



<b><u>Decision Ref:</u></b>	2021-0267
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to apply the correct tracker rate as part of the Examination Failure to offer appropriate compensation or redress CBI Examination Failure to apply a tracker rate at a point in time CBI Examination
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan account which is the subject of the complaint is secured on a residential investment property.

The loan amount was €990,000 and the term was 25 years. The Letter of Approval which was signed on **5 June 2007** outlined the Loan Type as “*2 Year Fixed Residential Investment Loan (Interest Only)*”.

The complaint was received by the then Financial Services Ombudsman’s office in **February 2011**. It detailed that the conduct complained of was that the Provider failed to fully advise the Complainant of the consequences of breaking the fixed interest rate period that applied to his mortgage loan account in **February 2009** and a refusal to return the Complainant’s mortgage loan account to a tracker interest rate.

This complaint was placed on hold between **November 2011** and **February 2015** as a result of High Court and Supreme Court litigation that was ongoing at that time. The litigation was not in relation to this complaint but dealt with similar issues to those arising in relation to this complaint.

On conclusion of the litigation, engagements then took place between the Central Bank of Ireland (the “Central Bank”) and the Provider with respect to a scheme of redress for mortgage account holders who were affected by particular conduct of the Provider.

The Complainant’s mortgage loan account was considered by the Provider under the Provider’s Mortgage Redress Programme. The Complainant’s complaint remained on hold with the Financial Services Ombudsman’s office throughout this process.

An offer was made to the Complainant by the Provider in **August 2015** as part of the Mortgage Redress Programme, in relation to admitted failures of the Provider in relation to the Complainant’s mortgage loan account, as follows;

*“On 01/02/2009, [the Complainant] broke from the fixed interest rate period which applied to [his] mortgage account at that time. This break took place before the scheduled maturity date of the fixed interest rate period.*

*In breaking from [his] fixed interest rate period early, [the Complainant] lost a contractual right to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period. However at the time that [the Complainant] broke from [his] fixed interest rate period, [the Provider] did not inform [the Complainant] that [he] would be unable to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period.”*

In the offer made to the Complainant in **2015**, the Provider proposed to provide redress to the Complainant by returning him to the tracker rate and compensate the Complainant as follows;

**(1) Tracker Rate Mortgage Option**

*“the opportunity to move to the tracker rate mortgage which you would have been entitled to move to at the maturity of your fixed interest rate period if you had chosen to do so. That rate will reflect the loan conditions of your mortgage with [the Provider]. The rate of interest charged on this product is based on the ECB Refinancing Rate (the “ECB Rate”) plus a margin of 2.35% (in practice this equals a tracker rate today of 2.40%).”*

**(2) Redress and Compensation**

**Part One: Redress – Balance adjustment and possible net refund to you**

*“We have established that your current loan balance would have been €741,231.54, which is €813.40 less than your loan balance at present. (Kindly note that for Interest Only loans there may be no adjustment to the loan balance).”*

*We have calculated a net refund of overpayments due to you of €123,560.61.”*

**Part Two: Compensation – Additional compensation payment directly to you**

*“This payment will include two elements:*

*Firstly, it will include a payment of €11,487.35 in recognition of our failure in this matter.*

*Secondly, it will include €400.00 (including VAT) which you may use to pay for independent advice if you choose to seek advice in respect of this letter. You have full discretion as to the use of this money.”*

The Complainant commenced an appeal to the Provider’s appeal panel in relation to the Provider’s offer of redress and compensation in **September 2015**.

In **October 2015**, the sums of €12,502.93 compensation, €400 towards independent legal advice and the net refund amount of €124,374.49 were remitted to the Complainant’s nominated bank account. These figures were calculated up to **23 October 2015**, and as such they differed from the August figures, quoted above. The tracker interest rate of ECB + 2.35% was also applied to the Complainant’s mortgage loan account.

The Provider’s appeal panel decided in **December 2015** that the appeal was partially successful and that the Complainant should be awarded *“additional compensation in the amount of €2,675 (including VAT)”*. The Complainant rejected that additional compensation award.

The part of the initial complaint relating to the Complainant’s entitlement to a tracker interest rate on his mortgage loan account has been resolved. However, the Complainant is dissatisfied with the tracker interest rate margin of ECB + 2.35% which has been applied to his mortgage loan account.

As the Complainant had been through the Provider’s appeal panel and he did not accept the outcome, the investigation and adjudication of the complaint to this office was progressed.

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The conduct complained of that is now being adjudicated on by this office and that is the subject of this Decision, is as follows;

- (a) The Provider has not applied the correct tracker interest rate margin to the Complainant's mortgage loan account from **09 July 2009**, and
- (b) The Provider has not offered adequate redress and compensation to the Complainant by consequence of the Provider's failure in relation to his mortgage loan account."

### The Complainant's Case

The Complainant was issued with a letter of approval by the Provider dated **28 May 2007**, which provided for a two year fixed interest rate of 4.99%. The Complainant requested to break early from the fixed interest rate period in **January 2009**, to apply a variable rate to the mortgage loan account. The Provider applied a standard variable rate of 4.65% to the mortgage loan account on **1 February 2009**.

The Complainant submits that he requested to break the fixed interest rate period in **January 2009** as variable rates had dropped significantly, and the Provider agreed to the rate change without imposing a breakage penalty. The Complainant outlines that following his request, "*the [Provider] moved the mortgage to the [Provider's] Standard Variable Rate, (SVR), and not to an ECB Tracker Rate as per the terms of the Loan Agreement*". The Complainant states that he wrote to the Provider in **November 2010**, to request that the mortgage loan account be adjusted to the tracker interest rate and the Provider informed him that by breaking from the fixed interest rate period in **January 2009**, the tracker interest rate was no longer an option for him.

The Complainant's mortgage loan account was subsequently considered by the Provider under the Mortgage Redress Programme and an offer was made to the Complainant by the Provider in **August 2015** in relation to admitted failures of the Provider in relation to the Complainant's mortgage loan account.

In relation to the redress, the Complainant submits that the sum of €124,374.49, being the sum of interest that he was overcharged, was calculated on the basis of a tracker interest rate of ECB + 2.35%, instead of the correct tracker interest rate of ECB + 0.9%. The Complainant details that the Illustrative Amortisation Table in the European Standardised Information Sheet he received with his Loan Agreement, dated **28 May 2007**, provides for a tracker interest rate of ECB + 0.9% and that it is reasonable for him to conclude that the European Standardised Information Sheet, which refers to the tracker interest rate of ECB + 0.9%, forms part of his legally binding loan agreement.

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The Complainant outlines that the Provider left the Loan Agreement itself “*deliberately vague*” as to the specific margin over ECB that would apply at the end of the initial two-year fixed interest rate period.

He submits that by comparison, other financial service providers specified the specific margin over ECB that would apply in the loan offers issued to their customers.

In relation to the compensation offered, the Complainant submits that the sum of €12,502.93 offered by the Provider is unacceptable. The Complainant submits that he is entitled to minimum compensation of €50,000, based on the following;

- (a) Essential repair works to the family home had to be abandoned and a planning permission has lapsed as a result.
- (b) The Complainant and his family have been unable to afford any family holidays.
- (c) The Complainant’s spouse had to sell an investment property so the Complainant could use the proceeds of the sale to maintain the mortgage loan repayments. He submits that the sold property is now worth over €100,000 more than the amount for which it was sold.
- (d) The Complainant’s health has suffered and he has an ongoing medical condition which may be due to the stress caused by the overcharge and the prolonged efforts of the Provider to avoid compensating the Complainant for the overcharge.

In relation to the payment of €400 offered by the Provider for independent advice, the Complainant submits that this sum is unacceptable as he has incurred significant fees in having the issues regarding the interest rate being applied to his mortgage loan account addressed, which is in excess of the sum of €400 offered by the Provider. The Complainant outlines that the advice fees were €36,900 (€30,000 + VAT) as at 01 November 2018.

The Complainant outlines that he is also seeking the payment of interest on the sum that he was overcharged on his mortgage loan account, at the rate of 10% per annum.

The Complainant is seeking the following;

- (a) The interest refund to be re-calculated on the basis of the tracker interest rate of ECB + 0.9% and the ongoing monthly repayment to be adjusted to reflect this rate.
- (b) The payment of interest on the overcharged interest, calculated at the rate of 10% per annum.
- (c) An increased compensation payment, to bring the total compensation payment to a minimum level of €50,000.

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(d) Reimbursement of financial advice fees.

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

The Provider submits that as a result of an investigation by the Central Bank, the Provider identified a failure in connection with the management of certain mortgage accounts, including the Complainant's mortgage loan account. The Provider outlines that the failure that occurred with regard to the Complainant's mortgage loan account was the Provider's failure to inform the Complainant that by breaking early from the fixed interest rate period in **January 2009**, he would lose his entitlement to a tracker interest rate in the future.

The Provider details that it implemented the Mortgage Redress Programme and the purpose of the Provider's redress and compensation offer was to return the Complainant's mortgage account to the position that it would have been in had the failure not occurred and to compensate the Complainant for the failure. The Provider submits that in its letter of **4 August 2015**, that the Provider's failure was explained to the Complainant and that details of the redress and compensation proposal were given to the Complainant.

The Provider states that an appeal was submitted by the Complainant to the Provider's appeal panel and it replied to the Complainant's submissions to the appeal panel. A decision was reached by the Provider's appeal panel to partially uphold the Complainant's appeal and the Complainant rejected that decision.

The Provider outlines that the offer of the mortgage account balance adjustment of €813.40, plus a refund of overpayments in the amount of €124,374.49 would return the Complainant's mortgage loan account to the position it would have been in had the mortgage loan account been placed on a tracker rate of ECB + 2.35% on **9 July 2009** (the maturity date of the Complainant's initial two year fixed interest rate period).

The Provider submits that the offer made to the Complainant was based on giving him the benefit of the assumption that had he been informed that by breaking early from his fixed rate period, he would lose his entitlement to a tracker interest rate and that as a result, he would not have done so and would instead have chosen to remain on the fixed interest rate until the scheduled maturity date, at which point it is assumed he would have selected a tracker interest rate.

The Provider details that €12,502.93 was an appropriate level of compensation to be given to the Complainant and that an additional amount of €400 was also provided to enable the Complainant to avail of independent advice if he wished.

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The Provider outlines that the Loan Offer, signed and accepted by the Complainant in the Acceptance Form dated **5 June 2007**, did not contain or provide any specific promise as to a particular tracker rate or a specific percentage over the ECB rate to be offered or made available to the customer, either on the expiry of the two year fixed rate period, or at any stage during the term of the loan. The Provider submits that the Complainant accepted the Loan Offer with the benefit of independent legal advice and the customer acknowledged with his signature that his solicitor had explained the terms of the Loan Offer to him. It states that in accordance with **Special Condition 6** of the Complainant's loan offer dated **28 May 2007**, the Complainant was entitled, on expiry of the initial two year fixed interest rate period in **July 2009**, to the tracker rate on offer by the Provider at that time.

The Provider states that interest rates for *“Residential Investment Property loans were not publicly listed, but were available on request”*. It states that if the Complainant had remained on the initial two year fixed interest rate period until **July 2009**, the tracker interest rate that would have been offered to him would have been ECB + 2.35%. The Provider refers to a printout, which has been furnished in evidence, which it states is an extract taken from an internal schedule of all tracker interest rates and associated mortgage products in respect of the period that tracker interest rates were on offer by the Provider, that is, from **mid-2006** to **mid-2009**. It states that the extract taken from its internal schedule illustrated the tracker interest rates applying to all mortgage products which did not have a specific tracker margin above the ECB rate in their loan agreement in respect of the period from **20 December 2008** and **30 August 2009**. It outlines that the tracker interest rate for Residential Investment Property loans between **20 December 2008** and **30 August 2009** was ECB + 2.35%.

With regard to the Illustrative Amortisation Table within the European Standardised Information Sheet, which was calculated based on a tracker interest rate of ECB + 0.9%, the Provider submits that the Illustrative Amortisation Table did not form part of the terms and conditions of the contract between the Complainant and the Provider. The Provider submits that the Illustrative Amortisation Table was based on the tracker mortgage rate available to customers in the Complainant's position in **2007**, and was not, nor was it ever intended to be, an indication of the rate that would be available on the expiry of the two year fixed period in **2009**. The Provider submits that the interest rate on which the Illustrative Amortisation Table is based, is clearly indicated to be for illustrative purposes.

The Provider has offered the Complainant, in recognition of the delay which has occurred in relation to his complaint, the sum of €5,000 towards the agreed resolution of his complaint, which was separate and distinct to the offer of compensation as part of the Mortgage Redress Programme of €12,502.93. The Complainant rejected that offer.

### **The Complaints for Adjudication**

The complaints for adjudication are;

- (a) The Provider has failed to apply the correct tracker interest rate margin to the Complainant's mortgage loan account from **09 July 2009**, and
- (b) The Provider has not offered adequate redress and compensation to the Complainant by consequence of the Provider's failure in relation to his mortgage loan account.

### **Decision**

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

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

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

A Preliminary Decision was issued to the parties on **26 February 2020**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

1. Letter from the Complainant's representative to this office dated **7 March 2020**
2. Letter from the Complainant's representative to this office dated **9 March 2020**
3. Letter from the Complainant's representative to this office dated **10 March 2020**
4. Letter from the Complainant's representative to this office dated **12 March 2020**
5. Letter from the Provider to this office dated **26 March 2020**
6. Letter from the Complainant's representative to this office dated **28 March 2020**
7. Letter from the Complainant's representative to this office dated **7 April 2020**
8. Letter from the Complainant's representative to this office dated **21 April 2020**
9. Letter from the Provider to this office dated **6 May 2020**
10. Letter from the Complainant's representative to this office dated **20 May 2020**
11. Letter from the Provider to this office dated **4 June 2020**
12. Letter from the Complainant's representative to this office dated **6 June 2020**
13. Letter from the Provider to this office dated **19 June 2020**
14. Letter from the Complainant's representative to this office dated **29 June 2020**
15. Letter from the Provider to this office dated **10 July 2020**
16. Letter from the Provider to this office dated **24 July 2020**
17. Letter from the Complainant's representative to this office dated **24 September 2020**
18. Email from the Complainant's representative to this office dated **25 September 2020**
19. Letter from the Provider to this office dated **7 October 2020**
20. Letter from the Complainant's representative to this office dated **9 November 2020**, attaching letter from the Complainant's financial advisor dated **3 November 2020**
21. Letter from the Provider to this office dated **23 November 2020**
22. Letter from the Complainant's representative to this office dated **11 December 2020**, attaching letter from the Complainant's financial advisor dated **7 December 2020**
23. Letter from the Provider to this office dated **30 December 2020**
24. Letter from the Complainant's representative to this office dated **21 January 2021**, attaching letter from the Complainant's financial advisor dated **18 January 2021**
25. Letter from the Complainant's representative to this office dated **22 January 2021**
26. Letter from the Provider to this office dated **4 February 2021**
27. Letter from the Complainant's representative to this office dated **9 February 2021**, attaching letter from the Complainant's financial advisor dated **8 February 2021**

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28. Letter from the Provider to this office dated **23 February 2021**
29. Email from the Complainant's representative to this office dated **19 March 2021**, attaching:
  - (a) Letter from the Complainant to this office dated **26 February 2021**
  - (b) Letter from the Complainant addressed to the Financial Service and Pensions Ombudsman dated **18 March 2021**
30. Letter from the Complainant's representative to this office dated **29 March 2021**
31. Letter from the Provider to this office dated **1 April 2021**

Copies of these additional submissions were exchanged between the parties. Following the consideration of additional submissions from the parties and all of the submissions and evidence furnished by both parties to this Office, I set out below my final determination.

Before dealing with substance of the complaint, I note that the application for the mortgage loan was submitted by the Complainant to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is only the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision. Therefore, the conduct of the third party Broker engaged by the Complainant, does not form part of this investigation and decision for the reasons set out above.

At the outset, it is also important to point out that this Office will not interfere with the commercial discretion of a financial service provider with respect to a decision to accept or reject a consumer's application for credit, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of **Section 60 (2) of the Financial Services and Pensions Ombudsman Act 2017**.

I further note at the outset that the Complainant's representative, under cover of his post Preliminary Decision submission dated **18 January 2021**, has submitted redacted extracts from correspondence issued by two third party financial service providers to their customers, *"to highlight to the Office the different treatment customers receive from other providers with a desire to resolve matters in a customer focused way, when compared to this Provider"*. I will not consider the contents of this correspondence, on the basis that this has no bearing whatsoever on the investigation of this complaint and I will, therefore, not be taking that material into account in arriving at my decision.

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The Complainant's representative has submitted as follows in his post Preliminary Decision submission of **19 March 2021**:

*"The Preliminary Decision states that the complaints for adjudication are:*

- (a) "The Provider has failed to apply the correct tracker interest rate margin to the Complainant's mortgage loan account from 09 July 2009, and*
- (b) The Provider has not offered adequate redress and compensation to the Complainant by consequence of the Provider's failure in relation to his mortgage loan account."*

*This is incorrect. [The Complainant's] complaint, submitted in February 2011, was in respect of the failure of [the Provider] to offer him an ECB Tracker Rate on the expiry of the two-year fixed rate. It was only as a result of [the Complainant's] complaint that [the Provider] reluctantly and belatedly admitted that he was entitled to an ECB Tracker Rate but in doing so failed to offer him the margin over ECB that he is entitled to.*

*The Ombudsman did not investigate what margin over ECB applied on the date [the Complainant's] Loan Offer was issued. It was only as a result of [the Complainant's] challenge that the Bank admitted that had [the Complainant] availed of an ECB Tracker rate on the date of drawdown of the loan, that the applicable rate would have been ECB + 0.9%. Furthermore, no official confirmation of the Tracker Rate, and Tracker Rate movement, relevant to [the Complainant's] loan type was requested or provided and no justification has been provided to support the application of the 2.35% margin."*

For the avoidance of doubt, it was outlined in my Preliminary Decision dated **26 February 2020**, and is outlined again here, that this complaint was received by the then Financial Services Ombudsman's office in **February 2011** and that the conduct complained of was that the Provider failed to fully advise the Complainant of the consequences of breaking the fixed interest rate period that applied to his mortgage loan account in **February 2009** and a refusal to return the Complainant's mortgage loan account to a tracker interest rate.

Subsequently an offer was made to the Complainant by the Provider in **August 2015** as part of the Mortgage Redress Programme, in relation to admitted failures of the Provider in relation to the Complainant's mortgage loan account, in that the Provider failed to inform the Complainant when he broke from his fixed interest rate period on **1 February 2009** that he would be unable to avail of a tracker rate at the maturity date of the fixed interest rate period.

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In the offer made to the Complainant in **2015**, the Provider proposed to provide redress and compensation to the Complainant by returning him to a tracker rate of ECB + 2.35%, adjusting his mortgage loan balance by €813.40, refunding the overpayments of €123,560.61, making a compensation payment of €11,487.35 and a payment of €400.00 in respect of independent legal advice.

I am of the view that the part of the initial complaint relating to the Complainant's entitlement to a tracker interest rate on his mortgage loan account has been resolved in circumstances where the Provider has accepted that the Complainant is entitled to a tracker interest rate. Therefore, the complaint now at hand is that the Complainant is dissatisfied with the tracker interest rate margin of ECB + 2.35% which has been applied to his mortgage loan account and with the redress and compensation offered. I fail to understand the logic of the Complainant's representative's argument that this is "*incorrect*" in circumstances where he has made detailed and lengthy submissions to this office in relation to both the tracker interest rate margin to be applied to the Complainant's mortgage loan account and the level of redress and compensation awarded to the Complainant.

I will now deal with each of the elements of the Complainant's complaint in turn.

**(a) The Provider has failed to apply the correct tracker interest rate margin to the Complainant's mortgage loan account from 09 July 2009**

In order to adjudicate on this element of the complaint it is necessary to review and set out the relevant provisions of the Complainant's loan documentation.

The Complainant's representative has submitted as follows in his post Preliminary Decision submission dated **7 December 2020**:

*"When I was first asked to review this case, I was astonished to see no reference whatsoever to the term "Experienced Investor" in any part of the Preliminary Decision, which given the attached additional evidence is quite remarkable.*

...

*It is clear to anybody taking a deep view of this case that the loan is approved based on ECB plus 0.90% as it was on this basis that the loan amount was based.*

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*The fixed rate subsequently chosen has no bearing on the basis of the loan because if it did the maximum loan approval would have had to be revisited and substantially reduced which did not occur.*

...

*The criteria for 'Experienced Investors' was a very defined criteria and was lauded as such by [the Provider].*

*The entire basis for this loan operating, was centrally based around the Tracker Rate applying and the rental income being received.*

..."

The Complainant's representative has submitted a Provider document entitled **Experienced Investor Criteria** under cover of his post Preliminary Decision submission dated **24 September 2020**. The document is undated and details as follows;

*"Experienced investors (investors who hold a minimum of two Residential Investment Properties (RIPs) for a period greater than 12 months) who satisfy the two following key criteria, will be considered as having satisfied affordability requirements. This means there will be no requirement for current account statements or evidence of income other than a completed 'Self Certification of Income Form' ...*

- *The LTV of the overall [Provider] RIP portfolio for the proposed case is below 75%.*
- *The rent to repayment cover is above 1.4 (repayments are calculated as interest only at 1.1% plus ECB).*

*The new criteria will simplify both the documentation requirements and the affordability calculation which ensures the standing of your established high net worth customers is recognised.*

..."

The Provider, in its post Preliminary Decision submission dated **23 November 2020**, stated as follows:

*"The Complainant's representative and [the Complainant's financial advisor] both appear to assert that the Complainant's loan was 'issued based on the [Bank's] 'Experienced Investor' Criteria' in 2007.*

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*The Bank categorically refutes that this would somehow have entitled the Complainant to apply a tracker interest rate of ECB + 0.90% to his mortgage loan at the end of the two year fixed rate period in 2009.*

*The Complainant's representative and [the Complainant's financial advisor] appear to rely on the brochure that was provided to the FSPO as Appendix 3 to [the Complainant's representative's] letter dated 24 September 2020. That brochure clearly states that the purposes of the "Experienced Investor" criteria were:-*

- (i) To simply the documentation requirements for mortgage loan applicants who met the relevant criteria; and*
- (ii) To set out the basis on which such an applicant would be deemed by the Bank to have satisfied the relevant 'affordability requirements' for a mortgage loan.*

*There is nothing in the brochure provided by the Complainant's representative that suggests the Complainant was entitled to any particular tracker interest rate in 2009, at the end of the 2 year fixed interest rate period relating to his mortgage loan. The reference in that brochure to '1.1% plus ECB' was a reference to the Bank's prevailing tracker interest rate at or around the time the brochure was published.*

*...the prevailing tracker interest rate, at or around the time of the Complainant's loan application in or around 2007, has no relevance to the tracker interest rate to which he was entitled in 2009. In any case the Bank is not aware of any evidence which suggests that the brochure in any way influenced the Complainant's mortgage loan application in 2007.*

*..."*

The Complainant's representative has further outlined as follows in his post Preliminary Decision submission dated **19 March 2021**:

*"Following the issue of the Preliminary Decision, [the Complainant] obtained a copy of his file records from [the Provider] on foot of a Subject Access Request and he engaged the services of [named financial advisor], recognised experts in the area of Tracker Mortgages.*

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These actions resulted in significant additional evidence being obtained to support [the Complainant's] entitlement to an ECB Tracker margin of 0.9%, as follows:

- The 'Approval in Principle' and the approval 'Sign off Sheet', in respect of [the Complainant's] Loan both state that the loan was approved under the Banks 'Experienced Investor Criteria' and the 'Approval in Principle' confirms an LTV of 68%. [The Provider's] 'Experienced Investor Criteria' clearly states that the applicable rate for this product was ECB + 1.1%. In the case of [the Complainant], the margin was 0.9% over ECB due to the size of the loan. The Approval 'Sign off Sheet' states that loan was within policy.
- A further 'Approval in Principle' report confirms that the loan was approved at an interest rate of 4.39%. The prevailing ECB rate at that date was 3.5% equating to a margin of 0.89% over ECB.
- The Loan Application Form dated 27th February 2007 submitted by [the Complainant] to [the Provider] also clearly states that the application was submitted as an '**EXPERIENCED RIP INVESTOR**' Application. In addition, in the Application Form, under '**Type of Loan**', [the Complainant] selected '**Tracker RIP**', and under the '**Rate Type**' he selected '**Tracker**'. However, under '**Rate Type**', '**Tracker**' is crossed out on the Application Form and the box '**Fixed**' is ticked. This was not actioned by [the Complainant]. Furthermore, the 'Approval in Principle' report, makes reference to "**Product Name: 1 Year Fixed (not 2 Year Fixed) Residential Investment Loan (Interest Only)**"
- The credit assessment of [the Complainant's] Loan Application was largely based on Rent/Repayment cover, (the key product offer feature), therefore the pricing (ECB + 0.9%) was a fundamental part of the loan offer. In their communication dated 16th January 2007, to their Broker network [the Provider] state "**Once the rental cover is 1:2 times the interest only mortgage repayment & the LTV does not exceed 75%, the loan will be approved**". [The Complainant's] loan would not have met that criteria based on a rate of ECB+2.35% and would, as a result, have required to be assessed on a 'Net Basis', which it was not.
- The APR quoted in the Loan Agreement was calculated using a rate of ECB+0.9% from Year 3 onwards."

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I note that the **cover sheet** for the application form furnished in evidence states **“EXPERIENCED RIP INVESTOR”**. It appears that there are two parts to the **application form** furnished in evidence. The first part is Broker-branded. The second part is the Provider-branded **Application for Credit** signed by the Complainant on **27 February 2007**.

In the Broker part of the application the option ‘*tracker RIP*’ is ticked in response to the question ‘*type of loan*’. It appears that the option ‘*interest only RIP*’ was ticked but subsequently struck out. The other options available were ‘*home loan*’, ‘*tracker home loan*’, ‘*interest only home loan*’, ‘*further advance*’, ‘*RIP*’, ‘*secured personal loan*’ and ‘*pension mortgage*’. In response to the question ‘*rate type*’ the option ‘*fixed*’ is ticked and ‘*2y*’ is handwritten next to it. It appears that the option ‘*tracker*’ was ticked but subsequently struck out.

There is no reference to interest rates in the Provider branded **Application for Credit**.

The Complainant’s representative has submitted into evidence an email from a redacted sender to “*all Intermediaries*” dated **12 March 2007** (“Appendix 5”) under cover of his post Preliminary Decision submission dated **7 December 2020**, which details:

*“[the Provider] will be launching an **LTV Tracker Mortgage** in mid May, the margin above the ECB rate at which the clients can borrow will be based on the ltv (loan to value) and the loan amount, the details below for private houses and residential investment properties;*

*LTV 0-80%      Loan less than E500K – margin above ECB .8%  
                    Loan greater than E500K – margin above ECB .75%*

*LTV 80-95%    Loan less than E500K – margin above ECB 1.1%  
                    Loan greater than E500K – margin above ECB .9%*

*LTV greater than 95% Loan less than E500K – margin above ECB 1.1%  
                                    Loan greater than E500K – margin above ECB .9%*

*...*

*Until the above can be formally launched, [the Provider] will be holding rates offered on the new business 1 year and 2 year Fixed Rates products (subject to no major fluctuations [sic] in the funding rates) so customers who fund loans between now and the formal launch of the LTV Tracker can avail of the 1 or 2 year fixed rate product and can then come into the LTV Tracker on maturity of the fixed rate term.*

/Cont’d...



Some points;

**\*Rates are based on a loan by loan basis**

**\*Price band remains on original loan amount & will remain so for lifetime of loan**

Client benefits;

**#At a time of uncertain interest rates and when most media comments are advising clients to fix loans for the short term, this allows clients avail of a 1 or 2 year Fixed Rate and revert to Tracker on maturity of fixed rate term. This will benefit clients who must fund before the formal launch of the LTV Tracker.**

**#When launched, the [Provider] experienced investor product with a loan in excess of E500K will be able to fund at a margin of .75% above ECB**

**#Price promise for clients on LTV Tracker band for lifetime of loan**

**I'm sure you will agree that the holding of new business 1 & 2 Fixed Rates (subject to no major fluctuations [sic] in the funding rates) until the formal launch, and then the introduction of the LTV Tracker offers your clients excellent value both now and throughout the term of their mortgage**

The Complainant's representative has submitted as follows in his post Preliminary Decision submission dated **7 December 2020**:

*"This email, entirely read, puts the basis for the Preliminary Decision at complete odds with the content of the email communication and clearly points to the aspects that I have raised on behalf of [the Complainant]*

...

*If this is not akin to an implied contract then I am at a loss to understand what was being implied by all this documentation."*

I do not accept the Complainant's representative's submission that this email is "akin to an implied contract". There is no basis whatever for such an assertion. It is not clear to me whether the Complainant's broker was a recipient of this email. In any event it appears that the purpose of the above email was to outline the tracker interest rates that would be on offer generally by the Provider from **May 2007** onwards. It cannot be relied on to determine the rate that should have been applied to the Complainant's loan.

/Cont'd...

An **Approval in Principle** document furnished in evidence dated **15 March 2007** states as follows:

“  
*Loan Type:* ...  
*Exp investor* ...  
... *Rate: tba*  
...

*Approval in Principle subject to:*  
...  
*Require confirmation of rental income @4600pm*  
...

**Note: An Approval in Principle does not constitute a formal letter of offer and should not be relied upon to enter into a binding contract or purchase at auction.”**

It further states “*Exp investor. 1.21 times cover achieved*” in response to “*Reasons for Approval*”.

The Provider’s **Sign off sheet** dated **15 March 2007** details as follows:

“ ...

<i>Loan amount:</i> €990,000	<i>Purchase price:</i> €Value	<i>Nets: %68%</i>	...
...			

*Is this loan outside of policy? Y OR N – No*

...

*Reasons for approval (incl reasons for policy exceptions):*

<i>Exp investor</i>
---------------------

...”

A further **Approval in Principle** document dated **16 March 2007** has been furnished in evidence which details:

“*Loan Purpose:* ... ..”

/Cont’d...

*Investment/Residential Letting* ... ..  
*Loan Type:* *Interest Rate:* ...  
*RIP* *4.39%* ...  
*LTV: 68%* ...  
*Product Name: 1 Year Fixed Residential Investment Loan (Interest Only)*

...  
***Note: An Approval in Principle does not constitute a formal letter of offer and should not be relied upon to enter into a binding contract or purchase at auction.***  
..."

The Complainant's representative has submitted a further email dated **26 March 2007** into evidence under cover of his post Preliminary Decision submission dated **7 December 2020**. Both the sender and recipient details have been redacted so it is therefore unclear to me whether the Complainant/his broker was a recipient of this email. In any event the email states as follows:

"...

*Please find attached copies of our new Net Sheets.*

...

*We have also amended our RIP loan calculator sheet. We now calculate these loans using an interest only calculation. We also no longer discount the rental income by 70% but we do look for minimum rental cover, depending on the category that you must selected [sic] from the two fields at the top of the sheet:*

- 1. Applicant Income*
- 2. Current Number of RIPS*

*The loan will automatically calculate on the interest only repayment on the tracker rate as per the standard loan calculator.*

*Our experienced investor product has not changed we still operate on 1.2 times cover. Again loans are calculated on the 1.10% over ECB rate*

...

*Looking forward to approving even more cases on the basis of these positive enhancements to our policy".*

/Cont'd...

A further document with a handwritten date of **April 2007** has been submitted into evidence (“Appendix 6”) by the Complainant’s representative under cover of his post Preliminary Decision submission dated **7 December 2020**, which details:

***“LTV Tracker Mortgage***

*An (LTV) Tracker Mortgage is where the rate is determined by Loan to Value. Loan to Value or LTV is the amount that is being borrowed relative to the value of the property being bought.*

*The customer is given a price promise based on this LTV and the loan amount.*

*...*

*Residential Investment Loans*

<i>Loan to Value</i>	<i>Mortgage Amount</i>	<i>Tracker Rate</i>
<i>0-800% LTV</i>	<i>&lt;€500k</i>	<i>ECB + 0.8%</i>
	<i>&gt;€500k</i>	
<i>80%-90% LTV</i>	<i>&lt;€500k</i>	<i>ECB + 1.1%</i>
	<i>&gt;€500k</i>	<i>ECB + 0.9%</i>

*Applications Currently in Pipeline*

*Loans which have not yet been approved will be offered the new LTV Tracker Mortgage Rates or Fixed Rates as above. If they already opted for the current 1 year discounted tracker and 1 year discounted tracker <50% LTV, this will be permitted to go to approval, however no new requests for these rates can be facilitated.*

*Approvals Currently in Pipeline*

*Loans can fund at the rate currently quoted on the loan approval (subject to rate changes) or the customer can switch to avail of the new LTV Tracker as above – this will require an amended approval.”*

The Provider, in its post Preliminary Decision submission dated **30 December 2020**, details as follows;

*“The Bank wants to briefly address the new documents provided by [the Complainant’s financial advisor].*

/Cont’d...

*For the avoidance of doubt, none of the new documents contained at Appendices 4 to 14 of [his] letter dated 7 December 2020 are relevant to the complaint.*

...

*[the Complainant's financial advisor] seeks to claim that the documents provided contain evidence that the Complainant had a contractual entitlement to a tracker interest rate of ECB + 0.90% at the expiry of the 2 year fixed rate period in 2009. However, the majority of these documents post-date the Complainant's mortgage loan documentation.*

*The Complainant's signed application for credit is dated 27 February 2007. Appendices 5 to 14 are either dated after that date, or are undated. Neither the Complainant nor his broker could have relied on any documents dated after 27 February 2007 for the purpose of the Complainant's loan application to the Bank.*

*Appendix 4 is dated prior to the Complainant signing the loan application, however [the Complainant's financial advisor] has not provided any evidence to suggest that the Complainant or his broker received this particular document, nor relied on it for the purpose of the mortgage loan application.*

...

*With the possible exception of Appendix 5, which is addressed to "all Intermediaries", no evidence has been provided to suggest that the Complainant or his broker ever received from the Bank, let alone relied on, any of the documents provided under cover of [the Complainant's financial advisor's] recent letter. The sender and/or recipient details have been redacted in the emails provided.*

...

*Furthermore, even if the Complainant or his broker had received any of the documents prior to the Complainant signing his loan application on 27 February 2007, none of the documents give rise to a contractual entitlement to a tracker interest rate of ECB + 0.90% in 2009, at the end of the 2 year fixed rate period applicable to the Complainant's mortgage loan.*

..."

/Cont'd...

In his post Preliminary Decision submission dated **18 January 2021**, the Complainant's advisor submitted:

“...

*Not surprisingly, the bank has refused to engage with the very significant underwriting point I raised, asserting in its response that it considers that it need not comment on my description and explanation of those matters relating to the underwriting process when dealing with an application relating to Experienced Investors which it knows well is absolutely accurate. To be clear, I have not asserted that the underwriting calculations form part of the contractual terms. However, what I am saying is that, given that there is a dispute between the parties as to what the agreed loan terms are, the bank's underwriting process provides objective, cogent evidence as to the intentions of the parties at the time the mortgage was incepted. The complainants assert that they were sold a mortgage that was a Tracker Mortgage Product with a certain margin attaching to their loan agreement. It is also confirmed in the loan agreement with the APR quoted in the front page.*

*When the bank assessed the customer's capacity to repay the mortgage loan, it, not unreasonably, performed its underwriting calculations based on the long-run, margin of 1.1% (for underwriting purposes) albeit the loan was approved on the rate ECB plus 0.90% as per the APR in the loan offer ... The bank's underwriting calculations prove that both the bank and the customer understood, that, after the expiry of the initial fixed period, the loan would revert to a certain long-run margin of 0.90% ...*

*... the loan was arranged as an “Experienced Investor” case and central to that qualification was*

- *Rental Cover*
- *Interest Only*
- *ECB plus 0.90% for loans greater than €750,000*

*It did not matter if the client wished to apply certainty on the initial cost by fixing the rate for 2 years (in this instance).*

/Cont'd...

*In the underwriting of the loan the Senior Underwriter was able to sign off on approval because the Underwriter understood that the following was achieved*

- *Rental Cover*
- *Interest Only*
- *Underwritten based on ECB plus 1.1%*

*(notwithstanding this loan qualified for ECB plus 0.90% as it was greater than €750,000) but Experienced Investor Loans were underwritten by the Underwriting Department using ECB plus 1.1% in all cases.*

*This was the basis for the loan being approved and the key factor here is the requirement around rental cover versus interest costs.*

*With a Tracker Mortgage Product there was one clear and ubiquitous matter.*

*The Margin was set at the outset and remained for the life of the loan. The customer, broker and bank staff were all clear on this. Most importantly the Underwriter of the loan was clear also in how the Experienced Investor Product worked.*

*That is after all the basis for approval of the loan as stated in the documentation ...*

*The reason [the Provider] was selected for the combination of [the Complainant's] entire loan portfolio to one provider was solely because (and based on) of the [Experienced Investor' Product and the advantages it gave to [the Complainant.*

*...*

*I feel that this case requires the Office of the FSPO, to now visit the office of [the Provider] to investigate fully the matter of the Experienced Investor and indeed request all and total historical information relating to Experienced Investors that the provider holds which will show and clearly inform the investigation how [the Provider] actively engaged in this market and importantly the product it used to attract customers, which was a tracker mortgage product.*

*..."*

In its post Preliminary Decision submission dated **4 February 2021**, the Provider submitted;

*“The Bank agrees with [the Complainant’s financial advisor’s] comment that the “underwriting calculations” referred to in his submissions do not “form part of the contractual terms” between the Bank and the Complainant ... [the Complainant’s] assertions in relation to underwriting calculations are contrary to the clear words of the mortgage loan agreement, and in particular Special Condition 6.”*

In his post Preliminary Decision submission dated **8 February 2021**, the Complainant’s representative further submitted;

*“The underwriting process is not a term of any mortgage, but the underwriting of the loan does provide the answers in terms of affordability, loan basis and importantly the interest basis for the loan ... The challenge here for the FSPO is, if the underwriting process is of importance to the basis of the loan operating and it is clear on the ‘Experienced Investor’ cases where the affordability of the loan is solely based on the ratio of rental income to interest rate, then the underwriting process is a key and integral part to the complaint in this case.”*

I note that tracker interest rates were on offer generally by the Provider when the Complainant applied for the mortgage loan in **February 2007**. Having considered the evidence, as quoted above, it appears that the tracker interest rates which were then available, varied from ECB + 0.80% to ECB + 1.10%, depending on loan to value or the amount borrowed.

The Complainant availed of the services of a third party Broker during the application stage of the mortgage loan application. I again note that the Broker’s application form outlined the types of interest rate options available generally on mortgage loans, including the tracker rate. In circumstances where the Complainant was engaging with a Broker with respect to the mortgage loan application, I accept that there was no requirement for the Provider to communicate directly to the Complainant at that time in relation to interest rate options for the mortgage loan. Furthermore the fact that tracker interest rate options were available generally as part of the Provider’s suite of products at the time, did not oblige the Provider to offer the Complainant a tracker interest rate on this loan application.

It is important for the Complainant to be aware that the Provider was under no obligation to offer him any particular interest rate in **2007**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainant any borrowings at the time and secondly, how that offer would be structured.

/Cont’d...



I accept that the decision whether to approve the application for a loan is a matter which falls within the commercial discretion of the Provider.

I will not interfere with a financial service provider's commercial discretion in the form of a decision to accept or reject a consumer's application for credit, other than to ensure that the Provider complies with relevant codes/regulations and does not treat the applicant unfairly or in a manner that is unreasonable, unjust, oppressive or improperly discriminatory.

It is not clear to me why the Complainant is of the view that he has an entitlement to a tracker interest rate of ECB + 0.90% on the mortgage account from the end of the initial fixed interest rate period, in circumstances where is no evidence before me to show that the Complainant requested a tracker interest rate of ECB + 0.90% for the mortgage loan account or that there were any discussions between the Complainant, his broker and the Provider in relation to a tracker interest rate of ECB + 0.90%. It appears to me from the evidence that the Complainant requested an initial fixed interest rate for the mortgage loan account, and this is what the Provider offered him.

In order for the Complainant to have a contractual right to a particular tracker interest rate margin of ECB + 0.90% on his mortgage loan on the expiry of the initial fixed rate period, that right would need to have been specifically outlined in the mortgage loan contract that was signed by the Complainant. A loan application is not a mortgage loan contract. 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 of ECB + 0.90% on the mortgage loan account based on the terms of the **Letter of Approval dated 28 May 2007**.

The **Letter of Approval** dated **28 May 2007** details as follows;

<i>"Loan Type:</i>	<i>2 Year Fixed Residential Investment Loan (Interest Only)</i>
--------------------	---

<i>Purchase Price / Estimated Value:</i>	<i>EUR 700,000.00</i>
<i>Loan Amount:</i>	<i>EUR 990,000.00</i>
<i>Interest Rate:</i>	<i>4.99%</i>
<i>Term:</i>	<i>25 year(s)</i>
<i>...</i>	
<i>LTV:</i>	<i>76%"</i>

/Cont'd...

The **Important Information section** details:

“ ...  
7. APR\* 4.8%\*  
...  
\*Annual Percentage Rate of Charge  
...”

It is understood that the total amount drawn down under this Letter of Approval was €740,000; €650,000 was drawn down on **09 July 2007** and a further €90,000 was drawn down on **12 December 2007**.

**Special Condition 6** to the Letter of Approval details as follows;

*“General mortgage loan approval condition 5 “conditions relating to fixed rate loans” applies in this case. The interest rate specified above may vary before the date of issue of the loan. On expiry of the fixed rate period, and where the applicant chooses the option of a tracker mortgage interest rate, the interest rate applicable to the loan **will be the tracker mortgage rate appropriate to the balance outstanding** on the loan at the date of expiry of the fixed rate period. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate for the loan will be the tracker mortgage rate applicable to the balance outstanding on the loan, at the date of expiry of the fixed rate period and as may be varied in accordance with variations to the European Central Bank refinancing rate.” [my emphasis]*

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

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

/Cont'd...

The **General Mortgage Loan Approval Conditions** also outline;

*IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:*

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

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

*“This document does not constitute a legally binding offer.*

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

**Page 2** of the **European Standardised Information Sheet** details as follows;

**“Nominal Rate**            *The interest rate is 4.99 percent  
This rate is fixed for 2 year(s).*

*At the end of the fixed rate period you may exercise an option to contract for another fixed rate period (if available) or to move to the standard variable rate or to a Tracker Mortgage Rate. If a Tracker Mortgage Rate is chosen the loan will become a Tracker Mortgage Loan and the rate applicable will be the rate appropriate to the balance outstanding on the loan at the time of the expiry of the fixed rate period and as may be varied in accordance with the variations to the ECB Rate. THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (applies if a Standard Variable Rate or Tracker Rate is chosen).”*

**Pages 4 and 5** of the **European Standardised Information Sheet** contains an **Illustrative Amortisation Table** and details as follows;

**“Illustrative Amortisation Table**

*Summarised amortisation table illustrating the capital outstanding and the monthly repayments for the first year followed by the yearly figures over the term of the loan and based on the assumptions referred to below.*

/Cont’d...

.....  
*Assumptions:*

*The table above illustrates the amortisation of the loan assuming the loan runs full term and interest rates that currently prevail are available for the term of the loan.*

*The rate is fixed for 2 year(s). The above table assumes that the loan will roll over into the Tracker Mortgage Rate appropriate for the balance outstanding at the end of this period and as may be varied from time to time.”*

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **05 June 2007**. The Acceptance of Loan Offer states as follows:

*“1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval Conditions*
- iii. [the Provider’s] Mortgage Conditions.*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

*4. My/our Solicitor has fully explained the said terms and conditions to me/us.”*

**Special Condition 6** of the Letter of Approval sets out the interest rate options that would be applicable at the end of the fixed interest rate period.

It appears to me that this condition obliges the Provider at the end of the 2 year fixed interest rate period to make the option of a tracker mortgage interest rate available for the Complainant to choose and in the event that the Complainant did not make any other interest rate election, then the interest rate would be the *“tracker mortgage applicable to the balance outstanding on the loan”*. The Provider accepts that this is the case.

In his post Preliminary Decision submission of **7 December 2020** the Complainant’s representative has submitted:

*“I disagree entire with the view that is expressed in the Preliminary finding*

*/Cont’d...*

*“The Complainant does not have a contractual entitlement to a Tracker Rate of ECB + 0.90% on the basis of the ESIS Sheets”*

*“The Complainant did not have a contractual entitlement to a Tracker Rate of ECB plus 0.90% or to any particular Margin over ECB as there was no Margin set in the Complainants Mortgage Loan Documentation”*

*The second commentary is entirely wrong, as I wish to show that by the inclusion of the APR in the Loan Offer documentation, this is sufficient representation of the Tracker Rate of ECB plus 0.90% to achieve a position of a specific margin being contained in the Loan Offer...”*

The Complainant’s representative has further submitted as follows in the post Preliminary Decision submission dated **19 March 2021**;

*“While the Preliminary Decision appears to be based solely on Special Condition 6 all of this additional evidence now available clearly confirms that [the Complainant’s] loan was approved on the basis of an ECB Tracker rate at a margin of 0.9%.*

...

*As pointed out from the very outset of this Complaint, it is clear that [the Provider] used initial short-term fixed rates to compete with competitor’s offering ECB Variable Rate Pricing in what was a very competitive marketplace at that time. In doing so, they incorporated a vague clause, totally contrary to the requirements of Chapter 2, Common Rule 12 of the Consumer Protection Code of 2006, into their Loan Agreements in an attempt to allow them increase their margin on the expiry of the fixed rate, hoping that most borrowers would not notice.*

...

*The decision of the Ombudsman to find in favour of [the Provider] appears to be based solely on Special Condition 6 of the Loan Agreement ... This is completely at variance with the Consumer Protection Code 2006 which states:*

- (a) General Principle 3 - “does not recklessly, negligently or deliberately mislead a **customer** as to the real or perceived advantages or disadvantages of any product or service”.*
- (b) General Principal 6 - “makes full disclosure of all relevant material information, including **charges**, in a way that seeks to inform the **customer**”.*

/Cont’d...

(c) *Common Rule 12 – “A regulated entity must ensure that all information it provides to a **consumer** is clear and comprehensible, and that key items are brought to the attention of the **consumer**. The method of presentation must not disguise, diminish or obscure important information”.*

(d) *Common Rule 30 – “A regulated entity must ensure that, having regard to the facts disclosed by the **consumer** and other relevant facts about that **consumer** of which the regulated entity is aware: a) any product or service offered to a **consumer** is suitable to that **consumer**; b) where it offers a selection of product options to the **consumer**, the product options contained in the selection represent the most suitable from the range available to the regulated entity; or c) where it recommends a product to a **consumer**, the recommended product is the most suitable product for the **consumer**”*

*Furthermore, the Loan Agreement breaches the EU (Unfair Terms in Consumer Contracts Regulations 1995).”*

The Provider submits in its post Preliminary Decision submission dated **4 February 2021** that;

*“The Bank strongly rejects [the Complainant’s representative’s] allegation that the mortgage loan agreement between the Bank and [the Complainant] is contrary to Chapter 2, Rule 12 of the Consumer Protection Code 2006 (“CPC”).*

*For the avoidance of doubt, the Bank considers that the information provided to [the Complainant], around the time the Letter of Approval dated 28 May 2007 was issued, was clear and comprehensible, and that key items were brought to [the Complainant’s] attention. The method of presentation of the mortgage loan agreement did not disguise, diminish, or obscure important information.”*

The Provider further submits in its post Preliminary Decision submission dated **1 April 2021** that;

*“the Bank does not accept that Special Condition 6 was “vague”, or in any way contrary to the Consumer Protection Code. The Bank also strongly rejects the implication of bad faith on its part, in relation to the inclusion of Special Condition 6 in its mortgage loan agreements or otherwise.”*

/Cont’d...

I do not accept the Complainant's submission that I reached my Preliminary Decision "*based solely on Special Condition 6*". I have considered the application of the **General Mortgage Loan Approval Conditions** and the **Special Conditions** set out in the Letter of Approval to the Complainant's mortgage loan account. As outlined above, **Special Condition 6** outlines that on the expiry of the fixed rate period, where the applicant chooses the option of a tracker mortgage interest rate the interest rate applicable to the loan will be the tracker mortgage rate appropriate to the balance outstanding on the loan. I remain of the view that there was no basis for the Complainant to reasonably expect that a tracker interest rate of ECB + 0.90% would be applied to the mortgage account at the end of the initial fixed interest rate period, in circumstances where was no guarantee in the **Special Conditions** or any other conditions applicable to the Complainant's mortgage loan that a specific tracker mortgage margin would be made available to the Complainant at the end of the fixed period. It is important for the Complainant to be aware that the Complainant's mortgage loan is governed by the terms and conditions of his mortgage loan documentation. In these circumstances the terms and conditions of the loan were clear. There is no evidence that the Provider agreed that a tracker interest rate of ECB + 0.90% would be applied to the Complainant's mortgage loan upon the expiry of the fixed rate period. It was a matter for the Complainant to consider the terms and conditions of the **Letter of Approval**, to ensure that he was happy with the terms offered and that they aligned with any discussions that he had before signing the Letter of Approval. The Complainant accepted the **Letter of Approval** on **5 June 2007**, having confirmed that the terms and conditions of the Loan Offer had been explained to him by his solicitor.

There is no obligation on a Provider to set a specific tracker interest rate margin in the mortgage loan documentation from the outset. The Provider was free to exercise its commercial discretion in making a loan offer to the Complainant providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainant to decline that offer if he was dissatisfied that the terms and conditions did not specifically contain a guaranteed tracker interest rate margin on expiry of the fixed period under **Special Condition 6**. The Complainant signed the mortgage loan having confirmed that his solicitor had "*fully explained*" the terms and conditions of the mortgage loan to him.

The parties differ in their views as to what was the "*tracker mortgage applicable to the balance outstanding on the loan*" in **July 2009**. **Special Condition 6** is silent as to any applicable margin above the ECB rate. Consequently, the Complainant has submitted that he is entitled to rely on the rate used in the **Illustrative Amortisation Table** in the **European Standardised Information Sheet**.

The Complainant submits that the **Illustrative Amortisation Table** is based on a tracker interest rate of ECB + 0.9%, as:

*“This table shows an interest charge of €46,035 in year 3, (the first year of the ECB Tracker Rate), which equates to an all-in interest rate of 4.65%. The ECB Refinance Rate on that date was 3.75% equating to a margin of 0.9% over the ECB Refinance Rate. Why was a rate of 4.65% used for illustration purposes and not 6.1%, for illustration purposes?”*

Under the **European Voluntary Code of Conduct on Pre-Contractual Information for Home Loans**, the Provider is required to provide certain standard pre-contractual information to borrowers by means of a personalised European Standardised Information Sheet. The purpose of a European Standardised Information Sheet is to enable a borrower to make an informed decision on whether or not to accept a loan offer from the Provider, by comparing the credit available from the Provider to what is available in the market at the time the credit is being advanced.

Having considered the content of this documentation, I note that it is specifically detailed on **page 1** of the European Standardised Information Sheet that the document is not a legally binding offer. The European Standardised Information Sheet sets out clearly that the figures have been prepared based on current *“market conditions”*, but that those figures could *“fluctuate”*.

I remain of the view that the Complainant does not have a contractual entitlement to a tracker rate of ECB + 0.90% on the basis of the information contained in the European Standardised Information Sheet. The information contained in the Illustrative Amortisation Table was for illustrative purposes only and was prepared on the basis of the ECB Refinance Rate applicable at the time the mortgage loan issued in **May 2007** and the ECB margin that the Provider was then offering to customers who had the same mortgage loan product as the Complainant. There was no commitment that the ECB Refinance Rate or the margin that was used to calculate the information in the Illustrative Amortisation Table would remain static from the time that it was prepared in **May 2007** to the time that the fixed interest rate period would end in **July 2009**. In fact, it was specifically outlined to be based on the *“assumption”* that the interest rates that *“prevailed”* at the time would be available for the term of the loan. The information contained in the Illustrative Amortisation Table could not reasonably be construed as a commitment to the tracker interest rate of ECB + 0.90% at the end of the fixed interest rate period which would end in **July 2009**.

/Cont'd...



The Complainant has submitted, in evidence, a copy of an **Illustrative Amortisation Table** issued by the Provider to another customer in or around the same time the Complainant was furnished with the Illustrative Amortisation Table applicable to his mortgage loan. He asserts that this demonstrates that, both mortgage loan accounts would have defaulted to the same interest rate margin (ECB + 0.9%) at the maturity of the fixed rate period, had the Complainant not been denied the tracker interest rate in **July 2009**. The Complainant has also submitted extracts from mortgage loan agreements between various other financial service providers and their customers in which the terms and conditions provided for a guaranteed tracker interest rate margin above ECB at the expiry of the fixed rate period. I do not propose to consider the content of this documentation in this decision. The terms and conditions provided for in loan offers issued by other financial service providers to other customers, are not relevant, insofar as they relate to the Complainant's loan offer. I am also of the view that an Illustrative Amortisation Table issued by the Provider in respect of another customer's loan offer, is not relevant to the Complainant's complaint in respect of the interest rate applied to his mortgage loan account on the maturity of the fixed rate period.

The Provider was free to exercise its commercial discretion in making a loan offer to the Complainant providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainant to decline that offer if he was dissatisfied that the terms and conditions did not specifically contain a guaranteed tracker interest rate margin at the end of the fixed interest rate period. The Complainant signed the mortgage loan having confirmed that his solicitor had "*fully explained*" the terms and conditions of the mortgage loan to him.

The Complainant's representative has submitted the following emails into evidence under cover of his post Preliminary Decision submission dated **7 December 2020**.

An email dated **21 June 2007**, in which the sender and recipient details are redacted, details as follows:

*"As discussed over recent weeks, I am delighted to announce the following enhancements to our Residential Mortgage & RIP lending policy:*

*...*

*Experienced Investors: The Repayment Cover Ratio (RCR) required for Experienced Investors has been reduced to 1.1. As in the past cases which don't meet Experienced Investor criteria has been assessed on a nets basis.*

*..."*

/Cont'd...

A further email dated **25 June 2007** details as follows:

*"[the Provider] wishes to advise you of the following changes to our credit policy. These developments will offer all new [Provider] customers the opportunity to qualify for higher loan amounts.*

...

***Reduced interest cover requirement for experienced investors***

- *Rent to interest cover requirement reduced to 1.1 times for experienced investors*

..."

A further email dated **28 March 2008** ("Appendix 13") sent from the Provider's intermediary support department to an unknown recipient(s) which details as follows;

*"New Lending Policy*

*Further to our communication of 12<sup>th</sup> March 2008 I now wish to confirm that the following changes to lending policy will come into effect from Tuesday April 1<sup>st</sup>.*

...

***Residential Investment Properties***

...

***Changes to Mortgage RIP Loan 'Underwriting Rates'***

- *RIP Loans, including Experienced Investor cases ... will decrease to 5.05%.*
- *The minimum allowable Interest Cover Ratio for Experienced Investor deals will now be 1.2 : 1.*

...

*All pipeline cases that have been approved under the current lending policies have until Friday April 11<sup>th</sup> to be fully Loan Offered.*

*If any cases have not been fully Loan Offered by this date, the new policy will apply.*

..."

I do not consider that the contents of these emails are relevant to the matters under consideration in this complaint. At the time the emails were sent the Complainant's mortgage loan account had been drawn down and was operating on the initial fixed interest rate.

The Complainant's representative has also submitted the Provider's **Product Summary** document dated **July 2008** into evidence under cover of his post Preliminary Decision submission dated **7 December 2020**. This document details as follows:

*"...  
RIP products have been suspended until further notice. Experienced Investor Product is also suspended."*

Again, this document appears to me to be irrelevant to the complaint at hand, in circumstances where the mortgage loan account had already been drawn down and was operating on the initial fixed interest rate in **July 2008**.

The fixed interest rate period did not expire in real time in **July 2009** in this matter, as the Complainant broke out of the fixed interest rate period in **February 2009**. The Provider subsequently became aware of failures in relation to information given to the Complainant as part of the Mortgage Redress Programme and offered the Complainant redress on the basis of the application of a tracker interest rate of ECB + 2.35% from **July 2009**.

The Provider has furnished in evidence a copy of its **Lending Interest Rates** document effective from "*the start of business*" on **5 June 2009**. I note that it details as follows;

*"Residential Investment Property Loans & Commercial Mortgages  
Rates available on request. The rate applicable to individual customers is  
determined in accordance with loan documentation."*

The Provider has also furnished what it submits is an extract from an "*internal schedule of all tracker interest rates and associated mortgage products in respect of the period that tracker interest rates were on offer*" by the Provider between **June 2006** and **August 2009**.

This extract details as follows;

<i>PRD</i>	<i>Start Date</i>	<i>End Date</i>	<i>Category</i>	<i>Monthly/Daily Rest</i>	<i>Product Code</i>	<i>Description</i>
...						
1194	20 <sup>th</sup> Dec 2008	30 <sup>th</sup> Aug 2009	IO Resi Rip	Daily Rest	[REDACTED]	Tracker – IO RIP Loan – ECB+2.35

For the reasons detailed above, the Complainant did not have a contractual entitlement to a tracker rate of ECB + 0.9%, or to any particular margin over ECB as there was no margin set in the Complainant’s mortgage loan documentation.

The Complainant’s representative submitted as follows in his post Preliminary Decision submission dated **7 March 2020**:

*“When the Bank was requested to provide evidence that their Tracker Rate relevant to the loan product in question was ECB+2.35%, on the date of the expiry of our Clients two-year fixed rate, all that was provided was a redacted spreadsheet. No official confirmation in the form of Pricing Committee Minutes were provided or requested. Furthermore, the Bank were not requested to provide confirmation of what margin over ECB applied on the date the loan offer was issued which we believe to be highly relevant. Furthermore, the Bank did not provide and were not asked to provide how their ECB Tracker Rates moved in line with movements in the ECB rate.”*

The Complainant’s representative further submitted as follows in his post Preliminary Decision submission of **19 March 2021**:

*“... no official confirmation of the Tracker Rate, and Tracker Rate movement, relevant to [the Complainant’s] loan type was requested or provided and no justification has been provided to support the application of the 2.35% margin.”*

As stated in my Preliminary Decision, the Provider has submitted evidence to the effect that the margin of ECB + 2.35%, was available in **July 2009** to all customers who had an Interest Only Residential Investment Property loan, which is the mortgage loan product that the Complainant held. The outstanding balance on the Complainant’s mortgage loan on **09 July 2009** when the fixed interest rate period would have expired was €740,000 (which was the amount drawn down on the mortgage loan).

/Cont’d...

It appears to me that had the fixed interest rate period on the Complainant's mortgage loan expired in real time in **July 2009**, the tracker interest rate that the Provider had available at that time and that would have been offered to the Complainant for his mortgage loan was ECB + 2.35%. It was within the Provider's commercial discretion to set this rate.

Having considered the evidence before me, I do not accept that there is any basis on which the Complainant could reasonably have assumed that a tracker interest rate of ECB + 0.90% would be applied to the mortgage account at this time. In the interests of clarity, a tracker interest rate of ECB + 0.90% never applied to the mortgage account. As such I believe that the Provider has applied the correct tracker interest rate margin (ECB + 2.35%) to the Complainant's mortgage loan account from **09 July 2009** to redress the Complainant's mortgage loan account.

**(b) The Provider has not offered adequate redress and compensation to the Complainant by consequence of the Provider's failure in relation to his mortgage loan account.**

I note the impacted period extended for some six years and one month, from **July 2009** to **August 2015**. The interest overcharged by the Provider on the Complainant's mortgage loan from **July 2009**, to the date that the mortgage loan was redressed in **October 2015** was €124,374.49. This amounts to an overcharge of interest on average of €1,703.75 per month during that period on the interest only loan. The Complainant has been refunded the interest overcharged and has been paid €12,502.93 compensation by the Provider. I note that during the investigation of this complaint by this office, the Provider offered the Complainant an additional €5,000 as a goodwill gesture however this was refused by the Complainant.

The Complainant submits that the compensation offered is inadequate, on the basis that he had to maintain his mortgage repayments at a significant personal cost to himself, to include the abandonment of essential repair works to the family home, the inability to afford any family holidays, and the forced sale of his wife's investment property and the Complainant's health has suffered; he has an ongoing medical condition which "may" be due to the stress caused by the overcharge and the prolonged efforts of the Provider to avoid compensating the Complainant for the overcharge.

I note that the Complainant had a number of residential investment properties in **2007**, two of which were the subject of a first legal charge to secure the mortgage loan which is the subject of this complaint (one located in Dublin and one located in the South East of Ireland).

/Cont'd...

The purpose of the mortgage loan was to purchase a third property in Dublin. The Complaint Form and other information submitted as part of the complaint indicates that the Complainant has an income from an occupation other than from the investments he had in the residential property market.

Having considered the documentary evidence submitted, it appears to me that the Complainant has not tendered any evidence which demonstrates that he has suffered the losses or damages that he has claimed, such that additional compensation to a minimum amount of €50,000 he has sought is warranted.

In my Preliminary Decision I stated as follows:

*“The Complainant has not submitted any evidence to support his position that he had to abandon essential repair works to the family home and that he was forced to sell his wife’s investment property or any evidence to demonstrate that these events occurred during the time period when the overcharging of interest took place. There is also no evidence to link these events to the overcharge of interest.”*

In the post Preliminary Decision submission dated **7 April 2020** the Complainant’s representative submits as follows:

*“...it is noted that the Preliminary Decision states that our Client ‘failed’ to tender evidence to support his claim for the additional compensation sought for losses incurred.*

*To the best of our knowledge the Ombudsman did not request the furnishing of evidence to demonstrate such losses yet is relying on the failure to furnish same as determinative of the position.”*

I would remind the Complainant’s representative that it is not the role of this Office to request that the Complainant furnish certain evidence or information in support of his complaint. It is a matter for the Complainant himself to submit to this Office any supporting documentation or information which he believes to be relevant to his complaint.

In the post Preliminary Decision submission dated **21 April 2020** the Complainant’s representative further detailed as follows:

*“As the Ombudsman is aware the Bank has admitted to overcharging our Client since July 2009 and as a result of this overcharging our Clients wife, [Name], had to sell her property at [Address] in early 2011 for the then market price of €185,000.*

/Cont’d...

*This property is currently worth €285,000 and in addition to this capital loss our Clients wife has lost the rental income since then. At the date of sale, the monthly rental income being generated from the property was €1,050 and the related mortgage repayments were €859.77. Accordingly, it is clear that the only reason for selling the property at that stage, when the market was depressed post the property market crash, was to realise the equity of c. €30,000 to support the overall family income position. The property in question was [the Complainant's wife's] Principal Private Residence before her marriage to our Client and it was always her intention to retain the property as an investment to provide income in her retirement. The logic of selling [the Complainant's wife's] house rather than one of the two rental properties held by [the Provider] as security was due to the fact that the full net sale proceeds of the sale of one of [the Complainant's] properties would have had to have been applied in reduction of the [Provider's] loan which would not have released any much needed equity to support the overall family income position.*

*At the time [the Complainant's wife] sold [the property] she was pregnant with their [number] child which was born on [date redacted].*

*At the time the [Complainant's wife's property] was sold the interest rate applicable to our Clients [Provider] loan was 5.45% and the monthly repayments were c. €3,400. Had [the Provider] been applying a rate of ECB + 2.35% at that time this would have equated to an overall rate of 3.35% and the monthly repayments would have been c. €2,100, a saving of €1,300 which would have been sufficient to avoid our Clients wife selling [address of the Complainant's wife's investment property]."*

The Complainant has submitted into evidence a letter from an estate agent dated **15 April 2020** confirming the sale of the Complainant's wife's property in **January 2011** for the sum of €185,000 and estimating the "current value" of the property to be "in the region of €285,000". I note from the evidence furnished that the sale proceeds of €149,702.28 was used to discharge the Complainant's wife's mortgage in favour of a third party Provider and the balance of €28,473.88 was returned to the Complainant's wife. The Complainant's representative has submitted that the sum of €28,473.88 was "much needed equity to support the overall family". Whilst I have no reason whatsoever to doubt the purpose for which the sum of €28,473.88 was used, I remain of the view that it cannot be determined, from the evidence before me, that the Provider's failure on the Complainant's mortgage loan account was the primary motivation for the sale of the Complainant's wife's investment property in **January 2011**.

/Cont'd...

It remains the case that the Complainant has not furnished evidence of his claims that additional compensation is warranted for the “*inability to afford any family holidays*”, and that his health has suffered which “*may*” be due to the stress caused by the overcharge and the prolonged efforts of the Provider to avoid compensating the Complainant for the overcharge. There is also no evidence to link these events to the overcharge of interest.

It also appears to me that the claims that have been made by the Complainant with respect to both an entitlement to interest on the sum overcharged and an entitlement to compensation for expenditure foregone in the form of abandonment of essential repair works to the family home, the inability to afford any family holidays, cannot be capable of being made at the same time. Either it is the case that if the Complainant had the money available to him which he would have spent it on those items or he would have held the sum that was accruing on deposit such that he may have had some claim for interest on the sums held on deposit. In any event in the Complainant’s circumstances there is no evidence to support any of his claims.

Finally with respect to the payment towards independent legal advice the Complainant is claiming that he is entitled to be reimbursed for the advice fees which stood at €36,900 (€30,000 + VAT) as at **01 November 2018**. I note that the Complainant has had a representative on record with respect to his complaint to this office since **March 2015**. It appears from the fee note that has been submitted in evidence dated **25 September 15**, that the financial advisor representative has been advising the Complainant since **September 2010**.

In my Preliminary Decision issued to the parties on **26 February 2020** I stated the following:

*“With regard to any costs the Complainant incurred in making his complaint to this office, I would point out that while the use of solicitors, or any other professional assistance, to handle a complaint to this office, while not necessary, is acceptable, it is important to note that any costs incurred, legal or otherwise, are entirely the responsibility of the Complainant. There is no provision for awarding costs under the Financial Services and Pensions Ombudsman Act 2017.”*

In the Complainant’s representative’s post Preliminary Decision submission of **21 April 2020**, he outlines as follows:

*“We note that there is no provision for awarding such costs under the Financial Services and Pensions Ombudsman Act 2017.*

/Cont’d...



*That being the case, we propose that the Ombudsman award additional compensation to the level of fees sought as this cost would not have arisen had the Bank not overcharged our Client, which they have admitted to doing. As the Ombudsman is aware, [the Complainant's representative] has been involved as financial advisers to our Client since September 2010 and as a result of our involvement the Bank has reluctantly admitted that our Client was incorrectly denied an entitlement to a Tracker Rate for which an advisory fee of €400 (including VAT) was reimbursed. Our Client will confirm that he could not have pursued his overcharging claim against the Bank without the input he received from this firm over the past 9 years".*

For the reasons already outlined in my Preliminary Decision I will not direct compensation in respect of the costs incurred by the Complainant in engaging professional assistance to handle his complaint to this office. It remains the case that there is no provision for awarding costs to the Complainant under the *Financial Services and Pensions Ombudsman Act 2017*. Furthermore, it is not a requirement to have professional assistance to make a complaint to this office.

Despite the volume of submissions and material submitted, it remains the case that I have been furnished with no evidence that the Provider has failed to apply the correct tracker interest rate margin to the Complainant's mortgage loan account from **09 July 2009**. There is no evidence to demonstrate an entitlement to a tracker interest rate of ECB + 0.90%.

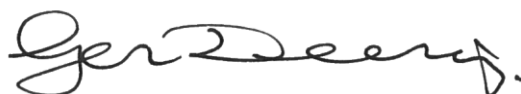
Whilst I am of the view that the interest overcharge of €124,374.49 between July 2009 and October 2015 is a significant sum, I have not been furnished with any evidence that the losses claimed by the Complainant were directly linked to the Provider's failure on his mortgage loan account.

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**

4 August 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.