



<b><u>Decision Ref:</u></b>	2021-0358
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's private dwelling home.

The loan amount was €350,000 and the term was 25 years. The Letter of Offer of Mortgage Loan which was signed on **07 December 2007** outlined that the interest rate applicable was a variable interest rate of 5.1%.

**The Complainant's Case**

The Complainant submits that when he applied for the mortgage loan, he was advised by an employee of the Provider that it was *"more straightforward to start with a variable rate and a tracker rate could be applied once the construction was complete"*. He submits that *"In hindsight, that was for the benefit of the Bank and not for me. I would have been better advised to go on a Tracker. The bank have clearly acknowledged that I have an entitlement to one, but are now failing in their duty to provide one at the correct rate."*

The Complainant details that under **Clause 3.2** of his mortgage agreement, he is entitled to a tracker interest rate option on the expiry of *"any fixed rate period"*.

The Complainant details that the construction of his property was completed in **March 2009**, by which time tracker rates had been withdrawn for new customers by the Provider. He states that *“Media news of the discontinuation of Tracker rates in [late] 2008 led me to believe that there was no longer a possibility of me having a Tracker Rate applied to my Mortgage.”* He submits that at that time the Provider should have *“...informed me that a tracker option was still available to me on completion of a minimum fixed rate period”*. He queries *“Does the [Provider] seriously want to suggest that I would have ignored a beneficial Tracker Rate, had I known that it was still a possible option and the prevailing rate at that time was with a margin of 1.0% to 1.3%?”*

The Complainant submits that this *“actual prevailing rate”* continued until **December 2013**, *“at which point the punitive rate (margin 4.91%) came in to effect to the detriment of clause 3.2 holders only. This lack of information was obviously a policy within [the Provider] ... I still contend that the “current prevailing” rate is spurious and a cynical exercise to deny the benefit of Clause 3.2 to the Mortgage holder.”*

The Complainant submits that *“When [the Provider] stopped offering a Tracker Mortgage (by their own admission) to new customers in 2008, this did not mean that all Tracker policies ceased to exist. It simply meant that no new mortgage offers would have a tracker option offered. It also meant that the Prevailing Rate was the rate at the time when the last Tracker Mortgages were offered. And it also meant that Clause 3.2 could not be simply ignored if I wished to avail of it at the end of a fixed rate period.”* He states that the Provider has *“attempted to circumvent”* Clause 3.2 by *“declaring a “commercial decision to reintroduce a prevailing tracker interest rate”*. He submits that *“This is flawed on 2 counts. Firstly, it was only available to a specific customer, namely one with Clause 3.2 who was coming off a fixed term, by the Banks own admission and not available to the general public. So, it was not a Tracker Mortgage in the true sense. Secondly, the rate was set so high as to never be a viable option, in any commercial way for the Mortgage holder. It was only a cynical exercise to deny the benefit of that clause to the mortgage holder.”* The Complainant contends that *“Plucking a figure out of the air (which happens to be more expensive than any Fixed or Variable Option) is simply a means of denying”* the Complainant the tracker interest rate option in accordance with Clause 3.2 of his mortgage loan agreement.

The Complainant outlines that on the expiry of the 5-year fixed interest rate period in **February 2015**, the Provider issued a rate options letter to him which did not contain the option of a tracker interest rate. He details that he subsequently received another rate options letter which contained the *“punitive”* tracker interest rate of ECB + 4.91%. The Complainant outlines that he chose a three-year fixed interest rate.

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The Complainant details that he wrote a letter of complaint to the Provider regarding the tracker interest rate offered to him and the Provider informed him that the tracker interest rate available in **February 2015** was ECB + 4.91%, and that the current tracker rate available in **June 2016**, was ECB + 3.67%.

The Complainant outlines that the Provider indicated that it withdrew tracker interest rates from the market in **late 2008**. The Complainant queries how the margins could still vary if tracker interest rates had been withdrawn. He contends that the Provider should have offered him the tracker interest rate margin which prevailed at the time of the discontinuance of the tracker rate product in **late 2008**, or the tracker rate margin that was available when the Complainant "*commenced*" his mortgage loan account with the Provider.

The Complainant does not accept the Provider's submission that "*Whether a prevailing Tracker interest rate is offered to the general public has no bearing as to whether or not its application causes a mortgage to be a Tracker Mortgage*". He states that "*What it does have a bearing on, is the question of whether it is "a prevailing tracker rate" or just simply a cynically contrived punitive rate of no benefit to the customer. If [the Provider] had not withdrawn Tracker Mortgages for new customers and simply raised the rate, then my complaint with regards to "the prevailing rate" would not be valid. But, ceasing to offer the product and then reintroducing a bogus punitive rate, only available to a very specific Mortgage type, is clearly done with one intended outcome, namely that myself and others in a similar situation would be deprived of our entitlement.*"

The Complainant details that in **July 2018**, the Central Bank published a document titled "*Behaviour and Culture of the Irish Retail Banks*" which detailed under **Clause 7.3** that individuals working in regulated financial institutions must act in the best interests of the customers and treat them fairly. The Complainant contends that that the Provider has not acted in such a manner in that the Provider has "*clearly acknowledged*" that the Complainant is entitled to a tracker interest rate but has failed to offer him the correct margin.

The Complainant submits that it is his contention that the Provider's goodwill offer of €250.00 is a "*cynical exercise by the bank, namely to give the appearance of benevolence towards customers*". He further states that the error for which the Provider has offered this goodwill gesture of €250.00 has "*nothing to do*" with his current complaint.

The Complainant is seeking the following;

- (a) The *correct* tracker interest rate to be applied to his mortgage loan account and backdated to **February 2015**; and
- (b) Reimbursement for the interest overpaid since **February 2015**, to be credited to the Complainant's current account.

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

The Provider submits that it issued the Complainant with a **Letter of Offer of Mortgage Loan** dated **03 December 2007**, which was signed and accepted by the Complainant, and witnessed by his solicitor, on **07 December 2007**. The Provider details that at this time fixed rates, variable rates and tracker rates were available for new loans, and the Complainant selected the standard variable rate of 5.10%. The Provider details that in between the execution of the mortgage loan documentation, and the first tranche payment of the mortgage loan account, "*there was a global rate change of the Bank's SVR to 5.25%*", and therefore the first repayment made on **29 January 2008** was on the standard variable rate of 5.25% in accordance with the executed Letter of Offer of Mortgage Loan.

The Provider details that **Part 4, Condition 3.2** of the terms and conditions provided that at the end of a fixed rate period, the Complainant could choose from a fixed rate, a variable rate or a tracker rate "*then prevailing and appropriate to his mortgage loan*". The Provider submits that the term "*then prevailing rates*" means the interest rates "*then current and available on the day that the Fixed interest rate period ends*". The Provider submits that prevailing rates do not refer to historical rates which might have been available at the start of their original fixed rate period or start of the mortgage.

The Provider states that it is satisfied that the documentation for the Complainant's mortgage loan account is sufficiently clear and transparent as to the meaning of "*then prevailing rates appropriate to the mortgage loan*". It states that the mortgage account was never on a tracker rate and as such, no tracker margin was referenced in the loan offer. It states that the terms and conditions of the mortgage loan do not expressly state that the Provider is required to offer a tracker interest rate at any particular margin on the expiry of a fixed interest rate period. It states that Condition 3.2 refers to the customer "*choosing*" between the Provider's rates which are "*then prevailing*".

The Provider states that in **late 2008** it withdrew tracker interest rates for new customers and existing customers whose mortgages were not already on a tracker rate, because it had become apparent that *“changes in the Bank’s cost of funding”* were no longer related to the European Central Bank rate and tracker rates *“no longer made economic sense as any Tracker rate it would have offered would have been prohibitively expensive”*. It states that if a prevailing tracker interest rate existed between **late 2008 and late 2013**, it would have been higher than the Provider’s prevailing variable rates.

The Provider submits that on **05 March 2010**, the Complainant selected a 5-year fixed interest rate of 3.86% for his mortgage loan account which was applied on **10 March 2010**.

The Provider submits that in **2013** *“following feedback from its customers”*, it made *“a commercial decision to reintroduce a prevailing Tracker interest rate as an available product for customers whose mortgage loan operated on the Terms and Conditions applicable to the Complainants Mortgage Loan Account ... and who were rolling off a Fixed interest rate period from that point in time onwards. This particular Tracker interest rate was set following a review of mortgage costs including funding costs.”*

The Provider details that prior to the expiry of the fixed rate period on **10 March 2015**, it issued a **Fixed Rate Expiry Notification Letter** dated **30 January 2015** to the Complainant which contained fixed and variable rate options then prevailing for the Complainant to choose from. The Provider details that the letter also stated that should the Complainant not choose a new rate, the standard variable rate would be applied to the mortgage loan account. It submits that it issued a further letter to the Complainant dated **03 February 2015** detailing that there was also a prevailing tracker interest rate of 4.96% (ECB + 4.91%) available to the Complainant as an option to consider at the end of the fixed rate period. The Provider outlines that this letter issued separately as this was *“the particular process in place for all customers”*.

The Provider submits that *“By way of example, if the Complainant drew down on a specific Tracker Rate (ECB plus a specific margin) but did not move to any other rate, then the applicable rate is the contractual rate he drew down on and as specified in the Letter of Offer. This is because he did not move to a fixed rate. However, the Complainant is entitled to choose from the then prevailing rates on offer, when a fixed rate expires. This is the distinct factual circumstance in the Complainant’s particular case. There was no contractual entitlement to a tracker rate at draw down or a tracker rate in the future, at the historical rate (and margin) that may have been available at drawdown. Rather, what was agreed to be provided was that, on the expiry of any fixed rate period, the Complainant could choose from the then prevailing rates on offer by the Bank”*.

The Provider details that this is what it offered to the Complainant by letters dated **30 January 2015** and **03 February 2015**.

The Provider submits that following receipt of these letters, the Complainant submitted two written instructions. It states that the first instruction dated **10 February 2015** instructed the Provider to apply a tracker interest rate to the mortgage loan account, and the second dated **24 February 2015** "*revised the initial instruction*" and requested a fixed interest rate for a period of three years.

The Provider states that the Complainant's second instruction was followed and a three-year fixed rate of 3.80% was applied on the mortgage loan account on **12 March 2015**.

The Provider submits that while it "*considers the manner in which it sets the price of any of its specific products at any particular time to be commercially sensitive*", it may consider a number of factors when setting the then prevailing tracker interest rate, including the cost of funding, capital requirements, loan default risk, mortgage operational costs and market competition. It states that "*Variations in any of the above listed factors could result in changes to the Bank's then prevailing Tracker rate*".

The Provider outlines that in **February 2015** the tracker interest rate of 4.96% comprised the then prevailing ECB interest rate (0.05%) plus the then prevailing margin as set by the Provider (4.91%). It details that the Provider's "*prevailing margin is reviewed on an on-going basis and determined at a point in time*". It states that "*The Bank reviews all interest rates on an on-going basis and determines the appropriate prevailing margin at a given date in light of the relevant commercial factors. The ECB rate is also subject to change, although the Bank has no input or control in relation to those changes.*" The Provider further states that there were no individual factors relevant specifically to the Complainant's mortgage account taken into account by the Provider in setting the tracker margin at that time. It states that the relevant category of rate for his loan was the PDH Rate because the loan was secured on a private dwelling house.

The Provider submits that the Complainant has not provided "*any reasoning or evidence*" in support of his statement that the tracker rate of ECB + 4.91% is "*punitive*" other than to state that it is higher than the tracker rates offered historically to customers of the Provider before **late 2008**. It states that the Complainant was not contractually entitled to a specific or historic tracker interest rate or margin, but was entitled to choose from the various prevailing rates then offered by the Provider at the point in time when the fixed rate expired. The Provider maintains that it has at no time exercised its discretion capriciously or acted in any way which could be described as "*punitive*".

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The Provider submits that given the “inherent additional risk associated with a Tracker rate which maintains a margin once the rate is applied to the mortgage versus SVR which the bank can reprice, Tracker rates continue to be priced at a rate more expensive than SVR. This is not a punitive measure, it is the commercial setting of rates based on cost and other factors as outlined above.” It states that in **February 2015** the standard variable rate was 4.15% and the prevailing PDH tracker rate was 4.96%. It states that in **2019**, tracker rates continue to be priced at a rate more expensive than standard variable rates (3.32% PDH tracker rate versus 3.15% PDH standard variable rate).

The Provider submits that the standard variable interest rate of 4.15% was applied to the mortgage loan account from **10 March 2015** until **12 March 2015** when it completed the Complainant’s request to apply a fixed interest rate of 3.8% for a period of three years. The Provider submits that it has recast the Complainant’s account with the effect of the fixed interest rate taking effect on **10 March 2015**. The Provider submits that the recast resulted in a refund of €8.48 being refunded to the Complainant. The Provider apologises for the oversight and offers the Complainant €250.00 as a gesture of goodwill.

### **The Complaints for Adjudication**

The complaints for adjudication are the following;

- (a) The *correct* tracker interest rate to be applied to his mortgage loan account and backdated to **February 2015**, and
- (b) Reimbursement for the interest overpaid since **February 2015**, to be credited to the Complainant’s current 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.

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

A Preliminary Decision was issued to the parties on 14 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.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation. It is also relevant to set out the details of certain interactions between the Provider and the Complainant between **2007** and **2015**.

I note that the Complainant has submitted that he was advised by an employee of the Provider that it was "*more straightforward to start with a variable rate and a tracker rate could be applied*" once the construction of the property was complete. No evidence has been provided to me of any discussions or dialogue between the Provider and the Complainant in the Provider's branch at this time.

It appears from the Complainant's submissions that if he had not received such advice from the Provider's employee, he would have proceeded to make an application for a tracker interest rate loan from the outset. I am of the view that it was reasonable for the Complainant to believe that he was receiving advice from the Provider's representative at that time. However, given that the representative was a person employed by the Provider and selling the Provider's mortgage products, I am of the view that the Complainant could not expect that any advice or information given to him by the Provider was independent. If the Complainant wanted independent advice about rates available in the market or the market generally, the Complainant should have been aware that he could only get that advice from an independent third party advisor.

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Furthermore, I do not see why a tracker mortgage would be any more or less straightforward simply because the construction was not completed.

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 his loan application. There is also nothing to suggest that if a request was submitted by the Complainant seeking the application of a tracker interest rate to the mortgage loan that this would have resulted in the Provider acceding to those requests and issuing a Loan Offer Letter on that basis.

It is important for the Complainant to understand that there was no obligation on the Provider, contractual or otherwise, to give the Complainant the option of a tracker interest rate on his mortgage loans when he made his application to the Provider in or around **December 2007**.

If the Complainant wished to pursue the potential option of applying for a tracker interest rate mortgage loan at the time in **December 2007**, the Complainant could have indicated to the Provider that he had a preference for a tracker rate. It does not appear however that the Complainant did so. The Provider offered the Complainant a variable interest rate, which was accepted by the Complainant, having acknowledged that the terms and conditions of the mortgage loan was explained to him.

The **Letter of Offer of Mortgage Loan** dated **03 December 2007** details as follows;

**"IMPORTANT INFORMATION AS AT 03 December 2007**

- |   |                            |
|---|----------------------------|
| 1. <i>Amount of Credit Advanced</i>       | <i>€350,000.00</i>         |
| 2. <i>Type of Loan</i>                    | <i>Annuity</i>             |
| 3. <i>Period of Agreement</i>             | <i>25 years/300 months</i> |
| 4. <i>Number of Repayment Instalments</i> | <i>240</i>                 |

...

***LEGAL ADVICE SHOULD BE TAKEN BEFORE THIS DOCUMENT IS SIGNED."***

**PART 1 - Particulars of Offer of Mortgage Loan** details as follows:

- |                             |                            |
|-----------------------------|----------------------------|
| <i>"Offer Date</i>          | <i>03 December 2007</i>    |
| ...                         |                            |
| <i>Mortgage Loan Amount</i> | <i>€350,000.00</i>         |
| <i>Loan Term</i>            | <i>25 years/300 months</i> |

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*Repayment Details as at date of Offer*

	<b>Term</b>	<b>Loan Type</b>	<b>Interest Rate Description</b>	<b>Rate</b>	<b>Margin</b>	<b>Net Rate</b>	<b>Amount of Each Instalment</b>
1	25 Years	Variable Annuity	Variable Rate	5.1%	0%	5.1%	€2,063.04

The relevant sections of **PART 4 - General Terms and Conditions of the Offer of Mortgage Loan** detail as follows;

**“3. INTEREST RATES**

**3.1 RATE NOT GUARANTEED TO DRAWDOWN**

*Due to fluctuations in interest rates the Bank does not warrant or guarantee that the rate so specified in the Particulars will apply on drawdown.*

- (a) In the case of an offer at a variable rate or tracker rate, the initial rate which will apply to the Mortgage Loan will be the rate prevailing at the date of drawdown.*
- (b) In the case of an offer at a fixed interest rate, the appropriate fixed rate which prevails at date of drawdown will apply to the Mortgage Loan if this is different from the rate specified in the Particulars.*

*The Customer may accept this rate or, within 21 days of drawdown, opt to switch to the variable or tracker rates prevailing at the time without incurring any early breakage cost under Clause 3.3.*

**3.2 FURTHER FIXED INTEREST RATE OPTIONS/CHOICE**

*At the end of any fixed interest rate period, the Customer may choose between:*

- (a) a further fixed interest rate period, or*
- (b) conversion to a variable interest rate Mortgage Loan, or*
- (c) conversion to a tracker interest rate Mortgage Loan,*

*at the Bank's then prevailing rates appropriate to the Mortgage Loan. If the Customer does not exercise this choice, then the Mortgage Loan will automatically convert to a variable interest rate Mortgage Loan.*

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3.3 FIXED INTEREST RATE EARLY BREAKAGE COSTS PAYABLE BY CUSTOMER

The Customer will be entitled, subject to prior advice to the Bank, to withdraw from a fixed interest rate agreement either:

- a) By repayment in full of the mortgage loan and interest accrued on the date of repayment or
- b) by conversion to a variable interest rate or another fixed interest rate, or
- c) by making a partial out-of-course payment.

In any of the foregoing events, subject to the provisions of Section 121(2) of the Consumer Credit Act, 1995, an early breakage cost is usually payable to the Bank. The early breakage costs shall be fairly and conclusively determined by the Bank on the basis of the formula contained in Part 5.

3.4 FIXED INTEREST RATE MORTGAGE LOAN

In the case of a fixed interest rate Mortgage Loan, the interest rate which prevails at the date of drawdown, and will be fixed for the period of time stated in the Particulars, subject to these conditions.

3.5 VARIABLE INTEREST RATE MORTGAGE LOAN

In the case of a variable interest rate Mortgage Loan the interest rate applicable, at any time, will vary according to the prevailing rates set generally by the Bank from time to time, subject to these conditions.”

**PART 5 - Statutory Notices and Other Notices details:**

**“WARNING**

...

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

Note: The above notice in respect of adjustments to payment rates will not apply during any period when the Mortgage Loan is at a fixed interest rate.

...”

I note that **PART 7 - Acceptance and Consent** was signed by the Complainant and witnessed by his solicitor on **7 December 2007** on the following terms:

*"I/We accept the conditions of this Offer and agree to mortgage the property to the Lenders as Security for the Mortgage Loan.*

...

*I/We acknowledge and accept that the rate of interest which applies to the Mortgage loan may be different from the rate shown in the Offer, and the case of fixed interest rates, the rate which prevails at the date of drawdown is the rate which will apply for the period of time stated in the Particulars.*

*I/We hereby confirm, that I/we have read the within Terms and Conditions attaching to this Offer, and acknowledge that I/we have receive a copy thereof"*

It is clear to me that the Letter of Offer of Mortgage Loan envisaged a variable interest rate. The variable rate in this case 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 purpose behind **General Condition 3.2** is to provide for the rate of interest that will apply to the loan agreement at the end of a fixed rate period. The clause provides for a choice of options to be made available to the borrower in this regard between a further fixed rate, a variable rate, or a tracker rate. Condition 3.2 makes clear that once the product has been selected, the interest rate will be the one "*prevailing*" at the time at which the fixed interest rate period ends, and not at some other time (such as at the date the mortgage agreement was entered into).

It is important for the Complainant to understand that in order for him to have a contractual right to a specific tracker interest rate margin on his mortgage loan at the end of a fixed interest rate period, that right would need to be specifically outlined in the mortgage loan documentation. However no such right was contained in the **Letter of Offer** which was signed by the Complainant on **7 December 2007**.

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 provide for a tracker interest rate from the date of drawdown or if he was dissatisfied with the interest rate that would apply at the end of a interest rate period.

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However the Complainant accepted the Letter of Approval on **7 December 2007**, having confirmed that the terms and conditions of the Loan Offer had been explained to him by his solicitor.

The Provider wrote to the Complainant in relation to the first tranche payment of €56,100.00 on **30 January 2008**. The letter stated as follows;

“...

*Mortgage Loan Account Number: [ending 8078]*

*Loan Amount: €350,000.00*

*I refer to your Mortgage Loan and advise that a cheque for €56,100.00 on the 29th January 2007 in respect of tranche payment has been debited to your account today (total now drawn €56,100.00) the details of which are:-*

***-Term is 25 years/300 months; Final Payment due on 31/01/2033.***

***-Interest rate, Variable Rate, is 5.25% (APR 5.366%) including interest adjustment of 0.00%***

***-Monthly repayments, based on the above interest rate, of €335.61 commence on 29/02/2008.***

***-Interest charge (estimated) to 31<sup>st</sup> December 2008 is €2,569.40***

*A variable interest rate moves in line with the general movement of interest rates and changes will be published in the daily press and on notices in [Provider] Branches. Your repayments will be adjusted in line with these changes. Interest, calculated on the daily outstanding balance of your mortgage loan, is debited to your mortgage loan quarterly, in arrears, on/about 15<sup>th</sup> of each month on “Interest Only” Mortgage Loans. Your account statement and interest certificate for the tax year to the 31<sup>st</sup> of December will be furnished to you in January. We acknowledge receipt of your completed direct debit mandate.*

*You may fix your interest rate and repayment at any time during the life-time of you mortgage loan. Details will always be available from your [Provider] Branch. You may also fix the amount of your repayment, without charge, subject to review on an annual basis, without fixing the interest rate.”*

The Provider wrote to the Complainant on **1 May 2008** in relation to the second tranche payment of €56,100.00 as follows;

“...

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*Mortgage Loan Account Number: [ending 8078]*

*Loan Amount: €350,000.00*

*I refer to your Mortgage Loan and advise that a cheque for €56,100.00 on the 29th January 2007 in respect of tranche payment has been debited to your account today. We acknowledge receipt of your completed direct debit mandate.*

*The terms of your mortgage loan, as already advised, are unchanged, with the exception of the next repayment which has been revised to take into account the increased balance on your account. Interest, calculated on the daily outstanding balance of your mortgage loan, is debited to your mortgage loan quarterly in arrears, on/about 15<sup>th</sup> March, June, September and December on Annuity Mortgage Loans and monthly in arrears, on/about 15 of each month on "Interest Only" Mortgage Loans."*

The Provider has submitted that in **late 2008** it withdrew tracker interest rates for new customers and existing customers whose mortgages were not already on a tracker rate, on the basis that tracker rates "*no longer made economic sense as any Tracker rate it would have offered would have been prohibitively expensive*". It states that if a prevailing tracker interest rate existed between **late 2008 and late 2013**, it would have been higher than the Provider's prevailing variable rates.

The Complainant has submitted that "*Media news of the discontinuation of Tracker rates in [late] 2008 led me to believe that there was no longer a possibility of me having a Tracker Rate applied to my Mortgage*". He suggests the Provider should have informed him at the time that "*...a tracker option was still available to me on completion of a minimum fixed rate period*".

The Complainant has further submitted that the construction of his property was completed in **March 2009**.

I do not accept that there was any obligation on the Provider to contact the Complainant either in **late 2008** when it withdrew tracker rates, or in **March 2009** when the construction of the property was completed, to advise the Complainant that a tracker interest rate was still available to him on the completion of a fixed interest rate period. At that time the Complainant's mortgage loan account remained on a variable interest rate.

The Complainant wrote to the Provider to request a fixed interest rate for the mortgage loan account on **4 March 2010**, as follows;

*"Re account ...8078*

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*I request that the above account be changed from a variable rate to a **five year fixed rate** account (quoted 3.86%), with immediate effect”*

The Provider responded to the Complainant by letter dated **10 March 2010** as follows;

*“Mortgage Loan Account Number: [ending 8078]*

*With reference to your recent request, I confirm that a fixed interest rate of 3.86% (including the existing interest adjustment of 0.00%) will apply to your mortgage loan from 10 March 2010 for **a period of 5 years**. The Monthly repayment for the period of the fixed interest rate will be €1,828.00 and will be revised on its expiry in accordance with the rate then applicable.*

*You will be entitled, with the Bank’s prior consent, to withdraw from the fixed rate either by repayment in full of the Mortgage Loan and interest accrued to the date of repayment or by conversion to one of the variable interest rates then prevailing. In either of the foregoing events, or in the event of your wishing to make a partial out-of-course payment, **a prepayment/conversion premium may be payable to the Bank sufficient to compensate the Bank for the cost of replacement.***

*The premium will be computed on the sum of the balance outstanding as at the date of repayment/conversion and interest accrued to that date or in the event of a partial repayment by reference to the amount paid.”*

The Provider has submitted that in **2013** it made a commercial decision to reintroduce a prevailing tracker interest rate for customers whose mortgage loan operated on the terms and conditions applicable to the mortgage loan account that is the subject of this complaint.

The Provider wrote to the Complainant on **30 January 2015** as follows;

*“I am writing to let you know that the fixed rate period on your Home Mortgage Loan Account above expires on 10<sup>th</sup> March 2015. As a result of this, I would be grateful if you could complete the enclosed form detailing the new mortgage rate you wish to avail of and return to us at the above address. Below is a sample of the rates currently on offer from [the Provider]. If you wish to choose one of our Loan To Value (LTV) rates and never availed of one before, you will need to provide us with an up to date valuation report completed by an approved valuer from the [Provider’s] Mortgage Valuer’s Panel.*

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In absence of your instruction, [Provider's] Default Variable Rollover rate of 4.15%, APR 4.215%, with mortgage repayments of €1,870.12, will be applied. With agreement, this may be changed to another rate at a later stage.

<u>Rate Description</u>	<u>%</u>	<u>APR %</u>	<u>Repayment</u>
PDH LTV Var <=50%	3.85	3.906	€1,826.63
PDH LTV Var >50 % <=80%	4.05	4.112	€1,855.56
PDH LTV Var >80%	4.25	4.318	€1,884.74
1 Year Fixed	4.15	4.215	€1,870.12
2 Year Fixed	3.8	4.130	€1,819.43
3 Year Fixed	3.8	4.093	€1,819.43
5 Year Fixed	3.9	4.082	€1,833.83

Important Information

PDH means, "Private Dwelling House". LTV means, "Loan to Value" i.e the loan amount as a percentage of the value of the property. To avail of a "LTV Variable" rate, an up-to-date valuation report must be provided to the Bank.

>Means "Greater Than" and >=means "Greater Than or Equal To"

<Means "Less Than" and <=means "Less Than or Equal To"

The Provider wrote to the Complainant again on **3 February 2015** as follows;

"You will have recently received a letter notifying you that the fixed rate period on your Home Mortgage Loan Account is due to expire and also requesting you to now choose a new mortgage rate type. In addition to the rates previously advised to you, you may alternatively select a prevailing tracker rate due to the terms and conditions of your Letter of Offer. This commercially priced prevailing tracker rate of 4.96% is calculated at ECB, currently 0.05%, plus a margin of 4.91%.

<u>Rate Description</u>	<u>%</u>
Prevailing Owner Occupier	4.96"

The Provider has furnished in evidence a table setting out the prevailing tracker rates applicable to Private Dwelling House (PDH) mortgage loans between **2014** and **2017** which outlines:



Effective Date for Prevailing Tracker Rates	PDH Tracker Rate (ECB plus margin)	PDH Prevailing Tracker Margin	ECB Rate
9 <sup>th</sup> September 2014	4.96%	4.91%	0.05%
1 <sup>st</sup> July 2015	4.02%	3.97%	0.05%
1 <sup>st</sup> October 2015	3.72%	3.67%	0.05%
16 <sup>th</sup> March 2016	3.67%	3.67%	0.00%
1 <sup>st</sup> November 2017	3.32%	3.32%	0.00%

The Complainant had a five-year fixed interest rate period applied to his mortgage loan account between **March 2010** and **March 2015**. At the time that fixed interest rate period ended on **10 March 2015**, the Provider offered a tracker interest rate of 4.96% (ECB + 4.91%). The evidence shows that the tracker interest rate that the Provider had available for home loans for existing business in **March 2015** was 4.96% and that was the tracker interest rate that was offered to the Complainant in respect of his mortgage loan account. It was within the Provider's commercial discretion to set this rate. The Complainant was notified of this rate on **3 February 2015** in advance of the expiry of the fixed interest rate period.

The Complainant wrote to the Provider on **10 February 2015** as follows:

*"Thank you for your letter of the 30<sup>th</sup> January, copy enclosed.*

*I wish to avail of the conversion to a tracker interest rate mortgage loan in accordance with Clause 3.2(c) of my Letter of Loan Offer dated 3<sup>rd</sup> December 2007, copy enclosed.*

*I look forward to hearing from you with confirmation of the revised reduced repayments"*

It does not appear from the evidence that the Provider responded to this letter.

I note that the Complainant subsequently signed an options form dated **24 February 2015** which detailed as follows;

*"I/We wish to avail of the 3 YEAR FIXED rate description, which I/we note is subject to variation prior to rollover date"*

/Cont'd...

The Provider wrote to the Complainant by letter dated **12 March 2015** as follows;

*"I refer to your mortgage account(s) below.*

<i>Mortgage Account</i>	<i>Interest Rate</i>	<i>Product</i>	<i>Balance</i>	<i>Next Repayment Date</i>	<i>Repayment Amount</i>	<i>Loan Expiry Date</i>
<i>[account ending 8078]</i>	<i>3.80%</i>	<i>3 Year Fixed</i>	<i>€281,348.08</i>	<i>29/03/2015</i>	<i>€1,819.47</i>	<i>31/01/2033</i>

*With reference to your recent request, I confirm that a fixed interest rate of 3.80% will apply to your mortgage loan from 12/03/2015 until 12/03/2018. The Monthly repayment for the period of the fixed interest rate will be revised on its expiry in accordance with the rate then applicable. If an alternative repayment arrangement exists, where the expiry date of this structure predates the fixed rate expiry, the repayment amount will also be revised.*

*You will be entitled, with the Bank's prior consent, to withdraw from the fixed rate agreement, with by repayment in full of the Mortgage Loan and interest accrued to the date of repayment or by conversion to one of the variable interest rates then prevailing. In either of the foregoing events, or in the event of your wishing to make a partial out-of-course payment, a prepayment/conversion premium may be payable to the Bank sufficient to compensate the Bank for the cost of replacement. The premium will be computed on the sum of the balance outstanding as at the date of repayment/conversion and interest accrued to that date or in the event of a partial repayment by reference to the amount paid.*

*If you have any further queries in relation to the above please do not hesitate to contact your local branch or this department."*

Having considered the mortgage loan documentation, it is clear that the Complainant did not have a contractual entitlement to a particular tracker interest rate at the end of the fixed interest rate period in **March 2015**. It is important for the Complainant to understand that the Provider has commercial discretion in setting its interest rates. The Provider has submitted that it takes into account a number of factors in setting its interest rates including the cost of funding, capital requirements, loan default risk, mortgage operational costs and market competition.

/Cont'd...

The tracker rate margin set by the Provider is solely within the Provider's commercial discretion. If the Complainant did not deem the tracker interest rate margin suitable, he did not have to, and ultimately did not apply this interest rate to his mortgage loan account.

The Complainant's mortgage loan is governed by the terms and conditions attaching to the Loan Offer Letter accepted by him. In this instance, I accept that the terms and conditions were clear as to what would occur at the end of the fixed interest rate period in **March 2015**, that is that a further fixed interest rate, a variable interest rate or a tracker interest rate would be offered, and there was no reference to a specific tracker margin applying. If the Complainant was not happy with the terms of the Loan Offer Letter, including the type of interest rate applied to his loan account or the fact that the loan agreement did not stipulate that a specific tracker mortgage rate margin would be applied at the end of a fixed rate period, the Complainant could have decided not to accept the offer made by the Provider. The Complainant accepted the **Letter of Offer of Mortgage Loan** on **7 December 2007**, having confirmed that the terms and conditions of the Loan Offer had been explained to him by his solicitor.

As set out above, having considered the Complainants' mortgage loan documentation, I accept that there was no contractual obligation on the Provider under **Condition 3.2** of the **Loan Offer Letter** to apply a particular tracker rate margin to the Complainant's mortgage loan account at the end of the fixed interest rate period in **2015** or at any other stage during the life of the mortgage. There was no contractual entitlement to a guaranteed interest rate of a particular percentage over the ECB rate. It is clear from the evidence that the Provider's current home loan tracker rate in **March 2015** was ECB + 4.91% and that was the rate that was offered to the Complainant on **3 February 2015**.

The Provider has submitted that it has recast the Complainant's account with the effect of the fixed interest rate taking effect on **10 March 2015** which resulted in a refund of €8.48 being refunded to the Complainant. The Provider has offered the Complainant €250.00 as a gesture of goodwill in respect of this oversight. While I accept the Complainant's contention that this matter does not appear to relate to the conduct complained of, I note that this offer remains open to the Complainant to accept.

For the reasons outlined in this Decision, I do not uphold the 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.**