



<b><u>Decision Ref:</u></b>	2021-0165
<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**

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

The mortgage is split into the following three mortgage sub-accounts:

- The loan amount for the mortgage sub-account ending **(01)** was €375,000 and the term of the loan was 20 years. The **Offer of Advance** dated **30 December 2005** detailed that the interest rate applicable was fixed at 4.25% until **31 December 2010**.
- The loan amount for the mortgage sub-account ending **(02)** was €375,000 and the term of the loan was 20 years. The **Offer of Advance** dated **30 December 2005** detailed that the interest rate applicable was a tracker rate of ECB + 1.05%.
- The loan amount for the mortgage sub-account ending **(03)** was €90,000 and the term of the loan was 17 years and 6 months. The **Offer of Additional Advance** dated **22 August 2008** detailed that the interest rate applicable was fixed at 6.27% until **31 August 2013**.

## **The Complainants' Case**

The Complainants submit that they originally applied for a mortgage with the Provider in **October 2005**.

They detail that the original Offer of Advance dated **5 December 2005** was for the full loan amount of €750,000 over a term of 20 years, on a tracker interest rate of ECB + 1.1%.

They state however that subsequently they *“decided to split the €750k into 2 x €375k (fixed & variable/tracker rates)”*. This meant that two revised Offers of Advance were issued on **30 December 2005** which relate to the mortgage loan sub-accounts ending **(01)** and **(02)** respectively.

The Offer of Advance dated **30 December 2005** relating to sub-account ending **(01)** provided for an initial fixed interest rate of 5 years with the Provider's *“Variable Home Loan Rate which is the Bank's Standard Variable Rate (SVR)”* to apply thereafter. The Complainants submit however that *“when the fixed period ended we received correspondence from [the Provider] dated the 15th December 2010 outlining a number of rate options for the fixed rate portion of the mortgage, indicating that automatic application of the SVR was not the only option”*.

The Complainants state that the **Special Conditions** of the Offer of Advance dated **30 December 2005** relating to sub-account ending **(02)** outline that *“The rate of the [Provider] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term.”* They assert that this condition relates to *“the overall mortgage, not any particular sub-account, and it is our view that the tracker rate ... should have been available for the life of the loan and should have been offered when each of the fixed rate periods expired”*.

The Complainants later drew down a top up loan of €90,000 under mortgage sub-account ending **(03)** pursuant to the terms of an **Offer of Additional Advance** dated **22 August 2008** which provided for a fixed interest rate until **31 August 2013**.

The Complainants submit that the Provider *“appear to be treating each sub-account as a separate loan and are using this as justification for the fact that the [Provider] Flexible Mortgage (“the tracker mortgage”) was not available to “sub-account 01” and “sub-account 03” when the fixed periods for each of those sub-accounts came to an end.”* The Complainants state however that *“all sub-accounts relate to a single loan”* and that *“it is very clear that the special conditions relate to the loan not any sub-loan”*. They further state that the *“individual offers of advance signed and accepted by us make no reference to sub-account numbers and only reference the single loan”*.

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They further submit that their “*monthly repayments appear as one single direct debit*” which supports their position that the Provider treats the three mortgage sub-accounts as one loan.

The Complainants state that the fact that the Provider withdrew tracker interest rates from the market in **mid-2008** is “*irrelevant, since the special conditions ... relate to “the life of the Home Loan term”*”.

The Complainants state that they should have been offered a tracker interest rate for the mortgage sub-account ending **(01)** when the 5 year fixed interest rate expired in **December 2010**. They further state that they should have been offered a tracker interest rate for the mortgage sub-account ending **(03)** when the fixed interest rate expired in **August 2013**.

The Complainants submit that “*It is our view that any ambiguity in the mortgage documentation should be resolved in our favour by reason of the contra proferentem rule, with which [the Provider] will no doubt be very familiar*”.

The Complainants are seeking for the following;

- a tracker interest rate to be applied to mortgage loan accounts ending **(01)** from the date of expiry of the fixed rate period in **December 2010**
- a tracker interest rate to be applied to mortgage loan sub-account ending **(03)** from the date of expiry of the fixed rate period in **August 2013**.

### **The Provider’s Case**

The Provider details that the Complainants hold the following three mortgage loan sub-accounts which are each secured on the one property:

- Mortgage sub-account ending **(01)** was drawn down for the amount of €375,000 for a term of 20 years on a five year fixed interest rate of 4.25%
- Mortgage sub-account ending **(02)** was drawn down for the amount of €375,000 for a term of 20 years on a tracker interest rate of ECB + 1.05%.
- Mortgage sub-account ending **(03)** was drawn down for the amount of €90,000 for a term of 17 years 6 months on a five year fixed interest rate of 6.27%

The Provider states that the **Offers of Advance** for mortgage sub-accounts ending **(01)** and **(02)** and the **Offer of Additional Advance** for mortgage sub-account ending **(03)**, were for different products and consequently were issued to the customers on different terms and conditions. The Provider states that the documentation relating to all three sub-accounts is clear with respect to making the customers aware of the three different interest rate products that applied to each sub-account and was clear with respect to what interest rate would apply after any initial interest rate expired, where applicable.

The Provider details that the Complainants' sub-account ending **(02)** was drawn down in **January 2006** on a tracker interest rate of ECB + 1.05% in line with the Offer of Advance for this sub-account dated **30 December 2005**. The Provider outlines that the margin on the tracker rate was reduced to 0.85% on **8 September 2006** and the sub-account has remained on this rate and margin since then.

The Provider details that what would transpire at the end of the fixed interest rate period on the mortgage sub-account ending **(01)**, was outlined in **General Condition 2** and in the **Special Conditions** of the Complainants' **Offer of Advance** for sub-account ending **(01)** dated **30 December 2005**. The Provider details that the Complainants signed and accepted the **Offer of Advance** on **11 January 2006** and in doing so confirmed that they accepted the offer on the terms and conditions contained in the Offer of Advance. It states that their solicitor also confirmed by witnessing the Complainants' acceptance, that the nature and the conditions of the mortgage had been explained to the Complainants.

The Provider details that what would transpire at the end of the fixed interest rate period on the mortgage sub-accounts ending **(03)**, was outlined in **General Condition 2** and in the **Special Conditions** of the Complainants' Offer of Additional Advance for sub-account ending **(03)** dated **22 August 2008**. The Provider details that the Complainants signed and accepted the **Offer of Advance** on **25 August 2008** and in doing so confirmed that they accepted the offer on the terms and conditions contained in the Offers of Advance. It states that their solicitor also confirmed by witnessing the Complainants' acceptance, that the nature and the conditions of the mortgage had been explained to the Complainants.

The Provider outlines in respect of both mortgage sub-accounts ending **(01)** and **(03)** that;

- The **Special Conditions** in both offers outlined that on the expiry of the fixed interest rate period the mortgage sub-account would *"automatically revert to the [Provider] Variable Home Loan Rate"* or the Provider *"may offer to continue the Advance at a Fixed Rate of Interest for such a period and at such a rate as it may decide."*

- There was no reference to a tracker rate in either offer and such a reference or a specific condition would have been necessary for a tracker interest rate to apply.
- **General Condition 2** of both offers did not state that a tracker interest rate would be made available to the customers on expiry of the fixed interest rate period, but out information as to the nature of the Variable Home Loan Rate and specifically that it can be amended at any time.

The Provider states that the Complainants could not have been offered a tracker rate on the mortgage sub-accounts ending **(01)** and **(03)** when the fixed interest rate periods expired, as tracker interest rates had been withdrawn from the market by the Provider in **late 2008** and were therefore not available as a product for selection from that time onwards. It further submits that it never offered a tracker interest rate as a default rate upon expiry of a fixed interest rate.

The Provider details that in line with **General Condition 2**, it wrote to the Complainants on **15 December 2010**, prior to the expiry of the initial fixed interest rate period on mortgage sub-account ending **(01)**. It states that the letter advised the customers of the expiry of the fixed rate period and that *“Any borrowings you have on this fixed rate will automatically roll to the Standard Variable Rate (APR 3.9%) of 3.85%.”* The Provider outlines that the letter also offered alternative interest rate products to the Complainants, however a tracker interest rate was not included as that product had been withdrawn by the Provider in **late 2008**.

The Provider submits that a fixed interest rate of 4.95% applied to the mortgage sub-account ending **(01)** from **January 2011** until **30 October 2015** and a fixed rate of 3.60% was applied from **November 2015** until **30 November 2020**.

The Provider outlines that it wrote to the Complainants on **24 September 2013** to inform them that the initial fixed interest rate on the mortgage sub-account ending **(03)** had expired and the sub-account had moved to the Provider’s Standard Variable Rate of 4.50%. The Provider states that sub-account ending **(03)** has been operating on a discounted standard variable rate of 3.55% from **September 2013** to present.

The Provider acknowledges that the term *“Standard Variable Rate”* was not contained in the Complainants’ Offer of Advance as referred to in the Provider’s letter of **15 December 2010** or the Complainants’ Offer of Additional Advance as referred to in the Provider’s letter of **24 September 2013**. It states that the Provider Variable Home Loan Rate and the Standard Variable Rate *“are one and the same i.e. a rate which can be amended by the Bank at any time.”*

It states that by comparison, a tracker interest rate is linked to the ECB base rate and so would only rise and fall in line with movements in the ECB base rate, which cannot be changed by the Provider.

The Provider outlines that it does *“not agree that any confusing and ambiguous terminology was used”* in respect of the customers’ mortgage sub-accounts ending **(01)** and **(03)**. It states that the terms and conditions pertaining to each advance *“clearly and unambiguously”* outlined that the loan in each case was to be incepted on a fixed rate basis and it would be reasonable to expect that if the loan agreements between the Provider and the customers were to include a provision for a tracker interest rate, then this would have been included in each offer. However, there was no such provision for a tracker interest rate in the Complainants’ loan agreements with the Provider with regard to the mortgage sub-accounts ending **(01)** and **(03)**. The Provider submits that it *“does not believe that the contra proferentem rule applies in the customers’ case.”*

The Provider states that when taking the full customer journey and the supporting documentation provided to the customers in respect of each sub-account into account, the Provider *“does not consider that the customers could have formed any reasonable expectation of defaulting to a tracker rate at the end of the fixed rate period for their sub-account 01 in December 2010 and for sub-account 03 in August 2013.”*

The Provider details that in circumstances where the Complainants’ payments for the three mortgage sub-accounts are made on the same day/date every month, it is standard practice for the direct debit payments to be merged into one single payment. It states that the payment is allocated out on a sub-account level to the individual sub-accounts which would be evident on the customers’ mortgage statements. The Provider outlines that if the Complainants wish to pay their mortgage sub-accounts on different days of the month, they can contact the Provider as the facility can be readily accommodated.

### **The Complaints for Adjudication**

The complaints for adjudication are:

- (a) The Provider failed to offer the Complainants a tracker rate when the period of fixed rate came to an end on account ending **(01)** in **December 2010**; and
- (b) The Provider failed to offer the Complainants a tracker rate when the period of fixed rate came to an end on account ending **(03)** in **August 2013**.

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## **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 **14 April 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 submission dated **4 May 2021**.

A copy of the Complainants' additional submission was exchanged with the Provider.

The Provider has not made any further submission.

Following the consideration of the Complainants' additional submission, I set out below my final determination.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished do not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict.

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I am also satisfied that the submissions and evidence furnished are sufficient to enable a Decision to be made in this complaint without the necessity for holding an Oral Hearing.

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainants' three mortgage loan sub-accounts. It is also necessary to consider the details of the interactions between the Complainants and the Provider when the fixed interest rate periods expired on mortgage sub-accounts ending **(01)** and **(03)** in **December 2010** and **August 2013** respectively.

In my Preliminary Decision I noted that the Complainants had not submitted into evidence a copy of the initial **Offer of Advance** dated **5 December 2005** issued to the Complainants which they stated provided for a loan amount of €750,000 over a term of 20 years, subject to a tracker interest rate of ECB + 1.1%.

Under cover of their post Preliminary Decision submission of **4 May 2021**, the Complainants provided a copy of this **Offer of Advance**, which details as follows:

"1. Amount of Credit Advanced:	750,000.00 Eur
2. Period of agreement:	20 years 0 months
...	
Interest Rate:	3.1500%"

The **Special Conditions** attached to the **Offer of Advance** set out as follows:

*"The rate of the [Provider] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 1.15%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged.*

As stated in my Preliminary Decision, it is not disputed between the parties that the Complainants did not accept this offer. Having sight of the initial **Offer of Advance** has not altered my view as set out in my Preliminary Decision that it has absolutely no relevance or application to the mortgages that form the basis for this complaint. The Complainants, therefore did not have any entitlement to a tracker mortgage on foot of that loan offer.

The **Offer of Advance** for mortgage sub-account ending **(02)** dated **30 December 2005** detailed as follows:

*"[The Provider] is pleased to offer you a revised advance as detailed below subject to the Special Condition(s) and the General Conditions detailed in the Original Loan Offer.*

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...

1. Amount of Credit Advanced: 375,000.00 Eur  
2. Period of agreement: 20 years 0 months

...

Interest Rate: 3.300%

...

WARNING

...

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

***This offer supersedes the offer issued on the 5<sup>th</sup> December 2005***

The **Special Conditions** attached to the **Offer of Advance** detail as follows:

*“The rate of the [Provider] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 1.05%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged.*

*Please note that the [Provider product name] Flexible Rate will only apply to your mortgage as long as you have a [Provider product name] current account. Should you close this account for any reason your mortgage rate will transfer to the Standard Flexible Mortgage Rate. You will be notified of the increase in your repayments prior to the amended repayment becoming available.”*

The Complainants signed the **Acceptance and Authority** relating to mortgage sub-account ending **(02)** on **11 January 2006**, in the presence of their solicitor, on the following terms:

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

The Complainants’ signatures were witnessed by their solicitor on the basis that “*the nature and contents hereof*” had been explained to the Complainants.

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It is clear that the **Offer of Advance** envisaged that a tracker interest rate of ECB + 1.05% would apply for the term of the loan. This was set out in the **Special Conditions** to the mortgage loan.

The Provider has submitted that the tracker interest rate margin was reduced to 0.85% on **8 September 2006** and has remained on that rate since. No evidence of this has been furnished to this office. Nonetheless it does not appear to be disputed between the parties that this is the case.

**Mortgage loan sub-account ending (01)**

The **Offer of Advance** dated **30 December 2005** for the mortgage loan sub-account ending **(01)** detailed as follows:

*"[The Provider] is pleased to offer you a revised advance as detailed below subject to the Special Condition(s) and the General Conditions detailed in the Original Loan Offer.*

...

1. Amount of Credit Advanced:	375,000.00 Eur
2. Period of agreement:	20 years 0 months

...

Interest Rate:	4.2500%
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...

WARNING

...

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

***This offer supersedes the offer issued on the 5<sup>th</sup> December 2005"***

The **Special Conditions** attached to the **Offer of Advance** detail as follows:

*"The [Provider] Home Loan fixed rate of interest applicable at the date of this letter is 4.2500 % per annum and this rate will apply until 31 December 2010.*

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*At the end of the fixed rate period the loan will automatically revert to the [Provider] Variable Home Loan Rate and [the Provider] may offer to continue the Advance at a Fixed Rate of Interest for such a period and at such a rate as it may decide. In the event of the Applicant electing to accept such an offer (if any), he/she must do so in writing, and the agreement must be signed by all parties to the mortgage advance. If no such offer is made by [the Provider] or if any offer is made by [the Provider] and not accepted by the Applicant(s) [the Provider] Variable Home Loan Rate shall apply from 1 January 2011 and thereafter but otherwise in accordance with General Condition 2 of the [Provider's] General Conditions Relating to Advances by [the Provider] House Mortgages Section enclosed herewith, which varies the Interest Rate, and the mortgage conditions incorporated in the mortgage, and the said General Conditions relating to the Advances shall be construed accordingly."*

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

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

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

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

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

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

The Complainants signed the **Acceptance and Authority** relating to mortgage sub-account ending **(01)** on **11 January 2006**, in the presence of their solicitor, on the following terms:

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

The Complainants' signatures were witnessed by their solicitor on the basis that "*the nature and contents hereof*" had been explained to the Complainants.

It appears to me that the **Offer of Advance** envisaged that a fixed interest rate of 4.25% which would apply to mortgage sub-account until **31 December 2010**, and at the end of the fixed interest rate period, the Provider "*may*" offer a further fixed interest rate period and that if no such offer was made or if an offer was made and it was not accepted, then the Home Loan Rate would apply. This was set out in the **Special Condition** to the mortgage loan and also **General Condition 2** of the **General Conditions relating to Home Loan Advances**.

Of further note, the **Offer of Advance** dated **30 December 2005**, was specifically outlined to have "*superseded*" the previous initial **Offer of Advance** that had issued on **5 December 2005**.

Under cover of their post Preliminary Decision of **4 May 2021**, the Complainants submitted a copy of a **mortgage loan application** signed by them on **10 January 2006**. They have submitted as follows:

*"...we subsequently signed a single loan application form ... on the 10<sup>th</sup> January 2006, following the making of the "Revised Offer of Advance" (x2)."*

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I note from the application form that in **Part F: About Your Mortgage Requirements**, in response to the question “Rate & mortgage product required” the Complainants have written “50% Tracker Variable ([Provider product]) > 50%” and “Fixed 5years to 31/12/2010”. In response to the question “Amount of loan” they have written “€750,000.00”.

It is not clear to me why the **application form** post-dates the **Revised Offers of Advance** dated **30 December 2005**. In any event, the fact that the Complainants applied for mortgage loan sub-accounts ending **(01)** and **(02)** under cover of a single loan application, does not confer an entitlement to a particular interest rate. The application form does not form the basis of any contractual agreement between the Complainants and the Provider. Rather it is the terms and conditions governing each mortgage loan which are relevant.

In their post Preliminary Decision submission to this office dated **4 May 2021**, the Complainants have submitted as follows:

2. “The “Revised Offer of Advance” (x2) dated the 30th December 2005 states:

- a. firstly; that they are “subject to the Special Conditions(s) and the General Conditions detailed in the Original Loan Offer” (emphasis by way of underlining supplied) and
- b. secondly; that the offers supercede (sic) “the offer issued on the 5th December 2005.”

*These two statements are contradictory and mutually exclusive, particularly in light of the Special Conditions set out in the Original “Offer of Advance”.*

3. *Whilst we did not accept this Original “Offer of Advance” (as you correctly state at page 7), the contents of the Original “Offer of Advance” are highly relevant given what is set out at paragraph 2.a. above and, in light of the foregoing, the statement at page 7 that this offer “has absolutely no relevance or application to the mortgages that form the basis for this complaint” must be seen to be erroneous.*
4. *A similar comment applies in respect of pages 9 and 11 of the “preliminary decision” where mention is made of the “Revised Offer of Advance” superseding the Original “Offer of Advance”.*

5. *This issue has not been raised previously but is, we submit, of crucial significance and such a contradiction must be resolved in our favour, firstly; by reason of the contra proferentem rule and secondly; any ambiguity in the mortgage documentation must be resolved in favour of us, the consumer.*

I do not accept that there is any ambiguity in the mortgage loan documentation. Both Revised Offers of Advance dated **30 December 2005** state that ***"This offer supersedes the offer issued on the 5<sup>th</sup> December 2005"***. As outlined above, the terms and conditions provided for in the loan offer dated **5 December 2005** which was not signed or accepted by the Complainants, are not relevant to and have no bearing on the Complainant's mortgage loans. Both Revised Offers of Advance were accepted by the Complainants *"on the terms and conditions set out above and overleaf and in the Bank's standard form of Mortgage."*

The **Offer of Additional Advance** for mortgage sub-account ending **(03)** dated **22 August 2008** detailed as follows:

<i>"1. Amount of Credit Advanced:</i>	<i>90,000.00 Eur</i>
<i>2. Period of agreement:</i>	<i>17 years 6 months</i>
<i>...</i>	
<i>Interest Rate:</i>	<i>6.2700%</i>
<i>...</i>	

**WARNING**

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

***This offer supersedes the offer that issued on the 26<sup>th</sup> July 2008"***

The **Special Conditions** attached to the **Offer of Advance** detail as follows:

*"The [Provider] Home Loan fixed rate of interest applicable at the date of this letter is 6.27 % per annum and this rate will apply until 31 August 2013. At the end of the fixed rate period the loan will automatically revert to the [Provider] Variable Home Loan Rate and [the Provider] may offer to continue the Advance at a Fixed Rate of Interest for such a period and at such a rate as it may decide. In the event of the Applicant electing to accept such an offer (if any), he/she must do so in writing, and the agreement must be signed by all parties to the mortgage advance.*

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*If no such offer is made by [the Provider] or if any offer is made by [the Provider] and not accepted by the Applicant(s) [the Provider] Variable Home Loan Rate shall apply from 01/09/13 and thereafter but otherwise in accordance with General Condition 2 of the [Provider's] General Conditions Relating to Advances by [the Provider]*

*House Mortgages Section enclosed herewith, which varies the Interest Rate, and the mortgage conditions incorporated in the mortgage, and the said General Conditions relating to the Advances shall be construed accordingly."*

**Condition 2** of the **General Conditions** attached to the **Offer of Advance** for mortgage sub-account ending **(03)** is the same as outlined above in respect of mortgage sub-account ending **(01)**. For the sake of brevity, I will not repeat it here.

The Complainants signed the **Acceptance and Authority** relating to mortgage sub-account ending **(03)** on **25 August 2008** in the presence of their solicitor, on the following terms:

*"1. I/We the undersigned accept the within Offer of Additional Advance on the terms and conditions set out above and overleaf."*

Again it appears to me that the **Offer of Advance** envisaged that a fixed interest rate of 6.27% which would apply to mortgage sub-account ending **(03)** until **31 August 2013**, and at the end of the fixed interest rate period, the Provider "*may*" offer a further fixed interest rate period and that if no such offer was made or if an offer was made and it was not accepted, then the Home Loan Rate would apply. This was set out in the **Special Condition** to the mortgage loan and also **General Condition 2** of the **General Conditions relating to Home Loan Advances**.

I note that **General Condition 2**, as quoted above in relation to both mortgage sub-accounts ending **(01)** and **(03)**, is somewhat lengthy and deals with a number of other matters related to the mortgage loan aside from the nature of the Home Loan Interest Rate which was applicable to the mortgage loan. The section that I have emphasised above in **General Condition 2**, when taken together with the warning in the **Important Information** section of the **Offer of Advance**, outlines the **Home Loan Rate** to be one which may be adjusted by the Provider at any time. I do not accept the Complainants' submission that there was ambiguity or a lack of clarity about the nature of the "*Variable Home Loan Rate*". There was no real basis for the Complainants to reasonably expect that the term "*Variable Home Loan Rate*" to relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate in the mortgage loan documentation for that portion of their loan. The Complainants were offered a variable rate which could be increased or decreased by the Provider at any time.

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In order for the Complainants to have a contractual right to a tracker interest rate on the mortgage loan sub-accounts ending **(01)** and **(03)** at the end of the fixed interest rate periods, 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 of Advance** dated **30 December 2005**, which was signed by the Complainants on **11 January 2006**, or the **Offer of Additional Advance** dated **22 August 2008** which was signed by the Complainants on **25 August 2006**. It is important for the Complainants to understand that the terms of a mortgage loan are governed by the terms contained in the **Loan Offer** which is signed by the parties.

The Complainants have submitted as follows in their post Preliminary Decision submission dated **4 May 2021**:

*“It is accepted that the Special Conditions relating to sub-account ending (01) state that “the loan will automatically revert to the [Provider’s] Variable Home Loan Rate.” However, it is our case that the [Provider’s] Flexible Mortgage (“tracker rate”) should have been available to us at the end of the fixed rate period, irrespective of the default/automatically revert provision, since the Special Conditions attached to the Original “Offer of Advance” (and by implication, the Special Conditions in respect of mortgage sub-account ending (02)) applied to the loan (“Special Conditions Relating to Loan [ending 9968]”) and not any sub-account.”*

They further outline:

*“we took no issue with the special condition stating that “the loan will automatically revert to the [Provider’s] Variable Home Loan Rate” when signing the “Acceptance and Authority” on the 11th January 2006. The fact that we took no issue in January 2006 is irrelevant in our view since we were aware that at the end of the fixed rate period, a number of options were to have been available to us, including, in our view, the [Provider’s] Flexible Mortgage (“tracker rate”). What was pertinent was what was available when the fixed rate period came to an end on the 31st December 2010, not what the default was on the 11th January 2006.*

*And at the end of the fixed rate period, we were not committed to the default but could have chosen from any number of rate options.”*

/Cont’d...



There was no contractual obligation on the Provider to offer the Complainants “a number of” interest rate options on the expiry of the fixed rate period on mortgage sub-account ending **(01)** in **December 2010**, as they have submitted. As outlined in my Preliminary Decision, if the Complainants were of the view that the **Offer of Advance** dated **30 December 2005** or the **Offer of Additional Advance** dated **22 August 2008**, were ambiguous as to the type of interest rate that the loan would roll over to at the end of the fixed interest rate period, the Complainants could have decided not to accept the offers made by the Provider and sought that an amendment be made to the Special Conditions of the Offers of Advance to the effect that the loan would default to the “[Provider] Flexible Mortgage” which “tracks the ECB rate with a margin which is fixed for the life of the Home Loan term”, as outlined in the Special Conditions of the Offer of Advance dated **30 December 2005** relating to the mortgage sub-account ending **(02)**. Instead, the Complainants signed the **Acceptance and Authority** on **11 January 2006** and **25 August 2008** respectively, in the presence of their solicitor and confirmed that they accepted the loan offers on the terms and conditions set out therein.

Prior to the expiry of the fixed interest rate on the mortgage sub-account ending **(01)**, the Provider issued a letter dated **15 December 2010** to the Complainants enclosing a **Rate Change Letter of Authority**. The letter detailed as follows;

**“THE FIXED RATE PERIOD ON YOUR MORTGAGE IS ABOUT TO END**

*Dear Customer(s)*

*The fixed rate period on your mortgage is coming to an end on 31/12/2010, so now it's time to start thinking about your next mortgage deal. Any borrowings you have on this fixed rate will automatically roll to the **Standard Variable Rate (APR 3.9%)**. Your monthly repayment on this rate is included in the table overleaf.*

*Alternatively you might choose a new variable or fixed rate. To help you make an informed decision the table below outlines the advantages and disadvantages of the default Standard Variable Rate compared to other variable and fixed rate mortgages.*

*.....”*

I note that the Provider’s letter to the Complainants of **15 December 2010** detailed that if no response was received the interest rate would roll to the Provider’s “*Standard Variable Rate*”. I understand that the Standard Variable Rate is the same as the “*Variable Home Loan Rate*”.

/Cont’d...

The Provider should have used the same terminology as contained in the Complainants' mortgage loan documentation when referring to rate choices and options in subsequent correspondence with the Complainants. This ensures that there can be no confusion as to interest rate options (contractual or otherwise) being offered by the Provider. I note that the letter of **15 December 2010** also detailed a number of Residential Fixed rate options, Discounted Variable rate options and Flexible Variable Rate options.

In my Preliminary Decision issued on **14 April 2021** I stated as follows:

*"I note that tracker mortgages had been withdrawn from the market by the Provider from **mid-2008** and therefore the Complainants could not have been offered a tracker interest rate when the fixed rate expired in **August 2010**. Furthermore, for the avoidance of doubt it is my view that the Complainant did not have a contractual or other entitlement to a tracker interest rate at the end of the fixed rate period which applied from **January 2006 to December 2010**."*

The Complainants submit as follows in their post Preliminary Decision submission of **4 May 2021**:

*"In our view, this statement and conclusion are incorrect, since the withdrawal "from the market by the Provider" could only have applied to new mortgages and it is our case that whilst tracker rates may have been withdrawn for new customers/mortgages, we were existing customers with an existing mortgage, the contractual terms of which provided that the [Provider's] Flexible Mortgage ("tracker rate") ought to have been available to us for the life of the Home Loan term."*

As outlined above, the Complainants' mortgage loan documentation relating to the mortgage sub-account ending **(01)** did not provide for a contractual entitlement to a tracker interest rate at any point during the lifetime of the loan. For that reason, there was no obligation on the Provider to offer the Complainants a tracker rate on the expiry of the fixed rate in **December 2010**, or at any other point in time.

I note from the evidence that the Provider issued a letter to the Complainants on **24 September 2013** which outlined as follows in relation to the mortgage sub-account ending **(03)**:

*"We wrote to you recently to ask you which type of interest rate you wanted on your mortgage now that your fixed rate has expired. As we haven't heard from you, we have moved your rate to our Standard Variable Rate of 4.50%."*

/Cont'd...

*Your new gross monthly repayment will be €4,143.51. We will reduce this amount if you get Tax Relief at Source (TRS).*

*Your new repayments will start on 01 October 2013.”*

It is disappointing that a copy of the rate options letter that issued to the Complainants prior to the expiry of the fixed rate period has not been furnished in evidence to this office, nor has the Provider provided any explanation as to why this letter has not been furnished.

**Provision 49 of the Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines as follows;

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

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

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

The Complainants’ mortgage loan was incepted for a term of **17 years 6 months** commencing from **August 2008** and the rate options letter purportedly issued in **September 2013**. There is no indication that the mortgage has been redeemed or disposed of in any way. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It is therefore unclear to me, in the absence of any explanation, why this correspondence has not been furnished by the Provider. This is most disappointing.

/Cont’d...

Nonetheless, I note that it is not in dispute between the parties that the Complainants were not offered a tracker interest rate on the expiry of the fixed interest rate period in **September 2013**. The Provider has submitted that the Complainants' mortgage loan sub-account ending **(03)** has been operating on the Provider's discounted standard variable rate since the fixed interest rate period expired in **September 2013**.

The Complainants detail as follows in their post Preliminary Decision submission of **4 May 2021**:

*"We note the comments on pages 14 and 15 of the "preliminary decision" as to [the Provider] not providing certain documentation to you. It should be noted that we had to engage in significant and time-consuming correspondence with [the Provider] in order to obtain the documentation relating to our mortgage. This correspondence commenced on the 31st October 2017 by way of a subject access request ("SAR") to [the Provider], progressed to a complaint by us to the Office of the Data Protection Commissioner ("ODPC") on the 7th February 2018 given the lack of engagement by [the Provider], and ended (unsatisfactorily) on the 15th October 2018 when we informed the ODPC and [the Provider] that we were closing out the SAR, whilst not being fully satisfied with the documentation received and reserving our position in that regard."*

Any issues in relation to data protection or subject access requests are more appropriate for the office of the Data Protection Commission and therefore I will not comment on the Complainants' submission in this regard.

The Complainants have submitted that the mortgage loan documentation in respect of the three mortgage loan sub-accounts *"does not differentiate between different sub-accounts and simply references the Home Loan."* They further submit that the monthly mortgage loan repayments for the three sub-accounts is taken as a single payment which is proof that the Provider treats the sub-accounts *"as one loan (instead of three separate loans)"*.

Whilst the three mortgage loan sub-accounts are secured on the same property, it is important for the Complainants to understand that each mortgage sub-loan is governed by the terms and conditions applicable to that particular mortgage sub-loan.

The Complainants have submitted that the **Offer of Advance** dated **30 December 2005** that was issued in respect of their mortgage loan sub-account ending **(02)** quoted a rate of ECB + 1.05% that *"tracks the ECB rate with a margin which is fixed for the life of the Home Loan term."*

/Cont'd...

The Complainants' three mortgage loan sub-accounts were drawn down at two different points in time (**January 2006** and **August 2008**), they commenced on different interest rates (fixed rate and tracker rate) and were subject to different terms and conditions. The fact that the Provider offered the Complainants a tracker rate for mortgage loan account ending **(02)** and the Complainants accepted that offer on that mortgage loan account, did not create any obligation on the Provider to offer the same rate on the Complainants' separate mortgage loan accounts ending **(01)** and **(03)** when the fixed interest rate periods expired on those sub-accounts.

In the Complainants' post Preliminary Decision submission of **4 May 2021**, they submit the following:

*The "preliminary decision" appears to draw no distinction between sub-accounts ending (01), (02) and (03). In light of the contradictions between the Original "Offer of Advance" and the "Revised Offer of Advance" (x2), which are not replicated in the "Offer of Additional Advance" of the 22nd August 2008, we acknowledge that there is a distinction between the terms and conditions affecting sub-accounts ending (01) and (02) on the one hand, and sub-account ending (03) on the other hand.*

...

*By reason of this distinction, we accept the rationale as set out on page 16 of the "preliminary decision" insofar as it relates to sub-account ending (03) but not insofar as it relates to sub-accounts ending (01) and (02) which are, we submit, intrinsically linked by reason of the matters set out above."*

I do not accept that my Preliminary Decision issued on **14 April 2021** draws "*no distinction between sub-accounts ending (01), (02) and (03).*" As outlined above, the Complainants' mortgage loan sub-accounts ending **(01)**, **(02)** and **(03)** were secured on the one property, however they were drawn down as separate products and as such are all subject to different terms and conditions. Mortgage loan sub-account ending **(02)** was drawn down on a tracker interest rate and thus the Complainants have a contractual entitlement to a tracker rate for the term of that particular sub-loan. I have not been provided with any evidence that the Complainants had a contractual or other entitlement to a tracker interest rate on mortgage loan sub-accounts ending **(01)** and **(03)** and accordingly there was no obligation on the Provider to offer the Complainants a tracker interest rate on the sub-accounts at the end of the respective initial fixed interest rate periods in **December 2010** and **August 2013**.

/Cont'd...

The evidence shows that the choice to take out the mortgage loans on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants.

For the reasons outlined 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**

24 May 2021

Pursuant to **Section 62** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

**(a) ensures that—**

- (i) a complainant shall not be identified by name, address or otherwise,**
  - (ii) a provider shall not be identified by name or address,**
- and**

**(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.**