants on **27 July 2006** to this effect.

The Provider states that *“There is nothing in the July 2006 MFA to suggest that the Provider was obliged to provide the Complainants with a tracker rate of any sort at the end of the 10 year fixed rate period.”* It submits that the Complainants were *“fully informed”* by the Provider that by opting for a fixed rate period in **July 2006** that the tracker interest rate offering might no longer be available to them at the expiry of the fixed rate period. It states that it issued a **Product Review Notice letter** to the Complainants on **21 June 2006**, together with the **2006 MFA** which was signed and accepted by the Complainants, evidencing their receipt of the Product Review Notice letter. The Provider submits that it is unable to obtain a copy of the exact letter which issued to the Complainants, however there was no regulatory requirement to retain letters at that time and the signed MFA is evidence that the letter was received by the Complainants.

The Provider details that its **Product Review Notice** letter of **21 June 2006** set out the rate options available on the expiry of the fixed interest rate period on **20 July 2006** and stated that *“Unfortunately, we cannot hold the above choice of rates open after this date”*. It states that the letter also outlined that if the Provider did not hear from the Complainants by the date the fixed period expired, the loan would, in accordance with the loan offer, automatically move to the *“standard homeloan variable rate of 3.990%”*. It states that the letter also invited the Complainants to phone the Provider to discuss their interest rate options.

The Provider states that *“it would be entirely unjust and unreasonable to project the requirements of CPC 2012 backwards to a letter sent by the Provider on 21 June 2006”*. It states that **Provision 6.9** of the **Consumer Protection Code 2012** applies only to personal consumers who are on an *“existing tracker interest rate”* and who, therefore by necessity must start with a contractual entitlement to a tracker rate. The Provider submits that *“It is striking that, even by the exacting standards of CPC 2012, no warning on the loss of a tracker rate would be required today where a customer had no contractual entitlement to a tracker rate in the first place.”*

The Provider states that the homeloan variable rate *“is a “permanent” rate that would apply for the remaining term of the mortgage loan in contrast with “temporary” rates such as fixed rates that apply for limited times only ...*

That (in the Provider's view) helps underscore the "permanent" nature of the loss of the tracker rate option offered in June 2006 in the absence of positive choice by the Complainants on 12 July 2006."

The Provider submits that *"there is no ambiguity, lack of clarity or vagueness contained in the 2006 MFA, when read in conjunction with the Offer Letter, concerning the rate which the Complainants mortgage loan account would revert to upon expiry.*

The Complainants could not reasonably have expected to move to a tracker rate upon expiry of the 10 year fixed rate period because there was never a tracker entitlement within their Offer Letter."

The Provider states that in addition, it is within the Provider's commercial discretion to alter the rates offered to borrowers and the Provider exercised this discretion in withdrawing tracker rates in **late 2008**. It states that this is the reason that tracker rates were no longer available when the Complainants' ten year fixed interest rate period ended in **2016**.

The Provider submits that the Complainants have not provided any evidence to suggest that a tracker rate was expressly requested to apply to their mortgage account either at a particular point in time or at any point in the future. It rejects the Complainants' assertion that the Provider, its servants or agents advised that such a tracker rate would apply which would be contrary to the aforementioned contractual loan documentation. The Provider submits that *"it was at all times open between [late] 2006 and [late] 2008 for a customer to approach the Provider with a request to move their mortgage loan account to a tracker interest rate."* The Provider outlines that *"a funding fee"* would have been required to move from a fixed rate to a tracker rate during this time, as articulated at **section 2** of the **Acknowledgment and Agreement** section of the **Mortgage Form of Authorisation**. It outlines that this did not preclude the Complainants from seeking to convert the mortgage loan account, however the Complainants did not choose to do so.

The Provider states that before the Complainants' 10 year fixed interest rate period expired, a rate options letter was sent to the Complainants on **27 June 2016**. It details that the rate options offered included a standard variable rate and fixed rate options for 1, 2, 3, 5 and 10 year terms. The Provider states that the Complainants did not complete an MFA in **July 2016** and the mortgage loan account *"reverted"* to the default rate, i.e. the standard variable rate. The Provider states that in its view that accorded correctly with **General Condition 7(b)** of the Offer Letter. It states that it had no contractual obligation to offer the Complainants a tracker rate on expiry of the fixed rate in **June 2016**. It further details that the Provider had withdrawn tracker rates almost eight years earlier in **late 2008** and was not willing to offer the option of a tracker rate in **June 2016**.

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It submits that the Complainants *“have offered no corroborative evidence to support the contention that the Complainants entered into the 10 year fixed rate interest with a contractual entitlement to a tracker upon the expiry.”*

The Provider details that the Complainants redeemed their mortgage loan account on **13 June 2018** when the secured property was sold for €540,000. It states that it is *“of the strong view that the non-availability of the tracker mortgage was not the cause of loss of ownership in the property. The Provider is of the view that the consequences of not having a tracker mortgage in 2016 is too remote, and dependant on any number of factors, that a party may consider when making the financial decision to sell a property”*. The Provider further submits that *“if the tracker rate of interest was to be the sole reason for the sale of the Property, it seems somewhat unrealistic when there was almost 24 years remaining on the Mortgage Loan having never had a tracker rate of interest to date.”* The Provider states that *“a forbearance arrangement and/or a sustainable solution could have been available to the Complainants, had such a request been received, however the Complainants decided to sell the property and at no point sought forbearance in an effort to retain the Property.”*

The Provider states that it is *“entirely inappropriate”* for the Complainants to draw inferences from entirely separate contracts and documents regarding publications and/or documentation released by third parties. It states that the parties must rely on the terms and conditions as agreed between the parties in the original Offer Letter, as amended by the **2006 MFA**. It submits *“that to undermine the legal binding contract with reference to other documents would be contrary to the fundamental principles of the contract between the parties.”*

The Provider states that it was not obliged to convert the Complainants' mortgage loan account to a tracker rate of interest pending the Complainants' complaint to the office of the Financial Services and Pensions Ombudsman, as they do not have a contractual right to a tracker interest rate. It states that furthermore, when the Complainants were offered a tracker rate of interest they did not avail of same. It details that it offered the Complainants a sum of €250.00 on **19 February 2019** in relation to a delay in amending the address on their mortgage account.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate on the expiry of the ten year fixed interest rate period in **April 2016**.

The Complainants, in their Post Preliminary Decision submission, detail as follows:

“It is submitted that the complaint for adjudication is that the [provider redacted] failed to apply (as opposed to offer) a tracker variable interest rate of ECB plus 1.25% when the ten year fixed interest rate period expired in July 2016 (not April 2016) pursuant to Section 7 of “PART 5–The General Conditions””.

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 **22 February 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.

Following the issue of my Preliminary Decision, the Complainants made a post Preliminary Decision submission dated **11 March 2021**.

A copy of the Complainants’ additional submission was exchanged with the Provider. Following the consideration of that additional submission, I set out below my final determination.

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Before dealing with the substance of the complaint, I note that the Complainants have submitted as follows in their post Preliminary Decision submission dated **11 March 2021**:

“We had approached the FSPO to have an interim solution whereby the lower rate offered by [the Provider] would be applied while the investigation was ongoing and if the complaint was rejected then the rate would continue and naturally if our complaint was accepted then the rate would be changed to the tracker rate and a refund issued ...

The FSPO would not exercise its’ interim powers and [the Provider] applied a higher homeloan variable rate which was a way of pressurizing us into signing out of any tracker rate rights we may have.”

The Complainants have previously been informed that this Office does not have “interim powers”. The Complainants were informed of the powers of investigation available to this office, by letter, which outlined as follows:

“Interim Decisions

This office does not have the power to issue interim decisions. This has been explained to you in previous correspondence with the Ombudsman.

...

*The function of this Office, as detailed in **Section 12** of the **2017 Act**, is to deal with complaints by informal means, mediation, and where necessary, by formal investigation, or a combination of the foregoing. In accordance with **Section 60** of the **2017 Act**, where this office has completed an investigation of a complaint and this office finds the complaint to be upheld, substantially upheld or partially upheld, then certain directions can be made by this office, including mitigation of the conduct complained of, by rectification and/or compensation, as considered appropriate.*

*In this regard, I consider it necessary to highlight to you again, that such a direction may **only** be made at the conclusion of an investigation.*

...

For the avoidance of doubt, this Office does not have the statutory power under the 2017 Act to issue any interim orders or directions to your Provider, at any point in time in the consideration of your complaint.”

This Office does not have the legal power to issue interim directions, as has been suggested by the Complainants.

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In order to ascertain if the Provider failed to apply and/or offer the Complainants a tracker interest rate of ECB + 1.25% on the expiry of the fixed interest rate period in **2016** it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider certain interactions between the Provider and the Complainants between **2005** and **2016**.

The **Mortgage Loan Offer Letter** dated **18 June 2005**, detailed as follows;

"Part 1 – The Statutory Loan Details

...

1. Amount of Credit Advanced	€520,000
2. Period of Agreement	35 Years
3. Number of Repayment Instalments	4. Amount of each Instalment
12	Fixed at 2.750%
408	Variable at 3.600%

...

Part 2 – The Additional Loan Details

11. Type of Loan: Repayment
12. Interest Rate: 2.750% Fixed

...

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 Conditions** to the **Mortgage Loan Offer** detail as follows;

5. "General Interest Rate Provisions

- (a) Interest at the fixed or variable interest rate prevailing from time to time during the term of the Loan, shall be calculated on the daily balance outstanding and shall be compoundable at such monthly, quarterly or other periodic rates as the Lender shall, from time to time and at any time, at its absolute discretion, determine.

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(b) Any variation in the interest rate (whether an adjustment of interest rate as between one fixed rate period and another fixed rate period or any variation in the variable rate) may be accommodated at the discretion of the Lender by way of:

(i) an adjustment to the amount of the regular repayments during the remaining term of the Loan; or (ii) an adjustment to the number of repayments within the remaining term of the Loan; or (iii) an adjustment to the amount of the final repayment; or (iv) an adjustment in the term of the loan.

....

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 Lender'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 mortgage without penalty. [Emphasis added]

(b) The Lender 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), 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 Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan. 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 Lender's fixed rate available for the fixed period selected by the Borrower at the date of drawdown.

*(b) The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers a 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 on **page 5** of the Offer Letter states 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 **27 June 2005** and details as follows;

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

In my Preliminary Decision dated **22 February 2021**, I stated as follows:

*"It is clear to me that the **Mortgage Loan Offer** envisaged a fixed interest rate of 2.75% for the first 12 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 **June 2005**, having confirmed that they fully understood the terms and conditions set out in the Offer Letter."*

In their post Preliminary Decision submission of **11 March 2021**, the Complainants have submitted as follows:

“The FSPO committed a serious and significant error of law by making the above assertion in that it is clear that the FSPO is of the opinion that it does not matter what amending mortgage loan contractual [sic] is signed after the 2005 Loan Offer.

In essence the statement goes against a long line of legal authorities that provide for the ability of the parties to agree to amendments to contractual provisions and is a serious and significant error of law to apply greater significance to the 2005 Loan Offer than to the 2006 MFA. To put it simply the 2006 MFA and General Conditions take precedence over the 2005 Loan Offer, a statement which goes against any such order of priority is a serious and significant error of law and indeed is unreasonable and unfair to any consumer.”

The Complainants submit that **General Condition 6** “contains wording that is confusing and contradictory but more importantly it appears to cover both Homeloan variable interest rates and tracker interest rates. The [Provider] has to date failed to show which provisions apply exclusive[ly] or partly to tracker variable interest rate”. 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.

In my Preliminary Decision I stated as follows:

*“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 **Mortgage Loan Offer** refers to a variable rate which could be increased or decreased by the Provider at any time. This is quite different to a tracker interest rate.”*

In their post Preliminary Decision submission of **11 March 2021**, the Complainants submitted:

“The above statement is so clearly a significant and serious error of law and of fact that it is difficult to understand it. The [Provider] conceded that the General Conditions covered tracker variable rates, homeloan variable rates and fixed rates.

/Cont’d...

In addition there appears to be a total absence of consideration of the 2006 MFA which sets out the new terms and conditions which were to apply to the mortgage loan. FSPO should not be ignoring the terms and conditions of the 2006 MFA and furthermore, it should not view the confusion around the meaning of General Condition 6 to clarify the meaning of a “variable interest rate” in General Condition 7(b). The 2006 MFA specifically refers to a tracker interest rate as a “variable interest rate”.

It is a serious and significant error of law from a legal interpretation perspective not to even consider the wording in the 2006 MFA which is accepted has [sic] having amended the Mortgage Loan Offer.”

There is no mention in the **Offer Letter** about the application of a tracker interest rate to the Complainants’ mortgage loan. I remain of the view that in order for the Complainants to have a contractual right to a tracker interest rate on their mortgage loan at the end of the initial fixed interest rate period, that right would need to have been specifically outlined in the mortgage loan documentation, that was signed by the parties. However, no such right was set out in writing in the **Offer Letter** dated **18 June 2005**, which was signed by the Complainants on **27 June 2005**.

I stated as follows in my Preliminary Decision:

*“If the Complainants were of the view that the **Loan Offer** dated **18 June 2005**, was ambiguous or was not clear as to the type of interest rate that might be available to the Complainants at the end of the fixed interest rate period, the Complainants could have decided not to accept the offer made by the Provider or sought clarity as to the type of variable rate that the mortgage loan would default to on the expiry of the fixed interest rate period. Instead the Complainants signed the **Acceptance of Loan Offer** on **27 June 2005** and confirmed that they accepted the Offer Letter on the terms and conditions set out therein.”*

In their post Preliminary Decision submission of **11 March 2021**, the Complainants further submitted:

“The above statement would seem to confirm the position that the FSPO committed a serious and significant of [sic] error of law in holding that the Loan Offer is the primary contractual document when it comes to applicable interest rate.

The applicable interest rate and future interest rates are quite clearly covered in the 2006 MFA and the General Conditions. It is submitted that the error may have arisen due to the fact that the [Provider] could not supply a copy of the signed 2006 MFA which is an extremely significant issue when it is essentially the most important document in terms of the applicable interest rate to the loan."

The Complainants are incorrect in a number of their assertions in relation to my Preliminary Decision. I do not accept that I have afforded "greater significance to the 2005 Loan Offer than to the 2006 MFA". Nor do I accept that I have stated that the Loan Offer "is the primary contractual document when it comes to applicable interest rate".

I did not make any such statement. I have considered the application of the **General Conditions** set out in the Mortgage Loan Offer to the Complainants' mortgage loan account. As outlined above, **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 increased or decreased by the Provider at any time. I remain of the view that there was no basis for the Complainants to reasonably expect that the term "variable rate" would relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate in the Mortgage Loan Offer.

In any event, what is of relevance to this complaint is that the evidence indicates that at no stage did the Complainant have a contractual entitlement to a tracker interest rate on the mortgage loan account based on the terms of the Mortgage Loan Offer dated **18 June 2005**. The Complainants in their post Preliminary Decision submissions detail a number of times that I have not considered the **Mortgage Form of Authorisation** signed by the Complainants in **2006**. For the avoidance of any doubt, the effect that the Mortgage Form of Authorisation had on the Complainants' contractual entitlements is considered below.

The Provider has submitted that prior to the expiry of the fixed interest rate period in **June 2006** it issued the Complainants a **Product Review Notice letter and Mortgage Form of Authorisation** ("MFA") on **12 June 2006**. It is disappointing that a copy of the **Product Review Notice** letter that purportedly issued to the Complainants has not been furnished in evidence to this office.

Provision 49 of the **Consumer Protection Code 2006** governs retention of records and was not effective until **01 July 2007**. In these circumstances, while I am disappointed that the Provider has failed to retain records, there was no breach of the CPC 2006.

/Cont'd...

In the Complainants' post Preliminary Decision submission to this office dated **11 March 2021**, the Complainants outline as follows:

"The FSPO made a serious and significant error of law by not holding that the "loss" by the [Provider] of the MFA is a fundamental issue in the interpretation of the contractual obligations of the parties. It is quite extremely worrying and chilling that the FSPO would make such a finding in the context of consumer regulation. The loss of a document that forms a fundamental part of the mortgage loan documentation particularly the applicable interest rate to the loan is something which should be viewed as more than just disappointing by a regulatory body which was set out in essence to protect consumers.

It is submitted that in a financial provider consumer relationship this is a clear breach of implied statutory duty which should result in a significant adverse finding given the vital importance of contractual documentation to any contractual dispute.

...

It is submitted that we are significantly and seriously prejudiced by the fact that the [Provider] did not provide the signed 2006 MFA as the FSPO appears in many instances not to consider it when adjudicating of what the applicable interest rate of the loan should have been on expiry of the fixed term."

I note in their post Preliminary Decision submissions that the Complainants have stated a number of times that the Provider has not provided a copy of the **Mortgage Form of Authorisation** that was signed by the Complainants in **2006**. This is incorrect. In the interests of clarity, I would point out to the Complainants that a copy of the **Mortgage Form of Authorisation** signed by the Complainants in **2006**, has indeed been provided in evidence by the Provider and its content was set out in my Preliminary Decision and is set out again below.

However as outlined above, a copy of the **Product Notice Review letter** that purportedly issued to the Complainants from the Provider in **2006** has not been provided in evidence. For the avoidance of doubt, I cannot make any finding with respect to retention of records on the mortgage loan account, as the **CPC 2006** was not in effect when the **Product Notice Review letter** was purportedly issued in **June 2006**.

In any event it appears that the Complainants received the **Product Review Notice letter** in or around **June 2006** in circumstances where the Complainants signed and returned the enclosed **Mortgage Form of Authorisation** dated **12 July 2006**.

/Cont'd...

The Provider has submitted in evidence a **template letter** which it states is “*similar*” to the **Product Notice Review letter** which issued to the Complainants. The template letter details as follows;

“I am writing to let you know that your current rate of [Redacted]% will expire on [DATE]. We have a number of attractive mortgage products and I am pleased to offer you the following range of options:-

Description	Rate	Projected Repayment
Variable Rate	4.440%	€1,855.16
Fixed to 31 October 2007	4.750%	€1,902.80
Fixed to 31 October 2008	4.790%	€1,908.99
Fixed to 30 October 2009	4.790%	€1,908.99
Fixed to 31 October 2011	4.890%	€1,924.53
Fixed to 31 October 2016	5.190%	€1,971.55
Tracker Variable ECB+1.25%	4.500%	€1,864.33

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 [Provider address]. Unfortunately, we cannot hold the above choice of rates open after this date.

If you would like to discuss the best option for you, please do not hesitate to contact our Customer Relationships Team on [Phone number of Provider]. We will be more than happy to discuss the various options available to you.

If I do not hear from you by [DATE], 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** (“MFA”) that was signed by the Complainants on **12 July 2006**, has been furnished in evidence. **Page 1** of the MFA details as follows;

“I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate.

...

<i>Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input type="checkbox"/>	HOMELoAN VARIABLE RATE	3.990%
<input type="checkbox"/>	1 Year Fixed	4.290%

/Cont’d...

<input type="checkbox"/>	2 YEAR FIXED	4.390%
<input type="checkbox"/>	3 YEAR FIXED RATE	4.490%
<input type="checkbox"/>	5 YEAR FIXED RATE	4.750%
<input type="checkbox"/>	10 Year Fixed	4.990%
<input type="checkbox"/>	TRACKER VARIABLE ECB + 1.25%	4.000%

The **Consumer Credit Act Notices** section on **page 2** of the MFA details as follows;

“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 **page 2** of the MFA details as follows;

*“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, 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 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation*

/Cont’d...

in interest rates 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 by 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 Home Loan 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.” [my emphasis]*

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.

In the Complainants' post Preliminary Decision submission dated **11 March 2021** they have stated that *“there appears to be a total absence of consideration of the 2006 MFA which sets out the new terms and conditions which were to apply to the mortgage loan. FSPO should not be ignoring the terms and conditions of the 2006 MFA”*. I do not accept the Complainants' submission this respect. In the course of considering this complaint I have considered the application of the **Mortgage Form of Authorisation** signed by the Complainants in **2006** to their mortgage loan account and its effect on the terms and conditions of the Complainants' **Mortgage Loan Offer** dated **18 June 2005**.

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 element would fluctuate in accordance with the European Central Bank rate.

The MFA is clear that its purpose was to make an application for a particular rate type and then if the application was accepted by the Provider, then the terms and conditions applicable to the Loan would be amended/varied by the terms and conditions set out in the MFA. The application of **Clause 1, 3 or 4** are clearly dependent on the interest rate that the Complainants elected to select. In the Complainants' case they elected to apply for the 10 year fixed rate which, when accepted by the Provider, then triggered an amendment or variation to the terms of the **Mortgage Loan Offer**, such that **Clause 1** applied.

The Complainants did not elect to apply for the tracker variable rate of ECB + 1.25% or the Home Loan Variable Rate so there were no amendments or variations to the **Mortgage Loan Offer** by **Clauses 3 or 4**.

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 **12 July 2006** electing to apply the ten year fixed interest rate option of 4.99%.

The Complainants of their own volition decided not to choose the option of a tracker interest rate of ECB + 1.25% (4.00%) at the time and instead selected the higher fixed interest rate offered (4.99%).

The letter enclosing the MFA clearly outlined that the rate options outlined in the MFA were available for a certain period of time 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.

There is no reasonable basis for the Complainants to have formed the view that *"the FSPO is of the opinion that it does not matter what amending mortgage loan contractual [sic] is signed after the 2005 Loan Offer"*.

/Cont'd...

The Complainants signed the MFA on **12 July 2006** electing to apply the ten year fixed interest rate option of 4.99%. In doing so, the Complainants activated **Clause 1** of the MFA by selecting a fixed rate option.

The Complainants did not pursue the option of a tracker interest rate of ECB + 1.25% on the expiry of the fixed rate period in **2006** and therefore there was no amendment or variation to the **Mortgage Loan Offer** by **Clause 3** of the **MFA**.

The Complainants have submitted that they were “*explicitly told by the [Provider] mortgage person that on expiry of the fixed term we would be able to choose whether to fix our rate again or go onto either a variable or tracker rate and that the exact rates of all those products would be determined by what the ECB rate would be on the expiry date of the fixed term.*”

No evidence has been provided to me of any discussions or dialogue between the Provider and the Complainants at this time which supports the Complainants’ submission that they were informed by the Provider’s employee that a tracker interest rate would be available to them at the end of the 10 year fixed interest rate period.

In the Complainants’ post Preliminary Decision submission of **11 March 2021** they submit the following;

The FSPO committed a serious and significant error of law by not ascertaining whether the interest rate on the loan should have converted to a tracker interest rate of ECB + 1.25% on the expiry of the fixed interest rate period (i.e. a default rate in the absence of agreement) rather than merely seeking to ascertain whether the [Provider] should have offered a rate of ECB + 1.25%.”

The Complainants have further submitted:

“The FSPO has also totally ignored the fact that the [Provider] accepted that the General Conditions covered homeloan, tracker and fixed interest rate loans. It is our understanding that a number of whistleblowers have confirmed publicly that they informed the FSPO and the Central Bank of Ireland that it was accepted internally in [the Provider] that all fixed term loans entered into in 2006 where [sic] to automatically convert to tracker variable rates until a decision was made by [the Provider] senior management in October 2008 to change the default rate on such fixed term loans from a tracker variable interest rate of 1.25% plus ECB to the highest prevailing standard homeloan rate.

This is clear evidence of what the contractual position of such fixed rate mortgage loans were and there was a unilateral decision by [the Provider] to change the agreed contractual terms by implementing changes to its' IT systems. We believe [the Provider] has accepted this occurred both publicly and in correspondence with the FSPO and the Central Bank of Ireland."

The Complainants have provided no evidence to support their assertion that there was a "unilateral decision by [the Provider] to change the agreed contractual terms by implementing changes to its' IT systems" or that the Provider has accepted this in correspondence with this Office. In any event, it is important for the Complainants to understand that the Complainants' mortgage loan is governed by the terms and conditions of the Complainants' mortgage loan documentation. In adjudicating on this complaint, it is not relevant to consider the entitlements (contractual or otherwise) of other individuals who hold mortgage loans with the Provider.

I have considered the evidence available to me when investigating this complaint. I cannot consider speculation and hyperbole when arriving at my decision.

The Provider's internal note dated **25 April 2016** details as follows;

"...

Cus[tomer] adv[ised] that his address is [Redacted].

...

Adv[ised] cus[tomer] that if he needs to change correspondance [sic] address to send proof of address to [Redacted]"

A telephone call took place between the parties on **28 April 2016**. I have considered the content of this audio recording furnished by the Provider which details as follows;

Provider: *"...so it is actually coming off on the 27th of July ... And we will be writing out to you around the 27th of June then with the rate options at the time."*

Complainant: *"Ok do you know what the rate options will be?"*

Provider: *"I can tell you what they are now ... so for instance ... so the fixed rates then are firstly coming in at... the one year fixed rate is coming in at...let me see now...is this the private dwelling home or is this an investment property?"*

/Cont'd...

Complainant: *"private dwelling home"*

Provider: *"so you are living at your own address perfect ... so the one year fixed rate is coming in at 3.65, the two years also 3.65 and the three year is coming in at 3.7 and then the five year is 3.75 and then the standard variable rate is coming in at 4.5"*

Complainant: *"standard variable at 4.5?"*

Provider: *"4.5 yes"*

Complainant: *"I was told that ... because we were on a tracker beforehand and also had an option of the tracker at the time the fixed rate had taken down that the tracker rate would be an option that's offered to us"*

Provider: *"yeah ok and this was told to you by a mortgage advisor at the time was it?"*

Complainant: *"No...I...it was at the time I remember I thought we were on a tracker and then we moved to a fixed rate but notwithstanding that it was one of the options and somebody was saying to me that, I had read up about it that I should have the option of, that my brother and I should be given the option of a tracker whether we want to take that or not or go with a fixed rate that's a different story but we should be given the option."*

Provider: *"well ok what I'd say to you on that is ... I would suggest that you put that in writing to ourselves here"*

Complainant: *"ok"*

Provider: *"...and basically we will get it referred here to we actually have a team that are looking after the Tracker Investigations and they will just check and see the situation for your account."*

The Provider's internal note **dated 24 June 2016** details as follows;

"Cust[omer] adv[ised] only 1 DD left C[urrent]/a[ccount] when prev[iously] completed DDm for both ... Adv[ised] cust[omer] can see DD details changed on both A/cs but DD active on A/c [ending] 764 only.

/Cont'd...

Apologised to cust[omer] for this. Cust not happy & req[uested] a complaint to be logged in regards to this issue & also to be compensated if any inter[e]st charged & adv[ised] he was messed around by [the Provider] over the years & adv[ised] [Provider] made a mistake in the past with the DD dates which caused the customer to be charged fees to his C/a
..."

The Provider wrote to the Complainants by letter dated **27 June 2016** which detailed as follows;

"I am writing to let you know that your current rate will expire on 27/07/2016. Your current rate is Repayment, 4.990% and your current repayment is €2,606.48. The following table sets out the choice of rates available to you. The table also contains an indicative estimate of the cost of repayments for each rate being offered which you should compare to your current repayment which we have quoted below:

Description	Rate	*Estimated Standard Repayment
H/L VARIABLE LTV>80% VRP5	4.500%	€2,486.05
10 Year Fixed LTV>80%	4.400%	€2,461.55
1 Year Fixed LTV>80%	3.650%	€2,281.91
2 Year Fixed LTV>80%	3.650%	€2,281.91
3 Year Fixed LTV>80%	3.700%	€2,293.66
5 Year Fixed LTV>80%	3.750%	€2,305.45

...

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.

...

SWITCHES TO FIXED RATES

If you avail of a Fixed 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.

/Cont'd...

...

To avail of your selected option, please complete the enclosed Mortgage Form of Authorisation (MFA) and return it to us at [Redacted] before 27/07/2016.

*Unfortunately, we cannot hold the above choice of rates open after this date. **If we do not hear from you by 27/07/2016, your home loan will, in accordance with your loan offer or amended documentation, automatically move to the variable rate of H/L VARIABLE LTV>80% VRP5, a current rate of 4.500%.***

If you would like to discuss the above option(s) further, please do not hesitate to contact me or any member of my branch team. I would be more than happy to discuss this with you.

..."

The Provider's internal note dated **22 July 2016** details the following;

"Cust called to advise that DD has not left his A/C for the 2nd month running. Customer raised a complaint about this last month and DD still has not been activated.

...

Cust also querying tracker rate and why rollover rates were not issued. While investigating this issue the line dropped.

...

Called customer back as previous call dropped.

...

Correspondence address is different on two A/C's and this is why cust never received information on A/C [ending] 210 in relation to rates. Cust requested that correspondence address be amended to be correct on both. Adv cust I would request same and revert back if not possible. No arrears currently on A/C.

See note below – request sent to get correspondence address amended.

..."

The Provider's internal note dated **26 July 2016**, details as follows;

"...

/Cont'd...

Cust disputing repayment figure as was on 10 ys fixed rate which expired so should have been moved to lowest rate. adv[ised] cust corres[pondence] would issue but would not be amended until cust selected what rate they wanted to move to. cust does not want to agreed [sic] to new rate and was speaking to someone in may about tracker rate, was adv[ised] this would be investigated but not until 2017. no note re same. warm transferring cust to cru re interest rates."

The Provider wrote to the Complainants by letter dated **27 July 2016** which detailed as follows;

"Further to our previous letter regarding your [Provider] Mortgages Homeloan we are writing to inform you that your rate is now 4.50%.

The amount of your revised repayment is €2, 486.27 falling due on 25/08/2016.

The payment rates on this HomeLoan may be adjusted by the Lender from time to time. If there are any further changes in Mortgage Interest Rates we will advise you."

It is not in dispute between the parties that the Complainants did not receive the Provider's letter of **27 June 2016** outlining the available rate options, due to a delay on the Provider's part in amending the Complainants' correspondence address. This is most disappointing. I note that the Provider has offered the Complainants a goodwill gesture of €250.00 in recognition of this failure.

In any event, it is clear that a tracker interest rate was not offered to the Complainants in the Provider's letter of **27 June 2016**. The Complainants' mortgage account subsequently defaulted to the standard variable rate of 4.50%.

The Provider wrote to the Complainants by letter dated **12 December 2016** enclosing a **Mortgage Form of Authorisation**. The letter detailed as follows;

"Further to your request to change your current mortgage rate, I am very pleased to offer you the following range of attractive options. Your current rate is H/L VARIABLE LTV>80% VRP5 4.500% and your current repayment is €2,486.27. The following table sets out the choice of rates available to you. The table also contains an indicative estimate of the cost of repayments for each rate being offered which you should compare to your current repayment which we have quoted above.

Description	Rate	*Estimated Standard Repayment
1 Year Fixed LTV > 80%	3.550%	€2,266.26
2 Year Fixed LTV > 80%	3.550%	€2,266.26
3 Year Fixed LTV > 80%	3.450%	€2,243.25
5 Year Fixed LTV > 80%	3.550%	€2,266.26
10 Year Fixed LTV > 80%	4.200%	€2,418.96

...

A description of our different product types and 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.

...

Variable Loan to Value 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 your Lender.

...

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.

...

SWITCHES TO FIXED RATES

If you avail of a Fixed 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.

...

If we do not hear from you by 26/12/2016 your current mortgage rate will continue to apply in accordance with your loan offer and any amendments thereto previously agreed with you.”

The Complainants have submitted that in the above MFA the Provider was “asking [the Complainants] to sign out of our right to a tracker variable interest rate in the documentation”.

In the Complainants’ submission of **11 March 2021** they submit as follows;

“...the FSPO made a serious and significant error of law when it did not adjudicate on the unreasonableness and unfairness of the [Provider’s] actions in:

(1) not delivering documentation setting out the options available on the expiry of the fixed term to us until a number of months after the expiry of the fixed term (a fact acknowledged by the [Provider]); and

(2) the [Provider’s] requirement that we sign out of any right to a tracker variable right to avail of a lower home loan variable rate while it undertook a tracker investigation which it acknowledged would take a long time.

...

Given the [Provider] has acknowledged some responsibility we would ask that the FSPO make a clear adjudication on the [Provider’s] behavior [sic] rather than simply noting the offer in the Preliminary Decision.”

I remain of the view that 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 or apply a tracker interest rate at the end of the fixed interest rate period in **July 2016**.

I am of the view that the Provider’s goodwill offer of €250.00 to the Complainants in recognition of its failure to amend the Complainants’ correspondence address in a timely manner, adequately addresses this aspect of the complaint. It is now a matter for the Complainants to decide if they wish to accept this offer.

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The Complainants have stated that as a result of the Provider's failure to offer them a tracker interest rate of ECB + 1.25% in **2016** they were "forced" to sell the mortgaged property in **2018** and that the Provider "is wholly and directly responsible for the loss of the property." 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 2016** 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 2016** 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 or apply a tracker interest rate to, their mortgage loan account at the end of the initial fixed interest rate period in **July 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 **July 2006**. The Complainants elected not to accept the tracker rate, at that time, and instead chose a 10 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 period in **July 2016**. I have been provided with no evidence to support the assertion that the Provider acted in an "unreasonable" or "unfair" manner as has been suggested by the Complainants in their post Preliminary Decision submission.

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

27 April 2021

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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.

