



<b><u>Decision Ref:</u></b>	2021-0357
<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 Fees & charges applied (mortgage)
<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 Complainants with the Provider. The mortgage loan account which is the subject of the complaint was secured on the Complainants' private dwelling house.

The loan amount was €180,000 and the term of the loan was 23 years. The Letter of Approval which was signed by the Complainants on **28 February 2005** outlined the Loan Type as "1 Year Fixed Rate Home Loan".

The Complainants redeemed the mortgage loan account on **21 April 2009**.

**The Complainants' Case**

In **March 2005**, the Complainants' mortgage loan account was issued on a 1-year fixed rate. Upon expiry of the initial fixed rate, the Complainants opted to fix the rate on the mortgage loan account for a further period of 10 years at 4.70%.

The Complainants submit that they contacted the Provider in **January 2009** in relation to breaking early from the fixed term to avail of a variable rate. They submit that on several occasions between **January 2009** and **March 2009**, the Provider furnished them with inconsistent and inaccurate information regarding the breakage fee that would apply.

They detail that ultimately, they agreed to pay a €2,000 flat fee on **23 March 2009** in order to break from the fixed rate. They state that they *“were very aggrieved at the time that they had no other option but to pay such an exorbitant fixed breakage fee”*.

The Complainants further submit that when they sought to break early from the fixed rate in **2009**, the Provider did not offer them a tracker interest rate on the mortgage loan account at any point, even though it was evident that they were finding it difficult to meet their mortgage repayments.

The Complainants submit that they subsequently redeemed the mortgage loan account on **21 April 2009** as the mortgage repayments had become *“unsustainable”* for them.

The Complainants are of the view that they are entitled to compensation on the basis that the Provider failed to inform them that by breaking from the fixed term early, they would be unable to avail of a tracker interest rate on the scheduled maturity date of the fixed rate period.

### **The Provider’s Case**

The Provider details that it issued a Letter of Approval to the Complainants on **25 February 2005** for the sum of €180,000 over a term of 23 years, with an initial 1-year fixed rate of 2.74%. It submits that the Complainants accepted the offer on **28 February 2005** *“with the benefit of independent legal advice from their solicitor”* and the mortgage loan account was drawn down on **18 March 2005**.

The Provider submits that the Complainants’ Letter of Approval *“did not contain a contractual entitlement to a tracker interest rate at the end of the initial fixed rate period or at any other time during the period of the loan.”* It further details that the Letter of Approval did not contain an entitlement that the Complainants could exit the fixed interest period which was applied to the mortgage loan account *“other than at the end of a fixed rate period or in the event of a full or partial redemption of the loan.”* The Provider details that **General Mortgage Loan Approval Condition 5.3** outlines the interest rate option that would be applicable if the fixed interest period was broken.

The Provider states that prior to the expiration of the fixed rate period on **18 March 2006**, a rate options letter and form was issued to the Complainants. It submits that the Complainants returned the rate options form on **2 March 2006** indicating their preference for a 10-year fixed rate of 4.70%, which was applied to their mortgage loan account on **16 March 2006**.

The Provider does not accept that it provided inaccurate and inconsistent information to the Complainants in respect of the breakage fee that was to be applied in **2009**. The Provider states that the Complainants and their solicitor made various requests in relation to their mortgage loan accounts and the Provider “*responded accordingly*”.

The Provider submits that “*On each request, the Bank issued an accurate calculation of the amounts required which were either an amount to fully redeem the loans or an amount to switch to a variable rate.*” The Provider submits that the following information was requested and provided to the Complainants on the following dates;

<b>Date</b>	<b>Information</b>
<b>18 February 2009</b>	Fixed rate exit fee to clear the loan of €2,099.58
<b>23 February 2009</b>	Fixed rate exit fee to clear the loan of €2,092.18
<b>6 March 2009</b>	Fee to switch out of 10-year fixed rate of €6,048.54
<b>9 March 2009</b>	Fee to switch out of 10-year fixed rate of €6,048.54 (breakdown provided)

The Provider submits that the Complainants contacted the Provider by phone on **9 February 2009** to enquire about breaking the 10-year fixed rate period. It states that the Complainants also sent a letter to the Provider on **9 February 2009** requesting that the Provider confirm the breakage cost of exiting the fixed rates which applied to the mortgage loan account ending **8558** which is the subject of this complaint, and their other mortgage loan account ending **4160**. The Provider outlines that the Complainants detailed in their letter that “*they were in the process of thinking of reorganising their finances*” and they “*required this information regarding redemption of their loans and switching their interest rates respectively*”.

The Provider details that it sent a letter to the Complainants on **18 February 2009** confirming the redemption figure as of that date and the fixed rate exit fee in respect of the Complainants’ two mortgage loan accounts. The Provider outlines that the amount required to clear the mortgage account ending **8558** at this date was €163,456.98 inclusive of the fixed rate exit fee of €2,099.58.

The Provider submits that following a request from the Complainants, it issued a further redemption quotation to them on **23 February 2009** which detailed that the amount to clear mortgage loan account ending **8558** was €162,484.02 inclusive of the fixed rate exit fee of €2,092.18.

The Provider details that the *“reason that this redemption quote was lower than 18 February 2009 was that a scheduled monthly repayment had been made in the interim”*.

In response to the Complainants' submission that they were informed by telephone in **January/February 2009** that no breakage fee would apply if they were to exit the fixed rate, the Provider submits that it is *“not in a position to try to locate a relevant recording relating to a call in an extended period described as “January/February 2009”*. The Provider details that *“during a short period up to 6 February 2009, certain customers who called the Bank to request a fixed rate redemption were informed that no breakage fee applied. This was due to an IT issue which was rectified from 6 February 2009. Any customers who received such information by telephone prior to 6 February 2009 were informed that they must apply to the Bank in writing if they wished to break their fixed rate period.”*

The Provider states that the Complainants contacted the Provider by telephone on **24 February 2009** requesting details on how the fixed rate exit fee had been calculated.

The Provider states it issued correspondence to the Complainants on **6 March 2009** which detailed that *“the cost of the Bank unwinding its funding arrangement in respect of the Complainants' 10 year fixed rate was €6048.54.”* The Provider states that at this time *“7 years and 1 month remained in respect of the Complainants' 10 year fixed rate term”* and *“to enable the Bank to switch out of the fixed rate, the Complainants would have to reimburse the Bank in respect of the amount of €6048.54”*.

The Provider details that a further letter was issued on **9 March 2009** which confirmed that *“the fixed rate exit fee was calculated by applying the remaining loan amount by the difference between the Bank's cost of funds at the time, the fixed rate commenced and the current cost of funds multiplied by the remaining term in months divided by twelve.”* The Provider details that a computation was enclosed with the letter.

The Provider details that a fixed rate exit fee of €2,000 was *“negotiated”* by one of the Provider's branch managers and *“included a reduction of approximately €100 in respect of the quotations provided a month previously.”* The Provider submits that the Complainants lodged the sum of €2,000 to each of their mortgage accounts to discharge the fixed rate redemption fee on **20 March 2009**. The Provider details that a tracker interest rate was not offered to the Complainants at this time *“as the Complainants did not have a contractual entitlement to such an option.”*

The Provider submits that there is no evidence that the Complainants were finding their mortgage repayments to be “*unsustainable*” between **March 2005** and **January 2009**. It states that the mortgage loan account was not in default and the Complainants did not contact the Provider during this period to highlight any issues they were experiencing with their mortgage repayments during this time.

The Provider outlines that if “*the Complainants contacted the Bank, the Bank would have endeavoured to work with the Complainants to get them an appropriate solution to suit their financial circumstances.*”

The Provider states that correspondence was issued by the Complainants’ solicitors on **6 April 2009** requesting title documents for the Complainants’ property. The Provider submits that on **9 April 2009** it wrote to the Complainants’ solicitor to confirm the redemption figures for mortgage loan accounts ending **8558** and **4160**.

The Provider submits that on **20 April 2009** it received further correspondence from the Complainants’ solicitors regarding the calculated redemption figures when the mortgage payment of €928.10 was deducted. It submits that on **21 April 2009** it received a cheque from the Complainants’ solicitors to redeem the mortgage loan account ending **8558**, mortgage loan account **4160** and the Complainants’ credit card accounts.

The Provider details that on **23 April 2009** it wrote to the Complainants confirming that the mortgage loan account was now closed and enclosed a bank draft for €972.12, to reflect an overpayment that had been found after the Provider closed the account. The Provider details that on **27 April 2009** the Complainants’ solicitor issued a letter to the Provider enclosing €35.00 for the ‘Vacate of Mortgage’ deeds.

The Provider states that the mortgage loan account was redeemed on **19 April 2009**.

### **The Complaints for Adjudication**

The complaints for adjudication are as follows;

- (a)** The Provider provided the Complainants with inconsistent and inaccurate fees for breaking the fixed interest rate period between **January** and **March 2009** in relation to their mortgage loan account; and
- (b)** The Provider did not offer the Complainants a tracker interest rate on the mortgage loan account between **January** and **March 2009**.

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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 10 September 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.

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

Before dealing with the substance of the complaint, I note that the Complainants had a previous complaint with this office relating to their mortgage loan account ending **4160**. Therefore, I will not be considering the mortgage loan account ending **4160** in the adjudication of this complaint.

In order to determine the complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **January** and **March 2009**.

The **Letter of Approval** dated **25 February 2005** details as follows;

<i>"Loan Type:</i>	<i>1 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value :</i>	<i>EUR 260,000.00</i>
<i>Loan Amount :</i>	<i>EUR 180,000.00</i>
<i>Interest Rate :</i>	<i>2.74%</i>
<i>Term :</i>	<i>23 year(s)"</i>

The **Special Conditions** to the Letter of Approval detail as follows;

***"Special Conditions***

- A. *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 COMPLETION OF THE MORTGAGE."*

**General Condition 5** of the **General Mortgage Loan Approval Conditions**, states as follows;

***"CONDITIONS RELATING TO FIXED RATE LOANS.***

*5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on 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.*

*5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:*

- (a) a sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid, for the remainder of the Fixed Rate Period, or*

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*(b) a sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate Period of the loan, or part thereof, being repaid.*

*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 a variable rate loan agreement which will carry no such redemption fee."*

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."*

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **28 February 2005**. I note that 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 Condition*
- 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."*

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It is clear to me that the Letter of Approval envisaged a 1-year fixed interest rate of 2.74% and thereafter the Provider's variable rate would apply. The variable rate, in the Complainants' mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate. Rather it was a variable rate which could be adjusted by the Provider.

The Provider issued a letter to the Complainants dated **16 March 2005** as follows:

“...  
ACCOUNT NO: [ending **8558**]  
TERM : 23 YEARS MONTHLY INSTALMENT : EUR 879.83  
LOA AMOUNT : EUR 180,000.00 MONTHLY MORTGAGE : eur 0.00  
PROTECTION PREMIUM  
CURRENT INTEREST RATE : 2.74% TOTAL MONTHLY REPAYMENT : EUR 879.83

*I would like to thank you for choosing [the Provider] for your loan requirements and confirm the above details of your loan.*

...”

The **mortgage loan statement** shows that the mortgage loan was drawn down on **18 March 2005**.

It appears that a rate options letter and form was issued to the Complainants in or around **March 2006** on expiration of the initial fixed rate period. The Provider has stated that it has not retained a copy of the letter or the first page of the form issued to the Complainants in or around **March 2006**, because they “*issued to the Complainants from the Bank's automated mortgage processing system. It was not a practice of the Bank at that time to retain a copy of automated correspondence.*”

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

The Provider has submitted that it has retained the template letter and form in use by its mortgage processing system at that time. It states that “*Save for identification information relating to the Complainants' loan account, the information in the template is the same as that contained in the Complainants' letter.*”

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The Provider has furnished a copy of the template **options letter** that it submits was issued to the Complainants in or around **March 2006**, which details as follows:

“...

*I am writing to inform you that the fixed rate period on your mortgage account is due to expire on [date].*

*In keeping with the terms of your loan, you now have the option to convert your loan to a variable interest rate loan at a current rate of [redacted]. [The Provider] also offers you the opportunity of fixing your interest rate again and I enclose details of the fixed rates currently available.*

*Please complete and return the attached form before the expiry date to your local branch of [Provider's address].*

*It is important to note that if we do not receive a written instruction from you in relation to the above on or before the [redacted], your loan will automatically be switched to the current variable rate and interest will be calculated on a monthly basis. If you have any queries please contact [Provider] at [phone number].”*

The Provider has also provided in evidence a template copy of the **first page** of the **rate options form** which details:

*“I/We have duly considered my/our option(s) and hereby request [the Provider] to switch my/our account as indicated below. I/We are aware that the revised payment will be calculated on the principal outstanding for the remainder of the unexpired term.*

*I/We have read the warnings and any other information relating to housing loans printed on the reverse side of this form.*

*In the case that my/our account should be switched to a new fixed rate mortgage, I/We agree to the provisions relating to fixed rate loan as follows and printed overleaf.*

*Wherever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, [pay whichever is the lesser of the following two sums;*

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(a) a sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid, for the remainder of the Fixed rate Period, or

(b) a sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed rate with a maturity date next nearest to the end of the Fixed rate Period of the loan, of part thereof, being repaid.

I/We also agree that if our existing loan was an annuity loan that the interest will now be calculated on a monthly basis in accordance with the mortgage conditions."

The **second page** of the rate options form signed by the Complainants on **2 March 2006** was supplied in evidence and details as follows;

**"ONLY ONE OPTION MAY BE TICKED**

Re: [mortgage account ending **8558**]

			* MONTHLY REPAYMENT
			EUR
--- Variable Rate	- Currently;	3.70%	999.28
--- 1 year fixed rate	- Currently;	3.75%	1003.91
--- 2 year fixed rate	- Currently;	3.99%	1026.32
--- 3 year fixed rate	- Currently;	4.15%	1041.41
--- 5 year fixed rate	- Currently;	4.29%	1054.73
--- 7 year fixed rate	- Currently;	4.55%	1079.70
--- 10 year fixed rate	- Currently;	4.70%	1094.26

Dated            day of

...

\* The above monthly repayments are calculated, based on your current principal balance outstanding at the date of this letter and includes monthly/annual insurance of 32.46.

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*The above repayments do not include your Tax Relief at Source (TRS) deduction, which currently stands at EUR 39.85. NOTE THAT THIS DEDUCTION MAY FLUCTUATE WITH INTEREST RATE CHANGES FOLLOWING INSTRUCTIONS FROM THE REVENUE. They are only intended to be an indication of your revised monthly repayment, and may be subject to change.*

*Details of your actual repayment will be forwarded to you in due course.”*

The Complainants signed and dated the form **2 March 2006** indicating their preference for the 10-year fixed rate of 4.70%. The **mortgage loan statement** provided in evidence indicate that the 10-year fixed rate of 4.70% was applied to the Complainants' mortgage loan account on **16 March 2006**.

Having considered the mortgage loan documentation, it is my view that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the initial fixed rate period which applied from **March 2005** to **March 2006**.

It would have been a matter of commercial discretion for the Provider to offer the Complainants the option of a tracker interest rate on the mortgage loan. The Provider has summarised its policy at the time as follows;

*“...[in mid] 2006, the Bank introduced a policy of offering a tracker rate of interest rate of interest to its existing customers who were maturing from a period of a fixed rate of interest and whose contract did not specify an entitlement to be offered a tracker rate at maturity. From that date, until [mid] 2009, the Bank's rate options letter sent automatically to such customers prior to expiry if a fixed rate period included a tracker variable rate. This initiative was taken against the backdrop of the competitive mortgage market at that time. Between [mid] 2006 to [mid] 2006, while the options listed in the options letter included the offer a tracker interest rate, the letter stated that, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From the [mid] 2006 until [mid] 2009, options letters stated that, in the absence of a customer selection, the listed tracker variable rate was the rate which would be applied to the mortgage as the default interest rate.*

- *While the Bank commenced the withdrawal of its tracker mortgage interest rate offerings in [mid] 2008, the Bank continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.*

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- *After [mid] 2009, the Bank continued to offer and / or apply tracker interest rates to maturing fixed rate loans where customers had a contractual right to a tracker interest rate."*

It appears that the Complainants telephoned the Provider on **9 February 2009**. The Provider details as follows:

*"Due to a number of constraints, including the passage of time and the technical limitations of the Bank's historic telephone recording system which is no longer in use, the Bank is not in a position to search for calls over a protracted period from January 2009 to April 2009. The Bank has tried to locate a recording of a call made by the Complainants on 9 February 2009 and has failed to locate the call."*

A letter from the Complainants to the Provider dated **9 February 2009** has been provided in evidence which states:

*"...*

*We refer to the above matter and to [First Complainant's] telephone call to your customer services on today's date wherein he was instructed to write to you in order that we may obtain details of breakage costs of our fixed rate mortgages.*

*We would therefore be obliged if you would please furnish us with details of the breakage costs of breaking the fixed rate in relation to both the above mentioned mortgages.*

*We would be obliged if you would please furnish the information to us by return of post and we would further be obliged if you would please telephone us with details of the breakage costs also as soon as possible as we are currently in the process of thinking of reorganising our finances. Please note it is our intention to stay with [the Provider] at present (as we have had our mortgage(s) with your bank for many years) but a definite decision will be made in relation to our finances in due course.*

*We await hearing from you by return.*

*Ps. Alternatively the figures can be emailed to us at [email address]. Thanking you for your assistance."*

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In their letter the Complainants have detailed that during the telephone call they were instructed to write to the Provider *“in order that we may obtain details of breakage costs”*. Therefore the evidence before me does not support the Complainants’ submission that they were told by the Provider over the phone that no breakage fee would apply.

The Provider wrote to the Complainants by letter dated **18 February 2009** as follows;

*“Than[k] you for your recent request for the amount you need to pay to clear your mortgage. Here are the details.*

<i>Loan Number</i>	<i>Amount €</i>	<i>Daily Accrual</i>	<i>Inclusive of fixed rate exit fee €</i>
<i>[ending 8558]</i>	<i>163,456.98</i>	<i>20.72</i>	<i>2,099.58</i>
<i>[ending 4160]</i>	<i>26,493.88</i>	<i>3.72</i>	<i>2,166.47</i>

***Please note that the figures quoted are in accordance with the request received by [the Provider]. Please do not include vacate or accountable trust receipt fee in the amount you pay to clear the above mortgages.***

*These figures are valid for **20 days** from the date of this letter, after which these figures will be out of date. The figures quoted are for today's date, **therefore you will need to add on the daily accrual thereafter**. This fixed-rate exit fee can vary depending on changes in interest rates.*

***Please note direct debits that have not cleared on the above quoted account(s) to date are not included in the redemption figure(s) quoted above. Once the direct debit(s) have cleared the mortgage(s) will be closed off accordingly. Kindly note it can take up to 10 working days to clear direct debits.”***

A further letter issued from the Provider to the Complainants dated **23 February 2009** as follows;

*“Than[k] you for your recent request for the amount you need to pay to clear your mortgage. Here are the details.*

<i>Loan Number</i>	<i>Amount €</i>	<i>Daily Accrual</i>	<i>Inclusive of fixed rate exit fee €</i>
<i>[ending 4160]</i>	<i>26,512.49</i>	<i>3.72</i>	<i>2,166.47</i>
<i>[ending 8558]</i>	<i>162,484.02</i>	<i>20.58</i>	<i>2,092.18</i>

**Please note that the figures quoted are in accordance with the request received by [the Provider]. Please do not include vacate or accountable trust receipt fee in the amount you pay to clear the above mortgages.**

*These figures are valid for **20 days** from the date of this letter, after which these figures will be out of date. The figures quoted are for today's date, **therefore you will need to add on the daily accrual thereafter**. This fixed-rate exit fee can vary depending on changes in interest rates.*

**Please note direct debits that have not cleared on the above quoted account(s) to date are not included in the redemption figure(s) quoted above. Once the direct debit(s) have cleared the mortgage(s) will be closed off accordingly. Kindly note it can take up to 10 working days to clear direct debits."**

The Provider's internal email dated **25 February 2009** states:

*"customer is querying the exit fee which she was quoted in the redemption figures that she received recently. She is urgently requesting a breakdown of how the exit fee is calculated with the figures involved if possible. She doesn't see how the fee is so high on such a small loan. She has requested these figures ASAP as she has sent in a request to go variable however it was not honoured because of the new changes and she has had another offer from another bank."*

A further letter issued from the Provider to the Complainant dated **25 February 2009** which detailed:

*"...*

*The following is a breakdown of the redemption figure as of the 18/02/2009 on the above loan account.*

	€
<i>Principal Outstanding</i>	<i>160,687.38</i>
<i>Fixed Rate Exit Fee</i>	<i>2,099.58</i>
<i>Interest</i>	<i>582.64</i>
<i>Insurance</i>	<i>87.38</i>
<b><i>Amount Due as at 18/02/2009</i></b>	<b><i>163,456.98</i></b>
<i>..."</i>	

/Cont'd...

The Provider's internal email dated **26 February 2009** states:

*"please note penalty on redemption figure is to close the loan. Does customer want to know what penalty would be to exit fixed rate or to redeem loan?"*

A further letter issued from the Provider to the Complainants dated **6 March 2009** detailing as follows;

*"...*

*I refer to your recent query in relation to switching out of your fixed rate mortgage contract.*

*In order to break your current 10 year fixed rate contract, we require that all parties to the loan sign this form below and return to [the Provider].*

*A consequence of your wish to switch from your fixed rate is that the funding arrangements that the bank has put in place for your mortgage will have to be unwound. The cost to the bank of doing this is €6048.54, to allow us to proceed with your switch request we require payment of this amount.*

*Payment can be sent to us by cheque or can be lodged directly to your mortgage account. This quote is valid for 10 business days after which a fresh quotation must be obtained."*

The enclosed **form** detailed:

*"...*

*I/We confirm we wish to change the fixed interest rate applicable to my/our mortgage to the current variable rate applicable to my/our mortgage."*

A further letter from the Provider to the Complainants dated **9 March 2009** detailed:

*"Re: Fixed Rate funding loss recovery*

*Further to your recent enquiry regarding the calculation of your fixed rate funding loss recovery amount, I can confirm it is calculated by the following:*

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*Remaining loan balance multiplied by the difference between the cost of funds at the time you borrowed the money and the current cost of funds multiplied by the remaining term on the fixed term contract (in months) divided by 12*

*Please find enclosed a breakdown of this figure attached for your reference.*

*...”*

The enclosed **Fixed Rate penalty fee calculation** outlined the calculation of the fixed rate exit fee of €6,048.54.

The Provider outlined in its letters of **18 February 2009** and **23 February 2009** that the amount required “*to pay to clear your mortgage*” was €2,099.58 and €2,092.18. In its letter of **6 March 2009** the Provider outlined that “*to switch from your fixed rate*” the Complainants would have to pay a fee of €6,048.54.

It appears that some confusion arose because the figures outlined in the Provider’s correspondence of **18 February** and **23 February 2009** were payable if the Complainants redeemed the mortgage loan account, while the figure of €6,048.54 outlined in its correspondence of **6 March** and **9 March 2009** was a “*Fixed Rate penalty fee calculation*” to switch from the fixed rate to the variable rate. It is disappointing that the distinction was not more clearly explained in the Provider’s correspondence.

The Provider’s internal communication dated **19 March 2009** details:

*“Just following up on this case – [Redacted] phoned me yesterday to confirm that we would accept the lower fixed rate exit fees on both accounts*

*...*

*Customers are anxious to finalise details asap”*

The Provider’s internal memo dated **20 March 2009** details:

*“Please find attached signed request from [the Complainants] to convert both of the above mortgage loans from existing fixed rates to a variable rate.*

*[The Provider’s employee] and [the Provider’s employee] have agreed to reduced conversion fee of €4000.00 (€2000.00 for each of the loans) to cover the cost of converting both of these loans from fixed to variable rates. I have attached a copy of an email from [Provider’s employee] dated 20/3/09 confirming approval to convert loans to a flat penalty of €4000.00.*

/Cont’d...

*[The Complainants] have lodged €2000.00 to each of these mortgage loans to cover the cost of this conversion request.*

*Can you please arrange for the conversion to be put in place.”*

An email between two of the Provider’s employees dated **20 March 2009** details as follows;

*“I refer to the above named, your conversation with [Redacted] and our subsequent conversations and the attached e-mail. In that regard please note that I am happy to approve a flat penalty fee of €4,000 for this client as discussed. This reduction on the original quote is given on the basis of inordinate delays experienced by client in getting this matter resolved.”*

The Complainants sent a letter to the Provider dated **20 March 2009** as follows;

*“Re – Mortgage loans [ending **8558**] & [ending **4160**]*

*Dear Sirs,*

*We wish to revert both of our above mortgage loans from their present fixed rates to a variable rate.*

*We have today lodged the agreed fixed rate exit fees to both of our mortgage loans at [Provider’s branch].*

*The exit fees have been agreed with [Provider’s branch] as per agreement with [branch manager].”*

The enclosed **form** signed by the Complainants on **20 March 2009** detailed:

*“...*

*I/We confirm we wish to change the fixed interest rate applicable to my/our mortgage to the current variable rate applicable to my/our mortgage.”*

The **mortgage loan statements** show that a “**FIXED RATE EXIT FEE**” of €2,000.00 was paid on **26 March 2009** and that the interest rate was switched to the variable rate of 3.55% on **3 April 2009**.

/Cont’d...

**Condition 5(3)** of the **General Mortgage Loan Approval Conditions** details that if the “*repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period*” the borrower must pay a fee to the Provider. The method by which this fee is to be calculated is detailed in **Condition 5(3)**. It is clear that in the event that the Complainants decided to break from the contracted 10-year fixed interest rate period early, the Complainants’ mortgage loan account would convert to a variable interest rate loan or an alternative fixed interest rate loan upon payment of the appropriate breakage costs.

I note that the Complainants engaged in a series of communications with the Provider between **January** and **March of 2009** in relation to the level of breakage fees required to be paid. I acknowledge that these communications, as detailed above, suggest some confusion as to the appropriate breakage fee to be applied, depending on whether the Complainants intended to close the mortgage loan or to break away from the fixed interest rate period early to avail of another interest rate.

The evidence shows that by means of a resolution, the Provider decided to offer the Complainants a reduced breakage fee of €2,000 to move from the fixed interest rate prior to the agreed expiry date and avail of a variable interest rate. I note that the Complainants were in agreement with this approach and subsequently paid the relevant breakage cost and a product switch took place on **3 April 2009** in respect of the Complainants’ mortgage loan account.

Having considered the Complainants’ loan documentation, it is clear that the Loan Offer Letter provided for a fixed interest rate to be applied to the Complainants’ mortgage loan account for 1 year and thereafter, the application of a variable rate. **Condition 5.4** of the **General Mortgage Loan Approval Conditions** outlines that the Provider and the Complainants “*shall each have the option at the end of each fixed period to convert to a variable rate loan agreement will carry no such redemption fee.*” It appears to me that **Condition 5.4** does not apply in the circumstances of a break in a fixed interest rate period.

I note there is no specific provision in the conditions applicable to the Complainants’ mortgage loan that sets out what interest rates would or should be made available to the Complainants in the event of a break of a fixed interest rate period. As such, it appears to me that when the Complainants contacted the Provider in **January/February 2009**, there was no contractual obligation on the Provider to offer the Complainants a tracker interest rate at that time. The Complainants were seeking to vary the terms of the mortgage loan during the 10-year period of the fixed interest rate, and it was a matter for the Provider to decide firstly whether it wished to accede to that request and if so, secondly what interest rate products it wished to offer to the Complainants. In the circumstances, it appears that the Provider elected to offer a variable interest rate, and the Complainants accepted this offer and instructed that a variable rate be applied by letter dated **20 March 2009**.

/Cont’d...

There was no obligation on the part of the Provider to offer the Complainants a tracker rate on the Complainants' mortgage loan when the Complainant broke from their fixed rate in **March 2009**.

In any event, it does not appear from the evidence before me that Complainants requested that the Provider apply a tracker interest rate to their mortgage loan either in **2009** or at any other point in time. Even if they had, there was no obligation on the Provider to accede to such a request. Nor was there any obligation on the Provider to contact the Complainants at any stage to offer a tracker interest rate to the Complainants on their mortgage loan.

Nonetheless, if the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, the Complainants could have contacted the Provider to make such a request.

It would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan. It was entirely within the Provider's rights and commercial discretion whether to accede to that request, if it was made. There is no evidence before me which suggests that the Complainants ever made such a request.

A letter was issued from the Complainants' solicitors to the Provider on **6 April 2009** detailing as follows;

“ ...

*We refer to the above matter.*

*We would be obliged if you would please furnish us with redemption figures in relation to the above two mortgage accounts up to and including the 20<sup>th</sup> April next.*

*In relation to Mortgage account number [ending 8558], we note that the next mortgage payment due is on the 18<sup>th</sup> April next. Please arrange to take this payment into account when furnishing us with redemption figures as at the 20<sup>th</sup> April next i.e. please furnish us with the exact figure due as at the 20<sup>th</sup> April (this being the sum after the mortgage payment of the 18<sup>th</sup> April next has come off the loan).*

/Cont'd...

*Please also arrange to furnish us with daily accrual interest which would be payable from the 21<sup>st</sup> April next on both loans.*

*We await hearing from you with redemption figures as set out above by return of fax.”*

A letter issued from the Provider to the Complainants dated **9 April 2009** detailing as follows;

*“Than[k] you for your recent request for the amount you need to pay to clear your mortgage. Here are the details.*

<i>Loan Number</i>	<i>Amount €</i>	<i>Daily Accrual</i>	<i>Inclusive of fixed rate exit fee €</i>
<i>[ending <b>8558</b>]</i>	<i>160,136.24</i>	<i>15.55</i>	<i>0.00</i>
<i>[ending <b>4160</b>]</i>	<i>24,142.53</i>	<i>2.35</i>	<i>0.00</i>

***Please note that the figures quoted are in accordance with the request received by [the Provider]. Please do not include vacate or accountable trust receipt fee in the amount you pay to clear the above mortgages.***

*These figures are valid for **20 days** from the date of this letter, after which these figures will be out of date. The figures quoted are for today's date, **therefore you will need to add on the daily accrual thereafter**. This fixed-rate exit fee can vary depending on changes in interest rates.*

***You can pay off these mortgage(s) at any branch.***

***Please note direct debits that have not cleared on the above quoted account(s) to date are not included in the redemption figure(s) quoted above. Once the direct debit(s) have cleared the mortgage(s) will be closed off accordingly. Kindly note it can take up to 10 working days to clear direct debits.”***

A letter issued from the Complainants' solicitors to the Provider dated **21 April 2009** enclosing a cheque to clear the Complainants' mortgage loan accounts ending **8558** and **4160** in addition to the Complainants' credit card accounts. The **mortgage loan statements** indicate that a redemption payment was made to the Complainants' mortgage loan account on **21 April 2009**.

/Cont'd...

As outlined above, the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan account and accordingly there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account in **March 2009** or at any other time. I note that the Provider did not have any policy on offering tracker interest rates to customers, on demand, where there was no contractual right to a tracker interest rate in the underlying mortgage loan documentation.

The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants. The decision to redeem the mortgage loan in **April 2009** was one made by the Complainants of their own volition.

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

### **Conclusion**

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

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



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

7 October 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.