



<u>Decision Ref:</u>	2021-0367
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan was secured on the Complainants' residential investment property.

The loan amount was €189,000 and the term of the loan was for 25 years. The particulars of the **Amended Letter of Offer** dated **30 March 2005** provided for a 12-month fixed interest rate of 3.09% with the Provider's prevailing variable interest rate to apply thereafter. The mortgage loan account was drawn down on **12 July 2005**.

The Complainants' Case

The Complainants explain that they applied for a mortgage loan account with the Provider, through a third-party broker, and received a loan offer letter from the Provider in **March 2005** for a loan in the amount of €189,000. The Complainants submit that the interest rate was fixed for an initial 12-month period at 3.09% with a variable rate of interest to apply thereafter.

The Complainants state that on the expiry of the 12-month fixed interest rate period in **July 2006**, the mortgage loan account rolled on to a *“variable rate”* and remained on this rate from **July 2006** until **September 2006**. The Complainants submit that they are of the view that the variable rate that applied in **July 2006** was a tracker interest rate of *“1.5% over the ecb rate”*.

The Complainants maintain that the interest rate that applied in **July 2006** could not have been a standard variable rate as they had *“not even heard of”* a standard variable rate at this time and further there *“was no mention of a svr in [their] loan agreement or any written communication from [the Provider] or in terminology or options both privately or public i.e. newspapers tv.”*

The Complainants contend that they never received a letter dated **02 May 2006** titled *“Advance Rate Rollover Letter”* from the Provider. The Complainants also submit that they did not receive the *“Fixed Rate Instructions Form”* which contained four fixed interest rate options. Rather, they submit that they received a rate instructions form which also contained the option for a 3-year *“capped”* tracker interest rate.

The Complainants further submit that a letter issued to all third-party brokers in **2006** which stated that all *“Fixed rates would roll onto Trackers at end of fixed rate period”*.

The Complainants submit that they received *“unsolicited fixed rate forms from [the Provider] in Aug, Sept, and Oct in 2006. [The Complainants] signed the Aug document after some research and ticked the 3 year capped tracker, this document is gone missing from [their] file”*. The Complainants submit that the subsequent rate option letters that they received from the Provider from **August to October 2006**, only contained fixed interest rate options and did not contain the *“capped tracker rates offer”* which they submit they had already accepted.

The Complainants state that all interest rate changes to their mortgage loan account in **2006** and **2008** were in response to *“the ECB rate change”* and the Complainants note that this was also stated in a letter they received. The Complainants submit that this led them to understand that the interest rate applicable to their mortgage loan account was *“linked to the ECB rate”*.

The Complainants explain that they requested a tracker interest rate to be applied to their mortgage loan account in **August 2008**, however they state that the Provider refused to apply a tracker rate because tracker rates were not available for mortgages secured on investment properties.

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As a result, the Complainants state that they had to surrender the mortgaged property the subject of their mortgage loan account, which was ultimately sold in **2016**. They state that there is an outstanding balance on the mortgaged property which they are unable to pay and therefore their credit rating has been affected.

The Complainants submit that there was an Oireachtas Committee on **6 February 2018** in which the Complainants submit that a representative of the Provider was asked about affected customers with incomplete or missing documents.

The Complainants submit that the representative's answer was that they *"want to clarify that if a relevant piece of information is missing from a file therefore [the Provider] have taken the decision to consider the customer as impacted"*. The Complainants question why this has not happened in their case.

The Complainants are seeking the following:

- (a) The *"truth"* about the mortgage loan account and whether they have been treated *"wrongly"*;
- (b) Compensation for the losses incurred as a result of losing their property, to include either the return of the property or the full sum of what the property is worth now; and
- (c) Their credit rating to be *"fixed"*.

The Provider's Case

The Provider submits that it received the Complainants' mortgage loan application from their broker in **February 2005**. The Provider explains that between the date of the Complainants' loan application in **2005** and **mid-2008**, tracker rate options were available to both new and existing customers, subject to certain criteria such as the purpose of the loan, loan amount and the loan to value ratio. The Provider further explains that its **New Business Rate Matrix** confirmed the **Residential Investment Property Rates** which were available at that time.

The Provider submits that it did not act in an advisory capacity in relation to the Complainants' loan facility as the Complainants elected to use the services of a third-party broker. The Provider notes that the application form set out the interest rate options available to the Complainants at the time to include a tracker rate, a fixed rate, a split rate and a variable rate.

The Provider submits that the application form notes that the interest rate preference was "TBA" (to be advised) and that the broker indicated in a cover letter to the Provider that the Complainants wished to apply for a fixed rate of interest.

The Provider states that its **Mortgage Handbook** was provided to the Complainants with their **Letter of Offer** and this explained the difference between a "fixed" rate, "variable" rate, "split" rate and "tracker" rate. It further outlines that the **Mortgage Handbook** explained that the tracker interest rate was a variable rate of interest which would "track the ECB reference rate within a specified margin" and as such, "was clearly distinct from the variable rate outlined which was the Banks standard variable rate."

The Provider submits that it issued an **Amended Letter of Offer** dated **30 March 2005** that provided for a fixed rate of interest for a period of 12 months and thereafter the standard variable rate would apply until the Complainants elected to apply a further fixed rate to their mortgage loan account. The Provider states that the Complainants signed and accepted the Amended Letter of Offer.

The Provider submits that **General Condition 7** of the Amended Letter of Offer set out the default rate that would apply on expiry of the fixed interest rate period. The Provider submits that there "is no reference to the variable rate referenced being linked in any way to the ECB rate and no commitment that the prevailing variable rate referenced would track the ECB rate or any other quoted rate". The Provider submits that the term "prevailing variable rate" is not defined within the Complainant's mortgage loan documentation but it refers to the Provider's standard variable rate. The Provider states that it is satisfied that the term is "sufficiently clear and understood in its ordinary meaning". The Provider further submits that there is also no commitment to provide particular interest rate options to the Complainants on the expiry of the fixed interest rate period or indeed at any other time.

The Provider submits that a copy of the Amended Letter of Offer was provided to the Complainants with a covering letter inviting them to contact their broker in the event that they had any queries. The Provider further submits that the Amended Letter of Offer recommended that the Complainants seek independent legal advice before signing the loan offer.

The Provider submits that it issued an **Advance Rate Roll Over Letter** to the Complainants on **2 May 2006** and it has no record of the letter having been returned by the Complainants.

The Provider submits that it wrote to the Complainants on **10 July 2006** to notify them of the expiry of the initial fixed interest rate term and that the mortgage loan account “*had rolled to the current variable rate of 4.34%*”. The Provider submits that it cannot accept that the Complainants had any basis to assume that the “*current variable rate of 4.34%*” confirmed to them by letter dated **10 July 2006** provided the Complainants with a “*contractual guarantee that a set margin over the ECB rate was being maintained, or would be maintained, for the account*”. The Provider notes that the ECB rate at the time was 2.75%.

The Provider states that the Complainants returned a signed **Fixed Rate Instructions** form in **August 2006** but it was out of date. The Provider states that it did not retain a copy of the **Fixed Rate Instructions** form however maintains that it did not include a capped tracker rate option in that letter. The Provider submits that it wrote to the Complainants on **27 August 2006** to inform the Complainants that the completed form was out of date and enclosed a further **Fixed Rate Instructions** form.

The Provider submits that the Complainants signed a further **Fixed Rate Instructions** form on **2 October 2006**. The Provider submits that it did not provide the Complainants with the option of a capped tracker rate in the **Fixed Rate Instructions** form. The Provider explains that it only introduced the capped tracker interest rate product in **mid-2006** and this was only available to new mortgage loan applicants.

The Provider submits that where a tracker rate option was being made available to customers outside of the terms of their original loan offer, such customers were required to complete a Tracker Rate Instruction form.

The Provider highlights that the Complainants did not have an entitlement to any tracker interest rate and certainly did not have an entitlement to a tracker interest rate of “*1.5% over the ecb rate*”, as maintained by the Complainants.

The Provider submits that it offered a product for new private dwelling home mortgage applications from **November 2006** to **February 2008**. The Provider notes that this product provided for a specific guarantee of a tracker rate on the expiry of an initial fixed interest rate period in the loan offer documentation. The Provider submits that a communication issued to the Complainants’ broker in **November 2006** notifying the Complainants’ broker of the launch of this product. The Provider submits that the communication that issued to the Complainants’ broker in **November 2006** issued after the Complainants decided to fix the interest rate on their mortgage loan and did not apply to the Complainants as their loan application was received in the year prior to the introduction of this new product.

The Provider further notes that the mortgaged property the subject of the Complainants' mortgage loan account was a residential investment property and not a private dwelling home.

The Provider explains that the communication that was circulated to the Complainants' broker in **November 2006** is not considered to be an advertisement to the general public, rather it was only communicated to brokers. The Provider submits that it subsequently notified its broker network in **January 2008** that this product was being replaced with an alternative product offering.

The Provider submits that the second fixed interest rate period expired in **October 2008**. The Provider notes that the First Complainant contacted the Provider on **22 October 2008** at which time the Provider informed her that it no longer offered tracker interest rate options because it had withdrawn all the tracker rate product from the market in **mid-2008**. The Provider states that the First Complainant indicated her intention to refinance with another lender at that point.

The Complaints for Adjudication

The complaints for adjudication are that:

- (a) The Provider incorrectly failed to offer the Complainants a tracker interest rate on their mortgage loan on the expiry of the 12-month fixed interest rate period in or around **July 2006**; and
- (b) The Provider failed to keep documentation in relation to the Complainants' mortgage loan account from around **2006** to **2008**.

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.

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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.

Following the issue of my Preliminary Decision, the Complainants made a further submission by way of email to this office dated **14 September 2021**, a copy of which was transmitted to the Provider for its consideration. The Provider has not made any further submission.

Following the consideration of the Complainants additional submission and all of the submissions and evidence on the file, my final determination is set out below.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third-party broker.

As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision.

Further, I note that the Complainants included reference to a data access request made to the Provider in their Complaint Form to this office. The Complainants were informed of the parameters of the investigation by this Office, by letter dated **11 April 2017**, which outlined as follows:

"I refer to the above matter and note from your complaint form that one element of your complaint is that you appear to be dissatisfied with the data that you received from the Bank under a Data Access Request.

In the interests of clarity, you might note that this office is not the correct organisation to deal with this element of your complaint. Should you wish to make a complaint about this, you must contact the Data Protection Commissioner.

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Further details are available through the following link..”

Therefore, the element in relation to the data access request, does not form part of this investigation and decision for the reasons set out above.

In their post Preliminary Decision submission dated **14 September 2021**, the Complainants furnished in evidence a letter issued by the Provider dated **18 May 2008**, which refers to a request made to the Data Protection Commissioner. As outlined above and for the avoidance of any doubt, the data access request, does not form part of this investigation and decision.

In order to determine this complaint, it is necessary to review and set out the provisions of the Complainants' mortgage loan documentation and details of certain interactions between the Complainants and the Provider from **2005**, when the Complainants submitted their mortgage loan application up until **2008**, at the expiry of the second fixed interest rate period.

A **Letter of Offer** dated **24 March 2005** issued to Complainants which detailed as follows:

PARTICULARS OF ADVANCE

1. Amount of Credit Advanced	€189,000.00
2. Period of Agreement (Years – Months)	25-0
3. Number of Repayment Instalments	300
4. Amount of Each Instalment	€905.13
...	
Additional Particulars of Advance	
...	
18. Type of Advance	LETTING ANNUITY
19. Interest Rate	3.09
	Fixed for 12 months

I note that the **Letter of Offer** dated **24 March 2005** was not signed or accepted by the Complainants.

The Provider subsequently issued an **Amended Letter of Offer** dated **30 March 2005** to the Complainants, which replaced the **Letter of Offer** dated **24 March 2005** and which detailed as follows:

PARTICULARS OF ADVANCE

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1. Amount of Credit Advanced	€189,000.00
2. Period of Agreement (Years – Months)	25-0
3. Number of Repayment Instalments	300
4. Amount of Each Instalment	€905.13
...	
Additional Particulars of Advance	
...	
18. Type of Advance	FLEXI RESLET ANNUITY
19. Interest Rate	3.09 Fixed for 12 months

General Condition 5 of the **Loan General Conditions** attached to the **Amended Letter of Offer** dated **30 March 2005** details as follows:

“The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While this interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant’s Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with the fluctuations in the applicable interest rate. Payment of the monthly instalments must be made by Direct Debit Mandate....”

General Condition 7 of the **Loan General Conditions** attached to the **Amended Letter of Offer** dated **30 March 2005** details as follows:

“The rate of interest applicable to this loan will be fixed for 12 months from date of drawdown. The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant (s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender ... At the expiry of the fixed rate period the Lenders prevailing variable rate will apply.”

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General Condition 8 of the **Loan General Conditions** attached to the **Amended Letter of Offer** dated **30 March 2005** details as follows:

“The advance will be secured by way of mortgage in the Lender’s standard form (a copy of which is furnished with these general conditions) being first legal mortgage over the property.

The Mortgage will secure the advance together with interest at the appropriate rate (varying) and all present and future liabilities of the Applicant(s) to the Lender, howsoever incurred”.

General Condition 17 of the **Loan General Conditions** attached to the **Amended Letter of Offer** dated **30 March 2005** details as follows:

“THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER, THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED ...”

The **Loan General Conditions** also detail as follows:

“WARNING:

...

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

The **Special Conditions** attaching to **Amended Letter of Offer** dated **30 March 2005** detail as follows:

“Matters for the attention of Solicitor

Advisory

149 This Letter of Offer replaces the Letter of Offer dated 24/03/2005 which is hereby cancelled.”

The **Form of Acceptance** was signed by the Complainants on the following terms:

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“I/We the undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender’s General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender’s standard Form of Mortgage*
- (vi) the Assignment of Life Policy*

copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s).

The Complainants signed and accepted the **Amended Letter of Offer** in the presence of their solicitor which was furnished to the Provider under cover of letter dated **20 April 2005**. The mortgage loan account was drawn down on **12 July 2005** according to the **Statement of Account**.

It is clear that the **Amended Letter of Offer** dated **30 March 2005** envisaged a fixed interest rate of 3.09% for a period of 12 months with a variable interest rate applying thereafter. **General Condition 7** clearly outlines that the Provider’s “*prevailing variable rate will apply*” at the expiry of the fixed interest rate period. The variable interest rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate. Rather it was stated to be one which could be adjusted by the Provider from time to time.

Therefore, there was no basis for the Complainants to expect that the term “*variable rate*” would relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate in the **Amended Letter of Offer** dated **30 March 2005**.

While I acknowledge that tracker interest rates were on offer by the Provider, subject to certain qualifying criteria, at the time the Complainants applied for their mortgage loan with the Provider, the **Amended Letter of Offer** dated **30 March 2005** that was accepted by the Complainants did not contain a contractual entitlement to a tracker interest rate or an expectation that a tracker interest rate would apply either at the time of drawdown, or at any time during the term of the mortgage loan.

In order for the Complainants to have a contractual right to a tracker interest rate either on drawdown or on expiry of the initial fixed interest rate period, that right would need to be specifically provided for in the Complainants’ mortgage loan documentation.

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However, no such right was set out in writing in the **Amended Letter of Offer** dated **30 March 2005**. If the Complainants wished to pursue the potential of applying a tracker interest rate on their mortgage loan account, the Complainants could have contacted the Provider to explore the option of applying a tracker interest rate. It would appear to me that the Complainants did not request that the Provider apply a tracker interest rate to their mortgage loan account during the application process or indeed request to discuss alternative rate options such as a tracker rate on the expiry of the fixed term period in **2006**.

I note that the Complainants maintain that it was their belief that the interest rate applicable to their mortgage loan was a rate connected to the ECB rate, however, it is clear from the evidence before me that there was no reference to a tracker rate connected to the ECB rate in the **Amended Letter of Offer** dated **30 March 2005**. As previously stated, 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.

If the Complainants were not happy with the terms of the **Amended Letter of Offer** dated **30 March 2005**, including the terms with respect to the applicable interest rate and in particular **General Condition 7** which clearly outlines what will happen on the expiry 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 from their broker about the type of variable rate applicable to the mortgage upon the expiry of the fixed interest rate. In circumstances where the Complainants were engaging with a broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainants during the application stage.

The Provider has submitted a copy of its **Mortgage Handbook** in evidence which details as follows:

“This handbook is intended to assist our customers in understanding detailed aspects of the mortgage they have taken with [the Provider] and aims to provide in plain English a clear understanding of how mortgages work”.

Page 8 of the **Mortgage Handbook** details as follows:

“3. Rates Explained

FIXED RATE

With a fixed rate loan, the repayment you make is fixed for an initial term, (such

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as 1, 2, 3, or 5 years). When you choose a fixed rate, it's often easier to budget because you will know exactly how much the mortgage repayment will be for some time ahead. A fixed rate is not affected by changes in general market interest rates.

When the fixed rate you chose comes to an end you can agree another fixed rate, or you can switch to the variable rate at the time. The choice is yours.

VARIABLE RATE

With a variable rate, your monthly repayments may rise or fall from time to time, in line with general market interest rates. If rates fall, your monthly repayment reduces, but if rates rise, you pay more.

A variable rate may suit you if you are in a financial position where an increase in interest rates would not adversely affect your ability to repay. You may also benefit from the fact that unlike fixed rate mortgages a fee will not be applicable if you wish to change to another mortgage type or voluntarily increase your repayments.

TRACKER RATE

'LOCK IN' TO CURRENT MARKET RATES

With a Tracker Mortgage, movements in the European Central Bank (ECB) rate are fully transmitted in a defined timeline to the customer. In effect, from the customer's perspective this is a 'lock in' to current market rates.

This is a 'variable rate' type mortgage which guarantees to track the ECB reference rate within a specified margin

(percentage points), which means you will not be subject to any rate increases in the fixed period or any rate reductions that may be passed to variable rate customers.

PRICE GUARANTEE

*Our Tracker Mortgage is a variable rate product that guarantees full European Central Bank (ECB) rate changes will be passed on to customers within 30 working days. This product gives a price guarantee to customers locking them in at various rates above the ECB rate, dependent on other factors, such as loan amount, loan-to-value, and the type of securities against which the loan is held (i.e. primary residence or residential investment property).
..."*

Page 17 of the **Mortgage Handbook** details as follows:

"IMPORTANT INFORMATION

*NO LEGALLY BINDING LOAN AGREEMENT SHALL COME INTO EXISTENCE UNTIL SUCH TIME AS A FORMAL LETTER (WHICH INCLUDES [THE PROVIDER'S] STANDARD TERMS AND CONDITIONS) HAS BEEN SIGNED BY BOTH THE CUSTOMER AND [THE PROVIDER].
..."*

I note that the Provider is seeking to rely on the contents of the **Mortgage Handbook** and it states that a copy was furnished to the Complainants together with the **Amended Letter of Offer** in **March 2005**.

I am of the view that the **Mortgage Handbook** does not form part of the Complainants' loan documentation in circumstances where there is no reference to the Mortgage Handbook forming part of the terms and conditions of the **Amended Letter of Offer** signed in **2005**. Therefore, I do not accept that the definitions of "variable rate" and "tracker rate" contained in the **Mortgage Handbook** supports the Provider's position that the terms "Standard Variable Rate" and "Tracker Variable Rate" were clearly defined in the Complainants' mortgage loan documentation.

Despite the **Mortgage Handbook** not forming part of the Complainants' mortgage loan documentation, I accept that the particulars of the **Amended Letter of Offer** dated **30 March 2005** were sufficiently clear as to the type of mortgage offered to the Complainants and clearly set out that the applicable interest rate was a 12-month fixed interest rate with the Provider's "prevailing variable rate" to apply thereafter.

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The Complainants were formally offered and accepted a loan at a fixed interest rate with the Provider's "prevailing variable rate" to apply thereafter. There is no mention whatsoever in the Complainants' mortgage loan documentation that a tracker rate of interest would apply to the Complainants' mortgage loan at any stage during the term of the loan.

It is important to highlight that the Complainants had the benefit of seeking advice from their broker and their solicitor at the time of the mortgage loan application.

The Provider has submitted in evidence a copy of an **Advance Rate Rollover Letter** dated **02 May 2006** sent to the Complainants which details as follows:

"Dear [the Complainants]

....we like to stay in touch with our customers and are writing to tell you about some upcoming changes to the interest rate on your mortgage.

*The fixed rate or discount period on your mortgage is coming to an end shortly which means that your rate will change to our **current standard variable rate** for the 1st July 2006 repayment. This will change the amount of your mortgage repayment.*

*During the first week of June, you will receive a letter setting out our standard variable rate and the amount of your repayment. **Please note that you don't have to move to our standard variable rate and can instead take a fixed rate if you prefer.** This letter will also include a "Fixed Rate Instruction Form" listing all the fixed rates you can choose from and how to apply.*

If you'd like to ask us any questions about this change please email us directly at [redacted]. [my emphasis]

I note that the Complainants maintain that they did not receive this letter from the Provider. The Provider explains that it "has an audit process whereby any items of returned mail are recorded in the customer account contemporaneous notes and we can confirm that there has been no incidence of undelivered mail having been recorded in respect of the Complainants account in this regard". The Provider has included an extract from a folder from its service department to show that a letter was created in **May 2006** as follows:

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May 2006

Date modified: 04/05/2006 15:53

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The letter dated **02 May 2006** outlined that *“during the first week of June, you will receive a letter setting out our standard variable rate and the amount of your repayment”*. There is no evidence to suggest that such a letter issued during the first week of **June 2006**.

The Complainants appeared to be of the view in earlier submissions to this office that they received a letter dated **10 June 2006** from the Provider which enclosed a **Fixed Rate Instructions** form which included a 3-year capped tracker rate.

The Complainants, in their post Preliminary Decision submission dated **14 September 2021**, submit that *“no letter ever existed for June 2006 this is a red herring to misguide [your] office”*. The Provider in its submissions states that the Complainant makes *“intermittent reference”* to a letter dated **10 June 2006** however *“refers to the letter dated 10 July 2006, the subject of the DPC complaint”*. Neither the Complainants nor the Provider have supplied a copy of the Fixed Rate Instructions form that purportedly issued on **10 June 2006** and the Provider asserts that no such form or letter exists. However, the Provider has submitted a copy of a letter dated **10 July 2006** in evidence which was issued to the Complainants enclosing a Fixed Rate Instructions form. The letter dated **10 July 2006** details as follows:

“Dear [the Complainants]

A fixed rate interest period on your mortgage has expired, and has reverted to the current variable rate of 4.34%.

Your repayment from 1st August will be €683.55

If you pay by direct debit we will automatically notify your bankers of this change. Otherwise you need to take the necessary steps to amend your repayments to reflect these revised amounts.

This change to your repayment may also result in a change to any TRS credits due from the Revenue Commissioners.

Please find enclosed a list of our competitive fixed rate options. Should you wish to avail of one of these rates please complete the form and return to our Customer Services Department”.

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The **Fixed Rate Instructions form** that also issued to the Complainants on **10 July 2006** outlines as follows:

This fixed rate instruction form is valid until Friday 21st July 2006 subject to any changes in Interest rates

.....

I/We hereby instruct [Provider] to fix the interest rate on my/our homeloan account for a period of (please mark with an X the appropriate box below)

Fixed until 1st July 2007 at 4.69% (4.47% Typical APR)
Fixed until 1st July 2008 at 4.79% (4.53% Typical APR)
Fixed until 1st July 2009 at 4.79% (4.58% Typical APR)
Fixed until 1st July 2011 at 4.99% (4.68% Typical APR)

I/We hereby agree once a letter is issued by [Provider] to me/us, confirming that the interest rate on my/our Home Loan account has been fixed for the period requested by me/us then the terms below shall be binding on me/us for the fixed rate period in addition to the terms and conditions of my/our mortgage.

TERMS

Fixed rate repayments from the 1st August 2006 for the term as indicated above thereafter reverting to the company's standard variable rate. In order to provide this facility [the Provider] has entered commitments to fund same. If, during the fixed rate period, the Applicant redeems in whole or in part or converts the loan into a variable interest rate or to another fixed rate loan, on that date, (the redemption date) a "break funding fee" will be payable to the Lender. The break funding fee will be calculated by reference to the wholesale cost then prevailing for the unexpired portion of the fixed rate period and the wholesale rate prevailing at the date of drawdown. If, at the redemption date or switching date the wholesale rate prevailing is higher than the wholesale rate at drawdown no break funding fee arises. If however, the wholesale rate is lower a break funding fee will be chargeable."

....

WE RECOMMEND THAT YOU SEEK INDEPENDENT LEGAL ADVICE IN CONNECTION WITH THIS MATTER

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It appears that the **Fixed Rate Instructions form** was returned by the Complainants to the Provider in **August 2006**, however it was deemed to be out of date at that stage given it was only valid until **21 July 2006**. I note that the Provider wrote to the Complainants on **27 August 2006** as follows:

Dear [Complainants]

We have received your fixed rate instructions form. However, please note that the enclosed form is out of date.

We have enclosed the current fixed rate instructions form for completion. Please return in the prepaid envelope provided.

If you have any further queries, please do not hesitate to contact our Customer Services Department on [number and email address redacted].

[Signed the Provider]".

In circumstances where the **Fixed Rate Instructions form** was not furnished to the Provider by **21 July 2006**, the Complainants' mortgage loan account converted to the Provider's standard variable rate of 4.34 % on **01 August 2006**.

In their post Preliminary Decision submission dated **14 September 2021**, the Complainants state that their "rate did not change until August 1st 2006 or [the Complainants] payments, on the letter it says the rates will change the july payment this was not what happened". There appears to be some confusion on the part of the Complainants in relation to the date on which the rate changed in **2006**. It is clear from the letter dated **10 July 2006** that the rate would change on **01 August 2006** as it outlines that "Fixed rate repayments from the 1st August 2006 for the term as indicated above thereafter reverting to the company's standard variable rate".

The Complainants, in their Post Preliminary Decision submission dated **14 September 2021**, ask "why [the Provider] will not provide [them] with letters from july or August 2006 it is proof of what [they] have been telling [this] office" The Complainants submit further that this office ask the Provider "if [it] can provide the original july 2006 with the attached rate letter why is the fixed form document not scan to [their] account". I am satisfied that the Provider has furnished in evidence a copy of the **Fixed Rate Instructions Form** that issued to the Complainants in **July 2006** and it is clear from the evidence that the Complainants were not offered a tracker interest rate nor were they entitled to be offered such a rate.

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The Complainants maintain that they requested a *“Capped tracker mortgage”* to apply to their mortgage loan account on the expiry of the fixed interest rate term in **2006**. In their post Preliminary Decision submissions dated **14 September 2021**, the Complainants contend that the signed copy of the Fixed Rate Instructions form dated **10 July 2006**, *“would provide proof of the 3 capped fixed rate”*. While it is disappointing that I have not been provided with the completed Fixed Rate Instructions form signed by the Complainants, I do not consider it necessary to be in receipt of the signed Fixed Rate Instructions form to identify the interest rate options offered to the Complainants as the option rates were clearly set out on the face of the unsigned letter submitted in evidence. It is clear from the Fixed Rate Instructions form submitted in evidence that only a 1-year, 2-year, 3-year or 5-year fixed interest rate option was available to the Complainants, otherwise the mortgage loan account would convert to the Provider’s standard variable rate of 4.34% in line with **General Condition 7** of the **Loan General Conditions** attached to the **Amended Letter of Offer** dated **30 March 2005**. To that end, the evidence is that there is no reference whatsoever to a tracker interest rate let alone a *“capped”* tracker interest rate being made available for selection on the expiry of the initial fixed interest rate period. The only options available to the Complainants were fixed interest rates or the Provider’s standard variable rate.

A document titled **“New Product Announcement Capped Tracker Mortgage”** which is dated **June 2006** has been submitted in evidence and details as follows:

“The Provider is delighted to announce the introduction of a new Capped Tracker Mortgage Product is available to all new Mortgage Customers”.

While I acknowledge that the Provider had launched a new *“Capped Tracker Mortgage Product”* in or around the time of the expiry of the initial fixed interest rate period on the Complainants’ mortgage loan account, it would appear this new product was only available to new customers and not existing customers like the Complainants. In this regard, the evidence does not support the Complainants’ contention that they were offered this product and there is no reference to such a product offering on the Fixed Rate Instructions form that issued to the Complainants.

In their post Preliminary Decision submission dated **14 September 2021**, the Complainants submit that this office has not shown any proof that the Complainants were on a standard variable rate and contend that the Provider *“must provide proof of all rates provided at this time period why has the ombudsman not looked for the rate so you can see what rate was applied”*. The Complainants maintain that this office *“can not make a[n] informed decision without all rates been [sic] provided”*.

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The Provider has submitted a document titled **Mortgage Account Interest Rate Changes** in evidence in respect of the Complainants' mortgage loan account which details as follows:

Mortgage Account Interest Rate Changes:

Date:	Rate:	Type:
12 th July 2005 – 1 st July 2006	3.09%	Fixed, 1 year
1 st August 2006 – 1 st September 2006	4.34%	Variable
1 st October 2006	4.59%	Variable
1 st November 2006 – 1 st October 2008	4.79%	Fixed, 2 years
1 st November 2008	6.19%	Variable
1 st December 2008	5.69%	Variable
1 st January 2009	5.19%	Variable
1 st February 2009	4.79%	Variable
1 st March 2009 – 1 st April 2009	4.54%	Variable
1 st May 2009 – 1 st May 2010	4.29%	Variable
1 st June 2010 – 1 st June 2011	4.50%	Variable
1 st July 2011 – 1 st September 2011	4.90%	Variable
1 st October 2011 – 1 st December 2011	5.15%	Variable
1 st January 2012 –	4.90%	Variable

A copy of this document was provided to the Complainants under cover of letter dated **23 April 2020** from this office.

A **Customer Notice** issued to the Complainants in **August 2006** which details as follows:

"[Provider] advises its customers that the following mortgage lending rates are effective as and from [August 2006]".

		Rate	APR
Mortgages	Homeloan Variable Rate	4.45%	4.54%
	Investment Variable Rate	4.59%	4.68%

The Provider explains that this notice issued to the Complainants on foot of an increase in the ECB rate however the notice *"in no way indicated that that interest applicable to Complainant's loan tracked the ECB rate"*.

The Provider wrote to the Complainants on **11 September 2006** as follows:

Dear [the Complainants]

As announced by [Provider] in the Press in [2006] your revised interest rate is 4.59% (typical APR 4.69% with effect from 17th August 2006. This was in response to the ECB increase on 3rd August 2006.

On 1st October 2006 your repayment will be €742.35 which also covers the interest period from 17th August 2006 to 31st August 2006. Your repayment from 1st November will be €722.93.

If you pay by direct debit we will automatically notify your bankers of this change. Otherwise you need to take the necessary steps to amend your repayments to reflect these revised amounts.

This change to your repayment may also result in a change to any TRS credits due from the Revenue Commissioners

Please find enclosed a list of our competitive fixed rate options. Should you wish to avail of one of these please complete the form and return to our Customer Services Department.

*Yours sincerely,
[the Provider]*

I accept that the content of the Provider's letter to the Complainants dated **11 September 2006** may have created some confusion as to how the variable rate applicable to the Complainants' mortgage loan was set by the Provider and that the ECB rate had an effect on the Provider's variable rate. However, that does not mean that the interest rate applicable to the Complainants' mortgage loan was a tracker interest rate, which was guaranteed to track the ECB rate at a set margin above the ECB rate.

The Complainants, in their post Preliminary Decision submissions dated **14 September 2021**, appear to continue to maintain that their mortgage loan account switched to a tracker interest rate in **August 2006**. The Complainants specifically state that "My mortgage rate for August went to 4.09 Ecb rate 2.75 +134 [Provider] tracker rate. September was 4.34. E[c]b rate 3.00% plus 1.34 investment tracker rate with [Provider]=4.34. In October 2006 my rate changed to 4.59 which was the ECB rate of 3.25 +1.34 [Provider] investment tracker rate".

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The Complainants' mortgage loan account was in fact on a fixed interest rate of 3.09% in **August 2006** before the initial 12- month fixed interest rate period expired and subsequently switched to the Provider's standard variable rate of 4.34% in **September 2006**. The Provider adjusted its standard variable rate in respect of investment properties to 4.59% in **October 2006**, as outlined in the **Customer Notice** and letter from the Provider dated **11 September 2006**, as detailed above.

I have not been provided with any evidence to support the Complainants' assertions that the interest rate that applied after the fixed interest rate period ended comprised a set margin of 1.34% over the ECB rate. It is clear from the Complainants' mortgage loan documentation, to include the Letter of Offer and the Fixed Rate Instruction form, that there was no contractual or other entitlement to any tracker interest rate and no entitlement to one that is specifically ECB +1.34% on the expiry of the fixed interest rate period or indeed at any point in time. In order for the Complainants to have a contractual right to a tracker interest rate of ECB +1.34% on expiry of the initial fixed interest rate period, that right would need to be specifically provided for in the Complainants' mortgage loan documentation. Therefore, I remain of the view that 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 Complainants' mortgage loan account remained on the Provider's standard variable rate until end of **October 2006** when the Complainants chose to sign a **Fixed Rate Instructions** form which detailed as follows:

"I/We hereby instruct [Provider] to fix the interest rate on my/our homeloan account for a period of (please mark with an X the appropriate box below)

Fixed until 1st October 2007 at 4.79% (4.71% Typical APR)

Fixed until 1st October 2008 at 4.79% (4.73% Typical APR)

Fixed until 1st October 2009 at 4.78% (4.78% Typical APR)

Fixed until 1st October 2011 at 4.9% (4.71% Typical APR)

I/We hereby agree once a letter is issued by [Provider] to me/us, confirming that the interest rate on my/our Home Loan account has been fixed for the period requested by me/us then the terms below shall be binding on me/us for the fixed rate period in addition to the terms and conditions of my/our mortgage.

TERMS

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Fixed rate repayments from 1st November 2006 for the terms as indicated above thereafter reverting to the company's standard variable rate.

....

WE RECOMMEND THAT YOU SEEK INDEPENDENT LEGAL ADVICE IN CONNECTION WITH THIS MATTER"

I note that the Complainants opted for a 2-year fixed interest rate of 4.79% to apply until **01 October 2008** and the Complainants signed and accepted the **Fixed Rate Instructions form** on **2 October 2006** to this effect.

The Provider wrote to the Complainants on **09 October 2006** as follows:

Dear [the Complainants]

Thank you for your Instruction Form for our two year fixed rate Homeloan, fixed to 1st October 2008 at 4.79%.

We are pleased to let you know that you first revised mortgage repayment of €754.43 is due on 1st November 2006.

*Yours sincerely,
[the Provider]*

It is clear that the Complainants decided to convert their mortgage loan account from a standard variable rate to a 2-year fixed interest rate of 4.79% in **October 2006**.

The Complainants contend that the Provider failed to keep documentation in relation to their mortgage loan account from around **2006** to **2008**. While I have been provided with copies of the **Fixed Rate Instructions forms** that issued to the Complainants in **July 2006** and **October 2006**, I have not been provided with any documentation that might have issued to the Complainants during **2007** apart from mortgage loan account statements. That said, I note that the Complainants' mortgage loan account remained on a 2- year fixed interest rate from **October 2006** to **October 2008** therefore I see no reason why the Provider would issue any change of rate forms to the Complainants unless the Complainants specifically applied to have a different interest rate applied to their mortgage loan account during that time.

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Upon a careful consideration of the evidence submitted by the parties, it would appear to me that the only document not retained by the Provider from **2006 to 2008** was the signed Fixed Rate Instruction form submitted by the Complainants to the Provider in **August 2006** which transpired to be invalid as it was not submitted before **21 July 2006**.

I note from the **Mortgage Account Interest Rate Charges** submitted in evidence that the Complainants' mortgage loan account switched to the Provider's standard variable rate as per the **Fixed Rate of Instructions** in **October 2006**, at the end of the 2- year fixed interest rate period in **November 2008**.

It is clear from the evidence that the interest rate applicable to the Complainants' mortgage loan account was a 12-month fixed interest rate with the Provider's standard variable rate to apply thereafter. In circumstances where the Complainants did not select the option of applying a further fixed interest rate within the time allowed in **July 2006**, the Complainants' mortgage loan account was switched to the Provider's standard variable rate of 4.34% in **August 2006**. The Provider decided to adjust its standard variable rate to 4.59% in **October 2006**. While the Provider informed the Complainants that the reason for the increase in its standard variable rate was because of an increase that had occurred in respect of the ECB rate, I do not consider this is a basis for the Complainants to assume that this meant that the interest rate on their mortgage loan was in fact a tracker rate of interest that fluctuated in line with the ECB rate. It is important for the Complainants to understand that given the nature of the variable interest rate that applied to their mortgage loan account was one that could be adjusted by the Provider from time to time, the Provider was entitled to use its commercial discretion to increase or decrease its standard variable rate as it deemed fit.

The variable interest rate that applied to the Complainants' mortgage loan on the expiry of the fixed interest rate period in **2006** was not a tracker interest rate and I find there was no ambiguity in this respect. The evidence does not support the Complainants' contention that they were of the view that the term "*prevailing variable rate*" referred to in **General Condition 7** equated to a tracker interest rate. It is clear to me that the Complainants did not have a contractual or other entitlement to a tracker interest rate or a capped tracker mortgage product in **2006** or indeed at any stage during the term of the mortgage loan. Equally, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate product in **July 2006**, or at any other time, even if the Complainants had contacted the Provider to request that a tracker interest rate product be applied to their mortgage loan account.

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

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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**

13 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.**