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| <b><u>Decision Ref:</u></b>             | 2021-0360   |
| <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 at point of sale<br>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 one of the mortgage loan accounts held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling home.

The Complainants held the following mortgage loan accounts with the Provider:

1. **Mortgage loan account ending 1552**  
The loan amount was €639,700 and the term of the loan was 29 years and 10 months. The Housing Loan Agreement dated **7 March 2006** details the loan type as "*Fixed Rate Home Loan*". Mortgage loan account ending **1552** was repaid and replaced in its entirety by mortgage account ending **6454** in **December 2012**.
2. **Mortgage loan account ending 2574**  
The loan amount was €100,000 and the term of the loan was 15 years and 2 months. The Housing Loan Agreement dated **20 November 2007** detailed that the applicable rate of interest was "*Linked to the ECB Refinance Rate.*"
3. **Mortgage account ending 6454**  
The loan amount was €544,000 and the term of the loan was 23 years and 1 month. The Housing Loan Agreement dated **21 December 2012** details that the rate was fixed until the Roll-over date of **1 December 2015**.

The Provider transferred its interest in the mortgage account ending **6454** to another financial service provider in **December 2017**.

The Complainants have also referred in their submissions to a mortgage loan account ending **9258** which is not the subject of or related to this complaint.

### **The Complainants' Case**

The Complainants submit that they took out a mortgage loan under account ending **1552** to purchase a new house in **2004**. They detail that they were initially offered a tracker interest rate of ECB + 0.79% by the Provider for the loan, but they decided to opt for a fixed interest rate for the initial 5 years of the term.

The Complainants state that *"...despite accepting the fixed rate (for the banks and our security) this loan should have reverted to the ECB tracker on maturity? [We were] clearly not advised at the time that this mortgage would not revert to an ECB Tracker Rate"*.

The Complainants submit they drew down a top-up mortgage of €100,000 under account ending **2574** on the same property on a tracker interest rate of ECB + 0.50% in **early 2008**. The Complainants state that they *"assumed both our ECB Tracker and the Fixed Rate were on the same property and therefore would be on equal terms – which seems reasonable to us"*.

The Complainants submit that in **April 2008** they *"requested that the bank break our outstanding fixed rate and switch to the same ECB Tracker rate as our new loan [account ending **2574**], which was "on sale" at the time."* They submit that the breakage cost would have been *"minimal/zero"* if they had *"a "CAT session" which would allow [them] move back to the tracker"*. They state however that they were advised by the Provider that they should wait until the fixed rate period on the mortgage account ending **1552** matured. The Complainants state that the Provider's claim that the Complainants withdrew their instruction to proceed with a *"CAT session"* for an ECB tracker loan in **April 2008** when they became aware they would pay a significant break fee on their fixed interest loan, is *"completely incorrect and misleading."*

The First Complainant submits that the Provider has submitted that as a former senior employee of the Provider *"... my seniority would be suffice for me to be fully aware about the policy with regard to breaking fixed rate loans"*.

He submits in response to this as follows:

- *“If I was aware of the significant break cost, in my role as [Provider employee], why would I have requested the break on the fixed rate loan and a CAT session at all - this makes no sense ...*
- *If, as the bank claims, my department was responsible for the economic break costs on fixed rate loans - why would they need this if the calculation was so black and white, i.e. 6 months interest or interest for remaining period of the loan*
- *In fact, I submit that should the break cost be less than 6 months interest, then the break cost on the loan would be the lesser amount of 6 months interest or the economic break cost on the loan - i.e. 6 months interest was a cap on the break cost!*
- *Further, I believe the economic break cost on this loan in April 2008 was positive for the bank, i.e. the refinancing rate to Feb 2009 was significantly more than the 3.45% rate on our fixed rate loan. Therefore, should the branch have contacted to calculate the economic break cost, they would have been advised this was ZERO or favourable for the bank.*
- *If [the Provider] claim that in all instances, they always charged a minimum of 6 months interest, then I believe they should have to give evidence of this claim. I do not believe that is the situation on fixed rate loans, but of course, I was not responsible for this process and cannot confirm or deny.*
- *I therefore believe that I am correct that the bank would NOT have applied a break cost and therefore this 'submission' by the bank has no support that we would have withdrawn our request because of the 'break cost'”.*

The First Complainant further submits *“I assume the bank can show proof that they always charged 6 months interest or interest for the period remaining on the loan ... I believe the bank would have charged zero fee, as this was practice ... I believe the 6 months interest clause was actually a MAXIMUM that could be charged on breaking a fixed rate loan. Therefore, the markets team would calculate the break cost and if it was above 6 months interest, then 6 months interest was charged by the bank to the customer”.*

The Complainants submit that on the maturity of the fixed rate term in **February 2009**, they again requested to switch the mortgage account ending **1552** to the tracker interest rate, but the Provider informed them that the tracker interest rate was *“off sale”* and the loan was placed on an *“SVR Variable rate.”* The First Complainant states that as he was employed by the Provider at that time, he *“... felt it would compromise my position in the bank to dispute this and felt forced to accept this SVR rate”.*

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The Complainants submit that they “*believe the bank should have allowed us back to the tracker rate in 2008 and not blocked us breaking our fixed rate mortgage*”. They state that if they had been allowed to apply the tracker rate to the mortgage account ending **1552**, “*over the last 9 years we would have saved over €150,000 in interest payments*”. They further state that “*the banks policy to not allow us break a fixed rate in 2008 and revert to ECB Tracker will have cost us over €450,000 in interest costs, over and above what we should have paid over the life of our family mortgage on our family home.*” They submit that “*the fact [the Provider] refused to allow us take action as requested in 2008 has placed huge financial pressure on [their] family that otherwise would not have occurred*”.

The Complainants submit that they decided to fix the interest rate on the mortgage loan again in **2012** “*due to the financial pressure and not wanting to have the rate increased again.*” As a consequence of applying another fixed interest rate, the mortgage account ending **1552** was redeemed and replaced in its entirety by a new mortgage account ending **6454**.

The Complainants are seeking the following;

- (a) That the tracker rate of interest which was prevailing at the time of their initial request in **April 2008** is applied to mortgage loan account ending **6454**
- (b) A refund of overpayment in interest consisting of the difference in the tracker rate and the interest rate paid backdating to **April 2008**; and
- (c) Compensation.

### **The Provider’s Case**

The Provider submits that the Complainants drew down their mortgage loan account ending **1552** pursuant to the terms and conditions contained in a **Facility Letter** dated **6 March 2006**. The Provider submits the **Facility Letter** signed and accepted by the Complainants on **7 March 2006** confirms that the loan was for a term of 29 years and 10 months from the date of draw down. The Provider submits that **Clause 3** of the terms and conditions detailed “*that if the Complainants did not opt to fix the interest rate again “on the expiry of any fixed rate period the rate of interest will revert to our then applicable Variable Annuity Mortgage Rate”.*”

The Provider states that it did not record telephone calls relating to staff home loans and therefore it cannot comment further on any telephone communications which the Complainants state took place in **April 2008**.

It states that on **21 April 2008**, the First Complainant emailed a former employee of the Provider and enquired whether the mortgage account ending **1552** would “revert” to the tracker interest rate when the fixed interest rate period matured. It details that the Provider’s employee advised the First Complainant that the account would “revert” to the standard variable rate on the expiry of the fixed period and that if the Complainants wished to avail of “a new ECB Tracker loan”, a “CAT session” would need to be completed.

The Provider submits that the Complainants requested a “CAT session” for an ECB Tracker mortgage to be completed. It outlines that a “CAT session” is a “Customer Advisory Session” and is the first step in the process of the Provider’s internal credit system when a customer is seeking to avail of a new product.

The Provider submits that *“the Complainants withdrew their instruction to proceed with a “CAT session” for an ECB Tracker loan in April 2008 when they became aware they would have to pay a significant breakage fee on their fixed interest rate loan”*.

The Provider submits that in addition, the Complainants withdrew their instruction to proceed with a “CAT session” for an ECB Tracker loan in **April 2008** when they became aware that a mortgage application was only valid for 90 days from the date of issuance of the relevant facility letter. It states therefore that the Complainants did not proceed with the ECB Tracker loan application in **April 2008** as they were aware, or ought to have been aware, that the fixed interest rate period did not expire until **February 2009**. The Provider refers to an email from the Complainants to the Provider on **18 July 2008** in which they queried whether the loan would revert to an LTV rate on the expiry of the fixed interest rate period. The Provider submits that this shows that the Complainants at that time did not want to break the fixed interest period.

The Provider submits that a “CAT session” was completed for the Complainants on **21 April 2008** *“but this was for a new [Named Product Type] current account and not for an ECB Tracker loan”*.

The Provider submits that the Complainants’ submission that the breakage fee would have been “minimal/zero” in **April 2008**, is “incorrect”. It submits that in **April 2008** *“there was approximately 11 months remaining on the fixed interest rate period”* and therefore in accordance with **Clause 4(k)** of the Complainants’ facility letter dated **6 March 2006**, *“the breakage fee would have been “six months interest” at a fixed interest rate of 3.45% for the entire amount of the loan outstanding”*.

The Provider further submits that;

*“The Complainant is correct that the six months interest was a cap on break costs but not correct that, where the fixed interest period left to run was less than six months, the redemption fee was calculated by reference to the economic break cost on the loan. The contractual wording of clause 4(k) does not provide that the break cost was calculated with reference to the “economic break cost on the loan”. In this instance the break cost would not in any event have been calculated by reference to a fixed interest period remaining of less than 6 months as there were 11 months left to run on the fixed period ... the calculation of the break cost relates to the calculation of six months interest.*

*The Complainant has requested that the Provider evidence that break costs were always charged when customers wished to break a fixed interest rate period. For data protection and customer confidentiality reasons the Provider is not permitted to furnish details of the break costs previously paid by customers as their loans do not relate to this complaint...”*

The Provider submits that *“...To further clarify, clause 4(k) of the facility letter provided that a redemption fee was calculated both for loans with an expiry period of less than 6 months and also for loans with an expiry period of more than 6 months. If the remaining period of the loan was more than 6 months than clause 4(k) confirmed that the redemption fee was calculated at a maximum of 6 months interest e.g. if there were 11 months remaining on the term of the loan than the redemption fee was 6 months interest. If the remaining period of the loan had less than 6 months left to run the redemption fee was calculated at the interest for the remaining number of months e.g. if there were 4 months left remaining on the term of the loan than the redemption fee was 4 months interest”. It states that “as detailed in clause 4(k) the redemption fee was calculated with regard to the interest payable and not the “economic break cost on a loan”. It further states that “as per clause 4(k) a customer with 5 months left on the term of their loan would pay 5 months interest and not “zero”.”*

The Provider further details that it *“can confirm that it issued various types of facility letters with differing terms and conditions at various times throughout the Provider’s lending history. Certain types of facility letters issued by the Provider contained wording which specified a different method of calculating breakage costs which included costs of funding calculations. However, the Complainants’ facility letter did not reference “economic break cost” and this was not relevant to the calculation of a redemption fee for the Complainants’ loan facility which was governed by the terms of clause 4(k) of the facility letter i.e as there were 11 months remaining on the term of the loan the redemption fee would have been calculated at 6 months interest.”*

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The Provider states that the First Complainant was formerly *“a very senior employee of the Provider”* and *“given the seniority of the Complainant’s position he was fully aware (or ought to have been fully aware) that the Provider did not have any policy in place which prohibited a customer from breaking a fixed interest rate period”*. The Provider further submits that *“it was a matter for the Complainants to determine whether they wished to break the fixed interest rate period subject to payment of the required breakage fee.”*

The Provider submits that in **late 2008** it withdrew *“all ECB Tracker rate products from sale for both new and existing customers. From that date onwards, ECB Tracker rates were only available to customers with existing mortgage loans which had an existing contractual entitlement to an ECB Tracker Interest Rate”*. The Provider submits as a result, on expiry of their fixed interest rate period in **2009**, it was not possible for the Complainants to avail of an ECB tracker interest rate as *“the Complainants did not have a contractual right to a tracker loan at a future point in time under the terms and conditions of their facility letter dated 6 March 2006”*.

The Provider details that it issued the Complainants a notification letter dated **24 December 2008**, advising them that the fixed interest rate period was due to expire on **10 February 2009**. It states that the letter advised the Complainants *“that they had the opportunity to review and agree the interest terms for the amount outstanding on their loan and they had the option to choose between a standard variable rate or a new fixed interest rate.”* It states that the letter also stated that, in the event that the Complainants did not respond to the notification letter *“the interest rate on your Fixed Rate Home Loan will be changed to standard variable rate”*. The Provider states that on the expiry of the fixed rate period on **10 February 2009**, the Provider’s standard variable rate was applied to the mortgage account ending **1552** *“as per the agreed contractual terms of the facility letter.”*

The Provider states that mortgage loan account ending **1552** was repaid and replaced in its entirety by mortgage loan account ending **6454**, when this new loan was drawn down on **21 December 2012** as a separate fixed rate loan which expired in **December 2015**.

The Provider submits it is satisfied that the content of the Complainants’ loan documentation *“was sufficiently clear and transparent in its meaning.”* It states that *“the Complainants were at all times issued with documentation which confirmed that on the expiry of the fixed interest rate period the interest rate would move to the Provider’s standard variable rate and not to a Tracker interest rate.”*

The Provider submits that it transferred its interest in the mortgage account ending **6454** to another entity in **December 2017**. The Provider submits that it *“sent the Complainants a notification letter in October 2017 in advance of the loan sale taking place.”*

The Provider further submits that following the loan transfer the Complainants were sent a further notification letter which confirmed that the loan sale had completed.

### **The Complaints for Adjudication**

The complaints for adjudication are;

- (a) The Provider failed to permit the Complainants to break out of their fixed interest rate period and switch to a tracker interest rate on mortgage loan account ending **6454** per their requests in **early 2008**; and
- (b) The Provider incorrectly advised the Complainants to wait until expiry of the fixed interest rate period in **February 2009** before switching to a tracker rate, at which time the Provider had withdrawn tracker interest rates.

### **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 15 September 2021, outlining my 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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In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The issue to be determined is whether the Provider failed to allow the Complainants to break from their fixed interest rate period to apply a tracker interest rate to mortgage account ending **1552** in **April 2008**. In order to determine this, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also relevant to set out the interactions with the Complainants in **2008** when the Complainants requested a tracker interest rate.

I will also set out certain details with respect to the Complainants' mortgage loan account ending **2574** and **6474** which are not the subject of this complaint.

The Complainants have submitted that discussions took place between the Complainants and the Provider in **2005** at which the Provider's tracker interest rate offerings were discussed. It is disappointing that the Provider has not furnished records of the discussions or meetings with the Complainants.

It is understood from the Complainants' submissions that the discussions with the Provider were in relation to a tracker interest rate product that the Provider had available at the time. However there is no documentary evidence on the file to support this.

The First Complainant emailed the Provider on **15 November 2005** as follows;

"...

*I have an approval for a new Mortgage of €660k (I only need €640k actually) ... I am also selling my house to repay the current mortgage ... The sale of my current house will close on the 19 Dec.*

...

*With the timing mismatch that will almost definitely happen, I have to sort a couple of things I spoke with to (sic) [Redacted] about and signed documentation on ...*

- *I will need to borrow the full price of my purchase for a couple of days as bridging while I await the proceeds of my sale ...*
- *Upon receipt of the sale proceeds, I will need then to repay the bridging, the current mortgage, the tender price (total €1,225,260) and will only need to actually draw €640k ...*

..."

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I note that a **Mortgage Application**, was signed by both Complainants on **29 November 2005**. The '*Home Loan required*' section outlined that the loan amount required was €640,000, the term requested was 30 years and the purpose of the loan was "*new mortgage for house*".

The '*FOR BANK USE ONLY*' section of the **Mortgage Application** signed by the Complainants on **29 November 2005**, was signed by an official of the Provider on **7 December 2005** and detailed that the "*Initial gross charging rate of interest*" was "*2.79*". The rate option "*discounted variable*" was ticked. The other rate options were variable, non-discounted variable, fixed and other.

I note that a **Tailored Home Loan** Letter of Offer dated **29 November 2005** was issued to the Complainants which detailed as follows;

"..

*I am pleased to inform you that [the Provider] hereby offers a Tailored Home Loan to you linked to the refinance rate of the European Central Bank (ECB) as detailed hereunder.*

**Important Information as at 29/11/2005**

1. *Amount of credit advanced* : EUR 640,000.00("the Loan")
  2. *Period of Agreement* : 30 years from drawdown
- ..."

The "*Schedule*" on **page 2** detailed:

"...

*Rate of Interest* : *The total of the ECB Refinance Rate plus .79% (the Added Percentage), currently 2.79% p.a.*

..."

It does not appear to be disputed between the parties that the **Tailored Home Loan** Offer dated **29 November 2005** was not signed or accepted by the Complainants and the tailored home loan facility never proceeded to drawdown.

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I also note that a **Bridging Loan Agreement** dated **6 December 2005** was issued to the Complainants which detailed as follows;

“..

***Important Information as at 6<sup>th</sup> December 2005***

1. *Amount of credit advanced* : EUR 588,000.00(“the Loan”)
  2. *Period of Agreement* : 1 month
- ...”

The “Schedule” on page 2 detailed:

“...

*Purpose of Loan* : Bridging finance to assist purchase of [property address] as specified on your Loan Application Form dated 29<sup>th</sup> November 2005.

*Rate of Interest* : Our Variable Annuity Mortgage Rate currently 3.49% p.a. (Category A + 0% (Variable)

...”

The **Agreement and Acknowledgement** was signed by the Complainants on **12 December 2005**. However, it does not appear to be disputed between the parties that this bridging loan facility never proceeded to drawdown.

I note that the First Complainant emailed an employee of the Provider on **6 March 2006 at 10:40AM**, as follows;

“Subject: *How about me gettin[g] to fix my mortgage for 3 years?*

[Redacted],

*Can you arrange this at the current rate?*

*Once Its below 3.50%, I would be happy for 3 years fixed?*

*You can take this as my written instruction, if I need to hurry?”*

The Provider’s employee responded to the First Complainant by email dated **6 March 2006 at 16:40PM**, as follows;

“[Redacted] booked your fixed rate today and she will prepare your letters for signing tomorrow. 3 years fixed is 3.45%”

/Cont’d...

The First Complainant replied to the Provider's employee by email dated **6 March 2006** at **16:42PM**, as follows;

*"Thanks [redacted]*

*Getting expensive...how about given [sic] me a year or two of Int Only??".*

It does not appear from the evidence provided that the First Complainant received a response from the Provider to this email. In any event, the evidence is clear that the Complainants requested a fixed interest rate for the initial 3 years of the mortgage loan.

The Provider issued a **European Standardised Information Sheet** dated **6 March 2006**. **Page 1** details;

*"This quotation does not constitute a legally binding offer. The figures are provided in good faith and are an accurate representation of the offer that [the Provider] would make under current market conditions based on the information that has been provided. It should be noted that figures can fluctuate with market conditions. The provision of this information does not oblige [the Provider] to grant credit."*

The section titled **Tailored Home Loan Repayment Quotation** details as follows;

*"Product Description:*

***Type of Loan: Annuity:*** *You mortgage your dwelling to the Bank as security until your home loan is repaid. You make capital and interest payments during the loan period, so the full amount of the loan is repaid at the end of the term. The interest charged may vary during the course of the home loan.*

*Type of Interest Rate:*

*Fixed to 06/02/2009 then Standard Variable Rate for the remainder of the loan.*

*...*

*Interest Rate:*

*3.45% Fixed    Fixed Rate End Date: 06/02/2009  
3.74% Variable  
..."*

/Cont'd...

The Provider issued a **Facility Letter** to the Complainants dated **6 March 2006** which detailed:

*"I am pleased to inform you that [the Provider] ("we") hereby offers a Fixed Rate Home Loan to you as detailed hereunder.*

**IMPORTANT INFORMATION** as at 6th March 2006

1. Amount of credit advanced : EUR639700.00 ("the Loan").
2. Period of Agreement : 10 months and 29 years from drawdown
- ...
4. Amount of Each Instalment : EUR2,864.94 (FIXED RATE PERIOD) thereafter EUR2,872.92
- ...
7. APR\* : 3.7% (VARIABLE AFTER FIXED RATE PERIOD)
- ...

*THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME. (This is not applicable to any period in respect of which we have agreed to fix the interest rate.)*

**SCHEDULE**

*Purpose of the Loan : As specified in your Loan Application Form dated 29<sup>th</sup> day of November 2005*

*Latest Drawdown Date : 20th March 2006*  
*Rate of Interest : 3.45% per annum for First Fixed Rate Period (thereafter our Variable Annuity Mortgage Rate)*  
*First Fixed Rate Period : Fixed until February 2009*

*This Offer is made subject to our Fixed Rate Home Loan Terms and Conditions attached hereto.*

*..."*

/Cont'd...

The **Fixed Home Loan (Annuity) – Terms and Conditions** details as follows;

*“The following shall be read in conjunction with the offer of our Fixed Home Loan (the Offer) and acceptance of Offer is also acceptance of these Terms and Conditions.*

...

**(3) Rate of Interest**

*The Rate of Interest will be fixed at the rate specified in the Schedule on page 1 for the First Fixed Rate Period specified in the said schedule commencing on the date of drawdown of the Loan. Rates of Interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect...*

...

*You may, prior to the expiration of the First Fixed Rate Period, (and prior to expiry of any subsequent period or periods in respect of which the Rate of interest may be fixed) notify us that you require the rate of interest on the Loan to be fixed or such further period as you may specify at our prevailing fixed rate for such further period, provided always that we shall not be under any obligation to comply with the request where at the time of such expiry we do not make generally available to customers Home Loans at fixed rate of interest for the period requested by you. Unless this option is validly exercised, on expiry of any fixed rate period the rate of interest will revert to our then applicable Variable Annuity Mortgage Rate. You may not exercise this option where you are in breach of any of the terms of this Agreement.”*

**Condition 4** of the **Fixed Home Loan (Annuity) – Terms and Conditions** outlines;

**“Repayment**

...

*(e) Subject to sub-Clause (k), you may at any time repay the Loan or any part thereof without penalty. Repayment Instalments may be varied by us if you exercise your right to make early repayment of part of the Loan to ensure as far as possible that the Loan will be repaid over the unexpired portion of the Period of Agreement*

....

/Cont’d...

*(j) You may at any time during a period while our Fixed Interest Rate applies opt to convert to our Variable Annuity Mortgage Rate by notifying us in writing. Upon conversion, a Redemption fee shall be payable by you calculated in accordance with sub-Clause (k) below. You may not exercise this option where you are in breach of any of the Terms of this Agreement.*

*(k) Redemption fee shall be payable by you if you redeem the Loan in whole or in part at any time during a period where our Fixed Interest Rate applies. Such Redemption fee will be the equivalent of six months interest calculated at the rate applicable to the Loan on the amount thereof redeemed or converted or the equivalent of interest on the amount redeemed or converted for the number of days remaining where the outstanding period is less than six months."*

The Complainants signed the **Acceptance and Authority** on **7 March 2006** on the following terms:

*"I/We accept the within Offer of a loan on the Terms and Conditions set out including your Fixed Rate Home Loan Terms and Conditions attached.*

*I/We irrevocably authorise my/our Solicitor to give the undertaking(s) referred to in clause 2 of the Terms and Conditions.*

*I/We irrevocably authorise you to pay the Loan through my/our Solicitor (unless another mode of payment is agreed by the Solicitor)."*

It is clear to me that the facility letter envisaged a fixed interest rate of 3.45% until **February 2009** with the Provider's "*then applicable Variable Annuity Mortgage Rate*" to apply thereafter, or a further fixed rate if the Provider was offering fixed rates of interest for the period requested at the time of expiry. This was clearly set out in the **Schedule** and **Condition 3** of the Fixed Home Loan Terms and Conditions.

There is no mention in the mortgage loan documentation about the application of a tracker interest rate to the Complainants' mortgage loan. For the Complainants to have a contractual right to apply a tracker interest rate to the mortgage, that right would have to have been specifically outlined in the mortgage loan documentation, that was signed by the parties. However no such right was set out in writing in the **Fixed Rate Home Loan** dated **6 March 2006**.

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If the Complainants were not happy with, or did not fully understand the terms of the facility letter, including the type of interest rate that the loan would “roll-over” to at the end of the fixed interest rate period, the Complainants could have decided not to accept the offer made by the Provider, or they could have sought clarification as to the type of interest rate that would apply at the end of the fixed interest period before accepting the offer. Instead, the Complainants signed the **Acceptance and Authority** on **6 March 2006**, in which they confirmed “*I/We have read and understand the nature and contents of this Loan Agreement*”.

The Provider was free to exercise its commercial discretion in making a loan offer to the Complainants providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainants to decline the offer if they were dissatisfied with the interest rate that would apply at the end of the initial fixed interest rate period.

I note that a **Housing Loan Agreement** dated **20 November 2007** was issued to the Complainants in relation to their equity release mortgage loan account ending **2574**, which detailed as follows;

***“Important Information as at 20 November 2007***

1. *Amount of credit advanced* : EUR 100,000.00
2. *Period of Agreement* : 15 years 2 month(s) from drawdown\*\*

...

7. *APR\*: 4.60% variable*

...”

The **Schedule** on **page 2** details:

*“Purpose of the Loan:*

*Home Improvement, as specified in your Loan Application.*

...

*Rate of Interest: 4.50% per annum, variable. Linked to the ECB Refinance Rate.*

*You will make interest only payments during the whole loan period so you will still have to repay the original capital amount at the end of the mortgage term. The interest charged may vary during the course of the loan.”*

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The **Acknowledgement and Agreement** furnished in evidence is unsigned. Nonetheless it does not appear to be disputed that the Complainants drew down the mortgage loan account ending **2574** pursuant to the terms of the Housing Loan Agreement dated **20 November 2007**.

The Complainants state that they *“assumed both our ECB Tracker and the Fixed Rate were on the same property and therefore would be on equal terms”*. There is no provision in the Housing Loan Agreement to link the Complainants’ mortgage account ending **1552** which is the subject of this complaint, to the Complainants’ top up mortgage account ending **2574**, such that would mean that they share the same terms and conditions in relation to the applicable interest rates. I do not accept that the fact that the mortgage account ending **2574** drew down on a tracker interest rate, is of any relevance to the interest rate applicable to mortgage account ending **1552**.

The First Complainant emailed the Provider on **21 April 2008** at **10:20AM** as follows;

*“Quick question. I just need to know if my mortgage (the larger amount) will revert to the LTV tracker when my fixed rate rolls off, or can I transfer it over to the LTV tracker when my fixed rate matures! Can you check this for me, coz I don’t want to go the standard Variable rate?”*

*Also, you need to send me down that pack for the [Provider product], when you get a chance!”*

The Provider’s employee responded to the First Complainant by email on **21 April 2008** at **14:38PM** as follows;

*“It will revert to the standard variable rate on expiry (Feb 2009). In order to get LTV rates we’ll need to do a CAT Session etc... but will get that done in no time... I’ve put the docs in the internal mail for the package... I’ve marked it Private & Confidential”*

The First Complainant replied by email on **21 April 2008** at **15:38PM** as follows;

*“Can I do the CAT session now and make sure I have all the docs signed up? I just want to make sure that the LTV isn’t gone by the time I get out of the fixed rate? or the LTV tracker rate higher>”.*

/Cont’d...

It does not appear to me from the evidence provided that the Complainants pursued this matter with the Provider following the email exchange which took place on **21 April 2008**. I note from the **mortgage loan statements** that the mortgage account remained on the fixed interest rate of 3.45%.

Having considered the mortgage loan documentation, it is clear that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period or at any other time. It appears that the Provider, in line with its own commercial discretion and policy at the time, offered the Complainants the option of a tracker interest rate on the mortgage loan in **April 2008**, subject to a CAT session being carried out. It is important for the Complainants to understand that while tracker rate options may have been available as a product option from the Provider at the time, the Complainants were not contractually entitled to be offered a tracker interest rate.

The Complainants have submitted that they did not break from the fixed interest rate period in **April 2008** because they were *“advised by the bank that [they] should wait for the fixed rate to mature”*.

On the other hand, the Provider has submitted that *“the Complainants were aware or were informed that a breakage fee would be applicable and it was for this reason that they did not seek to further proceed with a credit application for an ECB Tracker loan in April 2008.”* The Provider has also submitted that it *“did not record telephone calls relating to staff home loans and therefore cannot comment further on any telephone communications which the Complainants state took place in April 2008.”*

It is not clear to me why the Provider is of the view that the reason the Complainants did not seek to pursue a credit application for an ECB tracker loan, was because of the *“significant”* breakage fee that would apply, in circumstances where the Provider has not provided any evidence whatsoever in support of this assertion.

In any event, no supporting evidence has been provided to this office, by either party, as to the reasons why the Complainants ultimately did not opt to break from the fixed interest rate period in **April 2008**. It appears from the Complainants' submissions that they are of the view that they would have proceeded to make the application for a tracker interest rate in **April 2008** if they were not advised against it by the Provider. I am of the view that it was reasonable for the Complainants to believe that they were receiving advice from the Provider at that time. However, I am also of the view that it was not reasonable for the Complainants to expect that any advice or information given to them was independent.

/Cont'd...

This is particularly so in circumstances where the First Complainant was by his own admission, a very senior employee of the Provider at that time. If the Complainants wanted independent advice about rates available in the market or the market generally, the Complainants should have been aware that they could only get that advice from an independent third party advisor.

Again, no evidence been provided to me by either party in relation to any discussions between the parties regarding the calculation of any breakage fee that would be payable in **April 2008**. **Condition 4(j)** of the Fixed Rate Home Loan Terms and Conditions provides that if the Complainants opted to convert to the “*Variable Annuity Mortgage Rate*” during a period where a fixed interest rate applies “*a Redemption fee shall be payable by you calculated in accordance with sub-Clause (k) below*”. **Condition 4(k)** states that the redemption fee “*will be the equivalent of six months interest calculated at the rate applicable to the Loan on the amount thereof redeemed or converted or the equivalent of interest on the amount redeemed or converted for the number of days remaining where the outstanding period is less than six months.*” In **April 2008** there was approximately 10 months remaining on the fixed interest rate period, which was due to expire in **February 2009**. The First Complainant as a former senior employee of the Provider, should be aware that the Complainants’ mortgage loan is governed by the terms and conditions of the Complainants’ mortgage loan documentation. There is no evidence before me which supports the Complainants’ submission that the breakage cost would have been “*minimal/zero*” if they had opted to break from the fixed interest rate period to avail of a tracker interest rate in **April 2008**.

I note that the Provider wrote to the Complainants by letter dated **21 April 2008** enclosing a **Final Financial Summary** which detailed on **page 1**:

“...

*Thank you for meeting with me to discuss your requirements regarding*

- *Day to day finance*

“...”

**Page 3** outlined:

**“The product you have chosen**

*I have indicated below the package type which you have selected. You have requested that the Main Current Account in the package should be a joint current account.*

/Cont’d...

...

*Package: [Provider product] (Joint products)*

..."

It appears from the **Final Financial Summary** that the Complainant's application for "Day to day finance" in **April 2008** was unrelated to their mortgage loan account ending **1552**. The evidence before me appears to support the Provider's submission that a CAT session was completed for the Complainants on **21 April 2008** for a new current account. I note that the First Complainant contacted the Provider by email dated **18 July 2008** which detailed as follows;

"...

*Second question, LTV (I am sure you will get loads of these!)... I have LTV of which €100k is floating, but the balance of €600k fixed to next year...Am I wrong to assume this will switch back into the same loan as the €100k on the LTV?? I had assumed so, but some of the guys here raised concerns on this>?? Obviously I want it to revert to the current LTV in Q2 next year and wonder how I can ensure this or do I need to complete new documentation!!"*

The First Complainant contacted the Provider by email dated **29 July 2008** as follows;

*"Did you have a chance to look at this?"*

It does not appear from the evidence that the Provider responded to the First Complainant's emails in **July 2008** which is disappointing.

The Provider issued a letter dated **24 December 2008** to the Complainants, which states:

"....

*The agreed Fixed Rate period matures on your Fixed Rate Home Loan matures on [sic] the 10.02.2009, so you now have the opportunity to review and agree the interest terms for the amount outstanding on your loan.*

***Variable interest rate or a new fixed interest period?***

*You have the option to choose between a standard variable rate and a new fixed rate period. The fixed interest rate will be determined on the day you agree the new agreement.*

/Cont'd...

*If you wish to continue with a new fixed interest rate period, please contact your local branch on [Number Redacted] to arrange a meeting to discuss your options.*

*If you do not respond to this letter by 05.02.2009 the interest rate on your Fixed Rate Home Loan will be changed to standard variable rate, as agreed in the original Terms and Conditions of your loan."*

The First Complainant contacted the Provider by email on **09 January 2009** as follows;

*"A couple of things...the first one is, do you remember our discussion (April 08) on my Fixed Mortgage and when it comes off, what was situation with regard to reverting to LTV. I know you were going to talk with [Redacted], but not sure what came out of that? I have some of the emails here if you need details around exact timing?"*

The First Complainant emailed the Provider again on **23 February 2009** as follows;

*"I assume you are moving my mortgage and this new money would be on the lowest Variable Rate possible i.e. the current LTV product?*

*Can you arrange this and send me the docs...I certainly don't want to be on the Standard Variable Rate on the my (sic) fixed rate coming off? I think the rates on the LTV are now down at 3.40% or 3.65% and the Standard Var is up at 4.15%??  
Can you change over my €600K urgently?"*

I note that the Provider emailed the First Complainant on **25 February 2009** as follows;

*"I just had a look at your lending file and the main mortgage is actually a capital and interest facility. I have a copy of the letter of offer from when you went fixed which I can send you down? Do you need me to apply to credit to put this on an interest only facility?"*

I note from the evidence that the mortgage loan account ending **1552** defaulted to the standard variable interest rate when the fixed rate period expired in **February 2009**. For the avoidance of doubt, I am of the view that there was no contractual obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account on the expiry of the fixed rate period in **February 2009**. The **Facility Letter** provided that the roll-over rate was the standard variable rate.

/Cont'd...

The fact that the Complainants engaged with the Provider in **2006** and/or **2008** with respect to the interest rate that would apply to their mortgage loan account ending **1552** following the fixed interest rate, did not obligate the Provider to offer the Complainants a tracker interest rate on their mortgage loan in **2009**. The Complainants accepted a product offering from the Provider in **2006** to apply a fixed interest rate to the mortgage loan account ending **1552** until **February 2009**, with a standard variable rate to apply thereafter.

I note that a **Credit Application** dated **19 November 2011** has been submitted in evidence which details:

“ ...  
*Application for EUR 544,000.00 Fixed Rate Home Loan [ending] 6454*

...  
...

*Comments:*

*[The Complainants] are married with [number] dependant children. [First Complainant] is [Provider employee] ...*

*They are looking to fix their existing mortgage, with no new monies.*

*Affordability is evident from disposable income. There will be no change to repayments as 3 year fixed rate is the same as standard variable rate.*

...”

The Provider issued a **Housing Loan Agreement** dated **21 December 2012** to the Complainants which details:

**“Important Information as at 21 December 2012**

1. Amount of credit advanced:                      EUR    544,000.00
2. Period of Agreement:            23 years 1 month(s) from drawdown\*\*\*

...

7. APR\*: 3.67%

...

/Cont'd...

The “Schedule” on page 2 details:

*Purpose of the Loan:*

*Home Loan Internal transfer, as specified in your Loan Application.*

...

*Latest Drawdown Date: 21 March 2013*

*Rate of Interest: 3.90% per annum,  
4.35% per annum, variable.*

*Fixed rate: Roll-over date: 1 December 2015. The Roll-over Date is the start date of the standard variable interest rate at that time. The fixed rate expires on the date preceding this day.*

...”

The **Acceptance and Authority** furnished in evidence is unsigned. Nonetheless it does not appear to be disputed between the parties that the mortgage account ending **6474** was drawn down in **December 2012** on a fixed interest rate.

I note the **mortgage loan statement** dated **21 December 2012** for mortgage account ending **1552** details that the account was closed as follows:

| <i>“Entry date</i> | <i>Value date</i> |                            | <i>Credited +</i> |      |
|--------------------|-------------------|----------------------------|-------------------|------|
|                    |                   |                            | <i>Debited –</i>  |      |
| ...                |                   |                            |                   |      |
| 21.12              | 21.12             | <i>Loan transfer</i>       | 544,000.00 +      | ...  |
| 21.12              | 21.12             | <i>Debit interest</i>      | 1,162.33 -        | ...  |
| 21.12              | 21.12             | <i>Close to Fixed rate</i> | 1,990.63 -        | ...” |

The First Complainant contacted the Provider by email on **4 October 2013** as follows;

“...

*I know we have mentioned this before, but I would like someone to have a look at my old documentation on my mortgages and should I have been entitled to revert to ECB tracker or LTV trackers back when rolling off my fixed rates.*

/Cont’d...

*I had these queries with [Redacted] who left and then with [Redacted], but I am not sure if someone looked into the detail. I understand Finance do this at the moment and I would be interest in knowing whether I should be on another product or no (I actually have an ECB tracker part on my facility at this time? I understand it comes down to whether the product was on/off sale at the time and what my entitlement was. As you can see, I did try to break my fix at the time to revert to the tracker.*

*If you could investigate if someone could look at it, that would be great.*

*Thanks a million."*

I have not been provided with any evidence to show whether the Complainants received a response from the Provider to the query outlined in their email. This is disappointing.

The First Complainant wrote a letter to the Provider dated **2 November 2015** as follows;

*"...*

*Re Accounts:*

- (a) [Loan ending 2574] ECB Tracker Variable Rate Home Loan*
- (b) [Loan ending 6454] Fixed Rate Home Loan*
- (c) [Loan ending 9258] Variable Rate Home Loan*

*I just spoke with a representative of the bank with regard to recent correspondence with my loan (b), where the bank had advised me they were returning to the SVR product. This information was incorrect and I hope you have corrected your records. I also wanted to take this opportunity to raise a number of queries with regard loan (b) above, given recent coverage of Fixed Rate Loans that should potentially have reverted back to a Tracker product.*

*In early 2008, I took out new loan (a). At the time loan (b) was in a fixed rate due to mature in early 2009. I requested at the time, in writing, from the loan officer [Redacted], that I move the Fixed Rate loan to the ECB LTV Tracker Rate. I also requested we do the CAT session to allow his happen. I was advised I could not do this at that time, however she would discuss with another official ([Redacted]) and revert. I was then advised over the phone, that I should wait for the fixed rate to mature to revert back to LTV Tracker.*

/Cont'd...



*However, when the fixed rate matured, I was told the Tracker rate was no longer available. I understand that [Redacted] or [Redacted] could not have known this at the time, but clearly this has left me with an inferior (more expensive) product. The bank proceeded to place the loan on the SVR rate in 2009 and I was left with little option but to look at a long term fixed rate. I was not aware that I could be entitled to revert back to ECB Tracker, which was the rate on this loan initially (2004), before I agreed the initial fixed rate period.*

*In light of recent media coverage of customers having the option to revert to Tracker following fixed rate maturities (or during Fixed Rate Periods), I am concerned that I took their word for this, didn't challenge colleagues at the time and maybe the information was incorrect...*

*Thank you for your attention to this matter and look forward to the correction of the rate on my loan with regard to current SVR and also your analysis or documentation supporting why my original mortgage could/should not have reverted back to a Tracker product in 2008."*

The Provider issued a Final Response letter to the First Complainant on **20 November 2015** which states;

*"The matter has now been investigated and I wish to respond to the your (sic) concerns, as follows:*

- *Your main mortgage account has never been on a ECB tracker rate. While a tracker rate was agreed for you in 2005, you did not proceed with this loan.*
- *There was no CAT session completed in 2008 to convert your main mortgage to a tracker rate. It was not Bank policy to allow a customer to convert from a fixed rate to a tracker rate as there would have been breakage costs involved in leaving your fixed rate mortgage.*
- *The Bank sold tracker rate mortgage until [late] 2008. If you were told that you would be able to switch to a tracker rate at maturity, this was the correct information you were given, as the product was still on sale. Unfortunately when your fixed rate matured in 2009, the Bank was no longer selling tracker rate mortgages.*

/Cont'd...

*Unfortunately as you never had a tracker mortgage in relation to your main mortgage you are not entitled to revert to a tracker rate at the maturity date in December 2015.”*

The Complainants’ three mortgage loan accounts ending **1552, 2574** and **6494** were drawn down at two different points in time (**2006, 2008** and **2012**). The three accounts commenced on different interest rates (fixed rate and tracker rate) and were each subject to different terms and conditions. The fact that the Provider offered the Complainants a tracker rate for mortgage loan account ending **2574** in **2008** and the Complainants accepted that offer on that mortgage loan account, did not create any obligation on the Provider to offer the same rate on the Complainants’ separate mortgage loan account ending **1552**, either at the time they requested to break from the fixed rate in **April 2008** or when the fixed interest rate period expired in **February 2009**.

Throughout this complaint I note that the Complainants continually refer to mortgage loan account **1552** being reverted “*back to*” the tracker rate of interest. For the avoidance of doubt the evidence shows that mortgage loan account **1552** was never on a tracker rate of interest. The mortgage loan account ending **1552** was redeemed in **2012** and the Complainants signed a new Housing Loan Agreement and mortgage loan account ending **6494** was drawn down. The evidence shows that the choice to take out their mortgage loans on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants.

For the reasons set out 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**

11 October 2021

/Cont’d...

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.