



<b><u>Decision Ref:</u></b>	2021-0400
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to mortgage loan account ending **8019** held by the Complainants (who are related to one another) with the Provider. The mortgage loan is secured on the first Complainant's private dwelling house.

The loan amount was €256,000 and the term of the loan was 25 years. The **Mortgage Loan Offer Letter** which was signed on **5 January 2005** outlined that the interest rate applicable to the loan was "Fixed at 3.750%" for a period of 24 months, with a variable interest rate applying thereafter.

A **Mortgage Form of Authorisation – Application to Extend Term** was signed by the Complainants on **31 August 2012** which extended the term of the loan to **1 February 2045**.

The Complainants also hold the following three mortgage loan accounts with the Provider, which are not the subject of this complaint:

- Mortgage loan account ending **1867** is secured on a private dwelling house
- Mortgage loan account ending **6407** is secured on a Buy-to-Let (BTL) property
- Mortgage loan account ending **1296** is secured on a BTL property

### **The Complainants' Case**

The Complainants outline that they drew down their mortgage loan account with the Provider in **January 2005** on a 2-year fixed interest rate of 3.75%.

The Complainants submit that in **September 2005** they "*received and accepted*" a **Mortgage Form of Authorisation (MFA)** to apply a tracker interest rate of ECB + 1.2% to the mortgage loan on the expiry of the 2-year fixed rate period in **January 2007**. The Complainants state that they are "*certain*" that the form was returned to the Provider and that they "*have a copy of the signed document...but [the Provider] claim they never received it.*" The Complainants note that the Provider has acknowledged that they requested a tracker interest rate for the mortgage loan in **2005**, and in this regard, they state "*Why would I specifically request this rate and then not sign [an] MFA form? That does not make sense.*"

The Complainants detail that in **April 2006** they opted to apply a 3-year fixed interest rate of 4.25% to the mortgage loan. The Complainants submit that when the 3-year fixed interest rate period expired in **April 2009**, their mortgage loan account rolled to the Provider's variable rate. The Complainants assert that they should have been offered a tracker interest rate at this point in time on the basis that the MFA they signed in **September 2005** provided them with a contractual entitlement to "*a variable rate at no more than 1.2% above ECB*" at the end of the fixed rate period in **April 2009**.

The Complainants subsequently applied a 5-year fixed interest rate of 5.20% to the mortgage loan account in **March 2010**.

The Complainants outline that in **August 2012** they had to extend the term of their mortgage loan "*as a direct result of the overcharging*" on the account. The Complainants submit that the term extension on their mortgage loan is "*going to cost us tens of thousands of euro in extra interest over the balance of the mortgage term.*"

With respect to the term extension, the first Complainant states that "*This mortgage was due to be paid off in 2030 (25 years from 2005) when I would be [age redacted]. I will be now [age redacted] before I have this mortgage paid off in 2045. Let me be crystal clear, the only reason I had to extend the term by such a long period of 180 months (almost doubling the length of the term) was because the provider was overcharging me and my wife massively (up to €1,500 a month in total) on four separate [Provider] mortgages. It must be remembered that this overcharging took place during the really tough austerity years and equated to about 30% of our net take home pay. The significance drain on our finances at that time cannot be underestimated*".

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The Complainants note that their mortgage loan account rolled to the Provider's variable rate when the 5-year fixed interest rate period expired in **March 2015**. The Complainants wrote to the Provider in **May 2015** and outlined that they had been paying an *"investment interest rate"* on the mortgage *"for the last 10 years"*, in circumstances where they were entitled to private dwelling house (PDH) interest rates.

By letter dated **8 June 2015**, The Complainants note that the Provider confirmed that the mortgaged property had been incorrectly classified as a BTL property instead of a PDH property. The Complainants refer to the Provider's letter dated **14 April 2009** which detailed that the Complainants' mortgage account *"rolled to the incorrect variable rate"* and they *"were then offered the incorrect rates until present"*.

The Complainants state that they completed a further MFA on **15 June 2015** and elected to apply the PDH 2-year fixed interest rate of 3.75%. The Complainants note that the Provider subsequently restored their mortgage loan account to the PDH rate and backdated it to **14 April 2009** and processed a refund of €13,200.16 representing the difference between the interest that was charged on the mortgage account on the BTL rate and the interest that should have been charged on the PDH rate.

The Complainants wrote to the Provider on **17 August 2015** stating that they *"discovered we were not informed of the correct mortgage rates / tracker rate that we were entitled to and could not make an informed decision when signing the Mortgage Form of Authorisation in June 2015"*.

The Complainants are seeking the following:

- (a) A *"variable rate mortgage at no more than 1.2% above the ECB rate"* to be applied to their mortgage loan account;
- (b) Reimbursement of all *"interest overcharging on this account dating back to 2009"*;
- (c) Reimbursement of *"arrears interest, fees and penalties"*;
- (d) Compensation for *"Stress and sleepless nights associated with meeting the repayments on the mortgage"*; and
- (e) Reimbursement for *"professional fees or otherwise that [they] incur in pursuing justice in this case"*.

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

The Provider submits that the Complainants drew down their mortgage under the Loan Offer Letter dated **15 December 2004** which was signed and accepted by the Complainants on **5 January 2005**. It details that the Loan Offer Letter provided for a fixed rate of interest for the first 24 months at 3.75% with a variable rate of interest to apply thereafter.

The Provider states that *"There is no contractual entitlement to a tracker rate included in the Offer Letter."* It outlines that **General Condition 7(b)** of the Loan Offer Letter *"clearly and unequivocally"* states that the Provider has the sole discretion upon the expiry of the fixed rate period, to provide a further fixed rate period, a choice of rates and if either of these is not selected, then the mortgage will convert to a variable rate. The Provider submits that a variable rate is defined in **General Condition 6(a)** *"and it is clear that it does not include a tracker rate of interest."*

The Provider states that its system confirms that a tracker interest rate was requested by the Complainants and its Treasury Department approved a *"special rate"* of ECB + 1.20% on **13 September 2005**. It details that the request was assessed and approved and subsequently offered to the Complainants by way of a MFA that issued on **22 September 2005**. The Provider states that it has no record of receiving a signed and completed MFA in respect of applying a tracker interest rate to the mortgage loan and therefore it did not apply the rate to the account on the expiry of the fixed rate period in **January 2007**.

The Provider asserts that *"the Complainants have not provided any contemporaneous evidence to support their assertion that this MFA was signed and returned to the Provider"* and that it has *"no record of the Complainants enquiring as to whether the MFA had been received by the Provider at any point in the 18 months between the alleged completion of the MFA and the time at which it was due to come into effect on the mortgage loan account."* It submits that it is *"reasonable to assume the Provider would have implemented the Complainants instruction to convert the mortgage loan account to a tracker rate of interest had the required documentation been returned."* The Provider states that it *"cannot give any explanation for the loss of the MFA, but is satisfied that it did not cause the loss."*

The Provider details that on **9 April 2006** the Complainants signed and returned a MFA to apply a fixed interest rate of 4.25% to the mortgage loan for a period of 3 years. The Provider states that this was a *"special rate negotiated for the Complainants"* and the rate was implemented on **12 April 2006**. The Provider submits that *"there is no evidence of the Complainants seeking to negotiate a new/alternative tracker rate in April 2006"* when its Treasury Department acceded to their request for a discounted fixed rate.

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The Provider states that this MFA *“superseded any prior offer”* and therefore, *“irrespective of whether or not the Complainants returned the “September 2005 MFA”, this rate was not due to be implemented until the end of the initial fixed rate period and therefore would never have been applied in light of the Complainants acceptance of the “April 2006 MFA””*.

The Provider submits that while the Complainants would have incurred a breakage fee in accordance with **General Condition 7(b)**, it was open to the Complainants to apply a tracker interest rate to their mortgage loan account between **April 2006** when a further fixed interest rate was applied to the account and **late 2008** when tracker interest rates were withdrawn as a product by the Provider. The Provider states that after this time, existing customers could only avail of tracker rates if they had a contractual entitlement to a tracker rate contained in their Loan Offer Letter or a MFA amending the interest rate to a tracker interest rate. The Provider states that the *“Complainants had no such entitlement.”*

The Provider submits that it issued a Product Review Notice and a MFA to the Complainants on **13 March 2009** which set out the interest rates available to the Complainants on the expiry of the 3-year fixed interest rate period. It states that a tracker interest rate was not included because it had withdrawn such rates at that point in time and *“the Complainants had no contractual entitlement to be offered one by the Provider.”*

The Provider details that the Complainants did not select their preferred option by signing and returning the MFA and as such, on **14 April 2009** the mortgage loan rolled to the existing variable rate of 4.70% in accordance with the contractual terms of the Loan Offer Letter. The Provider submits that on **17 April 2009**, a discounted variable rate of 4.45% was applied to the mortgage loan which again was a *“special rate negotiated for the Complainants”*. The Provider states that in circumstances where an internal mail issued from its Treasury Department approving of the rate change, it was not necessary to issue a MFA to the Complainants.

The Provider outlines that on **12 March 2010** the Complainants signed a further MFA and opted to apply a fixed rate of 5.20% to their mortgage loan account for a period of 5 years, which was implemented on **23 March 2010**.

The Provider details that the Complainants submitted a Standard Financial Statement (SFS) on **29 May 2012**, seeking to replace the second Complainant with a third party, and to extend the term of all mortgage loan accounts held by the Complainants with the Provider from a period of 25 to 30 years.

The Provider states that borrowers are encouraged to always prioritise repayments on their PDH mortgage accounts, in accordance with the Code of Conduct on Mortgage Arrears. It outlines that the SFS assessment which took place in **June 2012** *“identified all repayments as affordable and any financial pressure was identified as relating to farm debt.”* The Provider further submits that the second Complainant did not provide a SFS at that time and she was *“known to have a strong net worth.”*

The Provider details that the Complainants’ proposal was subsequently reassessed and by MFA dated **27 August 2012**, which was signed and accepted by the Complainants on **31 August 2012**, the term of the mortgage loan account was extended by a period of 15 years, resulting in a new loan maturity date of **1 February 2045**.

The Provider refers to the Complainants’ contention that the term extension on the mortgage loan would not have been required if the first Complainant and his wife were not overcharged by up to €1,5000 per month on all four mortgage loan accounts (ending **8019**, **1867**, **6407** and **1296**) held with the Provider. In this regard, the Provider submits that the Complainant’s BTL accounts ending **6407** and **1296** were *“unlikely to have had a material impact on the Complainants’ decision to extend the term on mortgage loan account [ending 8019]”* as the BTL accounts *“did not accrue arrears at any stage whilst active”* and the mortgage repayments on those accounts were being *“supported by rental income”*.

The Provider outlines the history of the mortgage loan account ending **8019** from **2015** onwards as follows:

- The mortgage loan account rolled to the existing variable rate of 5.65% on **23 March 2015** as per the contractual terms of the Loan Offer Letter.
- On **15 June 2015** the Complainants signed and accepted a further MFA to apply a fixed rate of 3.75% to the account for a period of 2 years. The new fixed rate was implemented on **16 June 2015**.
- On **16 June 2017**, the mortgage account rolled to the Provider’s home loan variable rate of 4.50% in accordance with the contractual terms of the Loan Offer Letter.
- The Complainants signed and accepted a MFA on **20 June 2018** to apply a 5 year fixed interest rate of 3.00% to the account which was implemented on **25 June 2018**. The Provider states that the mortgage loan account remains on this rate to date.



With respect to the Complainants' submission that the Provider was charging them BTL interest rates on the mortgaged property the subject of mortgage loan account ending **8019**, which was the first Complainant's PDH, the Provider states that it is *"satisfied that this issue has been addressed by way of the refund payment of €13,200.00 on 16 June 2015."*

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate of ECB + 1.2% on the expiry of the fixed interest rate period in **April 2009**.

### **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 11 October 2021, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

In order to ascertain if the Provider failed to offer the Complainants a tracker interest rate of ECB + 1.2% on the expiry of the fixed interest rate period in **April 2009**, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider certain interactions between the Provider and the Complainants between **2005 and 2009**.

The **Mortgage Loan Offer Letter** dated **15 December 2004**, detailed as follows:

***"Part 1 – The Statutory Loan Details***

...

1. Amount of Credit Advanced	€256,000
2. Period of Agreement	25 Years
3. Number of Repayment Instalments	4. Amount of each Instalment
24	Fixed at 3.750%
276	Variable at 3.600%

...

***Part 2 – The Additional Loan Details***

11. Type of Loan: Repayment  
12. Interest Rate: 3.750% Fixed

...

***This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter."***

The relevant sections of the **General Conditions** to the **Mortgage Loan Offer Letter** detail as follows:

**6. "Variable Interest Rates**

- (a) ***Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards.***

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*If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the mortgage without penalty. [Emphasis added]*

- (b) *The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c), or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

#### **7. Fixed Interest Rates**

- (a) *The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan.*

*In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of drawdown.*

- (b) *The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers a Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*

*..."*

The **Consumer Credit Act Notices section** on **page 5** of the Offer Letter states as follows:

*"If your mortgage loan is at any time at a variable rate, please note:*

*/Cont'd...*

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

The **Acceptance and Consents** section of the **Mortgage Loan Offer** was signed by the Complainants on **5 January 2005** and details as follows:

*"1. I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."*

Mortgage loan account ending **8019** was drawn down on **25 January 2005**.

It is clear to me that the **Mortgage Loan Offer Letter** dated **15 December 2004** envisaged a fixed interest rate of 3.75% for the first 24 months of the term of the loan with variable interest rate to apply thereafter, or a further fixed rate at the Provider's discretion. The loan offer clearly sets out the nature of the variable rate to be one which may be increased or decreased by the Provider at any time. The loan offer does not contain any reference to a tracker rate of interest that varied in line with the ECB rate. The Complainants accepted the loan offer in **January 2005**, having confirmed that they fully understood the terms and conditions set out in the **Mortgage Loan Offer Letter**.

It appears from a screenshot of the Provider's internal system which has been provided in evidence that the Complainants were in contact with the Provider in **September 2005** with respect to obtaining a tracker interest rate on their mortgage loan.

The entry by the Provider's representative on the internal system dated **13 September 2005** outlines as follows:

*"Special Rate Request*

*...*

*approval of TOO less 0.40% on rollover ie ecb plus 1.20% on rollover"*

The Provider has submitted that it issued an **Application for Change to Tracker Mortgage - Mortgage Form of Authorisation** to the Complainants on **22 September 2005** to convert the mortgage loan to a tracker interest rate of ECB + 1.20% on the expiry of the 2-year fixed interest rate period.

It is most disappointing that the Provider has not retained a copy of the MFA that issued to the Complainants in **September 2005**. It appears that the Provider is suggesting that the reason for this is because the *"letter was not a computer generated letter...*

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Rather, the letter issued further to a request made by the Complainants for a discounted interest rate” and therefore the letter issuing would not appear on its system nor would a copy of the letter be maintained.

Nevertheless, the Complainants retained a copy of the **Application for Change to Tracker Mortgage - Mortgage Form of Authorisation** which was signed by them on **27 September 2005**. A copy of this form has been submitted in evidence and details as follows:

*“The interest rate shall be no more than 1.2% above the prevailing European Central Bank Main Refinancing Operations Minimum Bid rate (“Repo rate”) for the term of the Loan.*

**APPLICATION FOR CHANGE OF INTEREST RATE:**

*I/We wish to apply for the tracker mortgage variable interest rate as detailed above for my/our mortgage loan (the “Loan”)*

*Please select when you wish to change your interest rate:*

- I/We wish to change to the rate selected above immediately\*.*  
 *I/We wish to change to the rate selected above at the expiry of my/our current fixed rate period (if applicable)*

*\*Note: If you change from a fixed rate during the fixed rate period, you may be liable to pay a funding sum to [the Provider]. See conditions overleaf.*

*....”*

The reverse side of the **Mortgage Form of Authorisation** is titled **Acknowledgement and Agreement** and details as follows:

***“Please read carefully before signing this form. Where there is more than one borrower, any references to “I” or “my” are to be construed as references to “we” or “our” respectively.***

*I acknowledge that following the acceptance by [the Provider] of this Application the terms and conditions applicable to the Loan shall be amended/varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them.*

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***I acknowledge and agree that: -***

....

- 3. *In converting the Loan to a Tracker Mortgage Loan, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the percentage stated on page 1 above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan. Variation in interest rate shall be implemented by [the Provider] not later than close of business on the 5<sup>th</sup> working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper.***

*In the event that, or at any time the Repo rate is certified [the Provider] to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*

- 4. *Save as set out in this Form of Authorisation all the terms and conditions applicable to the Loan remain unchanged.” [emphasis in original]***

I note that the Complainants elected to apply a tracker interest rate of ECB + 1.2% to their mortgage loan on the expiry of the initial 2-year fixed interest rate period in **January 2007**.

The Provider has submitted that it has no record of receiving the completed and signed MFA from the Complainants. While the Complainants submit that they completed and returned the MFA to the Provider in **September 2005**, I have not been provided with any evidence to this effect. In any event, I note that the Complainants’ mortgage loan account was not converted to a tracker mortgage loan on the expiry of the fixed interest rate period in **January 2007** in circumstances where the Complainants contacted the Provider in or around **April 2006** to break from the initial 2-year fixed interest rate period that applied to their mortgage loan account and apply a 3-year fixed interest rate instead.

In this regard, I note that an undated internal note was attached to a MFA which was completed by the Complainants on **4 April 2006**. The note details as follows:

*“The attached forms are all for 3yr fixed @ 4.25%. Customer changed mind at last minute”*

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It appears that the Complainants initially selected the 3 and 5 year fixed rate options on the MFA which were both subsequently crossed out however an asterisk appears next to the 3-year fixed rate option and "4.25%" is handwritten next the "Rate" box. The MFA enclosed with the note sets out as follows:

**1. Changing from one Interest Rate to Another**

*I wish to apply for the interest rate indicated below for my Mortgage Loan. I understand this rate will apply to my Mortgage Loan from the expiry date of my current fixed rate period (if applicable).*

...

\* ~~3 year fixed Rate 4.25%~~       ~~5 year fixed Rate 4.95%~~

...

**I agree to the following terms:**

(i) *The interest rate I have chosen on this form will apply to my Mortgage loan from the expiry date of my current fixed rate (if applicable).*

...

(ii) *In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower shall pay a funding fee to compensate [the Provider] for any loss it incurs as a result.*

*This fee will be (Amount x (R-R1) x Time) divided by 36500 and for the purposes of this formula the variables are defined as follows:*

*"Amount" means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments; in the case of an endowment loan, this will equal this will equal the full amount of the early repayment or conversion. "R" means the cost of funds for [the Provider] for the fixed rate period as incorporated in the existing interest rate applying to the Loan.*

*"R1" means the interest rate available to [the Provider] for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period.*

*“Time” means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period.*

*I will not be liable for any fee if I repay all or part of my Mortgage Loan, or make repayments in excess of what I am obliged to make, provided it is at a variable rate.*

...

*These terms replace any similar terms in my HomeLoan Letter of Offer.*

*I confirm that my Home Loan Letter of Offer as amended by this Authorisation remains in force.”*

The Provider has submitted that the fixed interest rate offered to and accepted by the Complainants was a “special rate” negotiated between the parties. In this regard, I note that the Provider’s internal system note dated **11 April 2006** outlines as follows:

*“Treasury have approved rn1 less 0.24% for 3yrs rate of 4.25% fixed for 3yrs please change rate in non-actionable text”*

The **mortgage loan statements** show that a fixed interest rate of 4.25% was applied to the mortgage loan account on **12 April 2006**.

The Provider submits that it issued a **Product Review Notice** and **MFA** to the Complainants on **13 March 2009** listing the interest rate options available on the expiry of the 3-year fixed rate period in **April 2009**.

However, I note that a copy of this document has not been provided in evidence, nor has the Provider given any explanation as to why this document has not been furnished.

**Provision 49** of the **Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines as follows:

*“A regulated entity must maintain up-to-date consumer records containing at least the following*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer’s contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*

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- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

*Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”*

The Complainants’ mortgage loan was incepted for a term of **25 years** commencing from **January 2005** and the letter purportedly issued in **March 2009**. There is no indication that the mortgage has been redeemed or disposed of in any way. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It is unclear to me, in the absence of any explanation, why this documentation has not been furnished by the Provider.

Nonetheless, I note that it is not in dispute between the parties that a Product Review Notice was issued by the Provider to the Complainants in **March 2009**. The Provider has submitted in evidence a “proxy” MFA from a mortgage loan account subject to the same product coding as the Complainants’ mortgage account at that point in time, which states as follows:

*“I/We wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate.*

*(Please note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)*

<i>Description</i>	<i>Rate</i>
<i>Existing Variable LTV Rate RIL</i>	<i>4.700%</i>
<i>2 Year Fixed RIL</i>	<i>4.850%</i>
<i>3 Year Fixed RIL</i>	<i>4.950%”</i>

The reverse side of the proxy MFA contains a section titled Acknowledgement and Agreement and details as follows:

*“Please read carefully before signing below. Where there is more than one borrower, any reference to “I” or “my” are to be construed as references to “we” or “our” respectively.*

*I acknowledge that following the acceptance by the Lender of this application, the terms and conditions applicable to the Loan shall be amended/varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them. I acknowledge and agree that:-*

- 1. If I have applied to convert to a fixed rate Loan, the interest rate shall be fixed from the date of the expiry of my existing rate. The fixed rate of interest that shall apply shall be the Lender’s fixed rate available for the fixed period selected by the Borrower at the date of the expiry of the existing interest rate.*
- 2. In the case of a fixed rate Loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower shall pay a funding fee to be calculated in accordance with the formula set out above under “Early Repayment”.*
- 3. If I have applied to convert to a tracker variable rate, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan. Any variation in interest rate shall be implemented by the lender not later than close of business on the 5<sup>th</sup> working day following a change in the Repo rate by the European Central Bank.*

*Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named Borrower where there is more than one Borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason, the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*

- 4. If I have applied to convert to a Home Loan Variable rate the payment rate on the Loan may be adjusted by the Lender from time to time.*

/Cont’d...

5. *Save as set out in this Form of Authorisation, all the terms and conditions applicable to the Loan remain unchanged."*

The **mortgage loan statements** show that the Complainants' mortgage loan account switched to the existing variable rate of 4.70% on **14 April 2009** and on **17 April 2009**, a discounted variable rate of 4.45% was applied to the mortgage loan. The Provider outlines that this was also a *"special rate negotiated for the Complainants with the Provider's Treasury Department"*.

The Complainants have submitted that they should have been offered a tracker interest rate on the expiry of the fixed interest rate period in **April 2009** on the basis that the MFA which they assert they completed and returned to the Provider in **September 2005** *"entitled us to a tracker rate for the duration of the mortgage agreement once the fixed rates expired."*

As outlined above, it is unclear whether the Provider received the MFA that the Complainants assert they completed and returned to the Provider in **September 2005**, however, it is not in fact central to the issues for determination whether this document was or was not received by the Provider at that time. The reason for this is that the Complainants did not have a contractual or other entitlement to be offered a tracker interest rate of ECB + 1.2% at the end of the fixed interest rate period in **April 2009**.

The MFA signed by the Complainants in **September 2005** provided for a tracker rate of ECB + 1.2% at the expiry of the initial fixed rate period in **January 2007**, however that fixed rate period did not reach maturity and therefore the tracker interest rate was never implemented.

The Complainants signed a MFA on **12 March 2010**, applying a 5-year fixed rate of 5.200%. The **MFA** details as follows:

*"I/We wish to apply for the interest rate indicated below for my/our Mortgage Loan (the "Loan") upon the expiry of my/our existing rate.*

*(Please note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)*

<i>Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input type="checkbox"/>	2 Year Fixed RIL	4.850%
<input type="checkbox"/>	3 Year Fixed RIL	4.950%
<input checked="" type="checkbox"/>	5 Year Fixed RIL	5.200%"

/Cont'd...

The **Acknowledgement and Agreement** section on the reverse side of the **MFA** contained the same detail as the **2006 MFA** as set out above. For the sake of brevity, I will not repeat it here.

The **mortgage loan statements** show that a 5-year fixed interest rate of 5.20% was applied to the Complainants' mortgage loan account on **23 March 2010**.

On **29 May 2012** the first Complainant and his wife (who is not a party to this complaint) completed a **SFS**. The Provider explains that a SFS was completed as they sought to replace the second Complainant with a third party and to extend the term of all the mortgage loan accounts held by the Complainants with the Provider from 25 years to 30 years.

I note that the second Complainant did not complete the SFS and the Provider has submitted that she was known to have "*strong net worth*".

A copy of the SFS has been submitted in evidence and **Section G** outlined that the Complainant and his wife had a combined monthly income of €7,981.82, monthly expenditure of €3,178.00, and mortgage repayments and other debts of €6,119.10, which created a monthly deficit of €1,315.28.

The Provider states that the SFS was assessed, and the Complainants' proposals were rejected as it was determined that there was repayment capacity. It outlines that the proposal was subsequently reassessed, and the Complainants were issued a **Mortgage Form of Authorisation – Application to Extend Term** on **27 August 2012**.

The Complainants signed the **Mortgage Form of Authorisation – Application to Extend Term** on **31 August 2012** which detailed as follows:

*"I wish to extend the period of the Loan for 180 months to a new loan maturity date of 1/02/2045. The Lender's estimate of my repayment instalments under the alternative repayment arrangement is €1,097.88 each month. This estimate is based on the amount I owe on the Loan and the rate of interest that applies today.*

*The actual amount of the repayment instalments may differ (e.g. to reflect changes in interest rates). "*

The **Acknowledgement and Agreement** section of the form states as follows:

*"I acknowledge that this Form will amend the terms and conditions that apply to the Loan, for example, the mortgage loan offer letter.*

/Cont'd...

*Unless amended by this Form, the terms and conditions which apply to the Loan will remain in full force and effect. I acknowledge this Form is an application by me and does not come into force until the Lender accepts the Form in writing. The Lender is not obliged to accept this Form.*

***I acknowledge and accept the following conditions and agree to be bound by them:***

- 1. The period of the Loan is extended to the new maturity date set out in the Form.*
- 2. I will have to repay the Loan over the period of the Loan as extended by this Form.*
- 3. The Lender will calculate the repayment instalments that I have to pay to ensure the Loan is repaid in full by the new maturity date set out in this Form. These instalments will include payments of interest and repayments of the capital amount of the Loan. I agree to pay these repayment instalments in full as they are calculated by the Lender.*
- 4. I acknowledge that the Lender advises me to get independent legal and/or financial advice about this Form.*
- 5. Where a condition of this Form gives an example of something that does not limit the meaning of the condition.*
- 6. I have considered the implications of the alternative repayment arrangement on the above mortgage account. For example:*
  - (a) The duration of the Loan will be longer. This may have an impact on my plans for my future.*
  - (b) I will pay more interest during the whole period of the Loan than is set out in my mortgage loan offer letter. This is because the amount of the Loan will not be repaid as quickly as originally required in my mortgage loan offer letter.*
  - (c) The Lender may record the alternative repayment arrangement with the Irish Credit Bureau (ICB). If I break the terms of the alternative repayment arrangement set out in this Form, the Lender may report that to the ICB.*
  - (d) The life assurance policy I have in place to cover the mortgage will probably need to be adjusted to make sure I have enough cover for the while period of the Loan. The Lender has advised me to review my life policy with my life assurance company.*
  - (e) I understand that I must keep insurance in place on each property which is mortgaged to secure the Loan and must continue to pay any premiums to my insurer for the extended period of the Loan."*

/Cont'd...

The first Complainant has submitted that *“the only reason I had to extend the term by such a long period of 180 months (almost doubling the length of the term) was because the provider was overcharging me and my wife massively (up to €1,500 a month in total) on four separate [Provider] mortgages.”*

The Provider has submitted that the Complainants have received redress and compensation in respect of their three mortgage loan accounts ending **1867, 6407** and **1296** that were deemed to be impacted as part of the Central Bank directed Tracker Mortgage Examination. I note that the Complainants have submitted that the issues with these accounts have been *“resolved in full”*.

In circumstances where the Complainants believe that their request to extend the term of mortgage loan account ending **8019** which is the subject of this complaint was directly linked to the Provider’s overcharging on mortgage accounts ending **1867, 6407** and **1296**, it appears to me that it was open to the Complainants to present this argument in an appeal of the Provider’s redress and compensation offerings in respect of those mortgage loan accounts, if they wished to do so. Having examined the submissions in relation to the mortgage loan ending **8019**, I have not been provided with any evidence to indicate that the Provider’s error in applying BTL interest rates to the mortgage loan rather than PDH rates was what caused the Complainants to request a term extension.

The Provider issued a **Product Review Notice** and **MFA** to the Complainants on **23 February 2015** prior to the expiry of the 5-year fixed interest rate. The MFA outlined as follows:

*“\*Note for Customers now on a Fixed Rate of Interest*

*If we do not hear from you by 23/03/2015 your home loan will in accordance with your loan offer or amended documentation, automatically move to the variable rate of Existing Variable LTV Rate BTL a current rate of 5.650%.*

<i>Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input type="checkbox"/>	<i>Existing Variable LTV Rate BTL</i>	<i>5.650%</i>
<input type="checkbox"/>	<i>2 Year Fixed BTL</i>	<i>5.750%</i>
<input type="checkbox"/>	<i>3 Year Fixed BTL</i>	<i>5.800%</i>
<input type="checkbox"/>	<i>5 Year Fixed BTL</i>	<i>6.200%</i>
<input type="checkbox"/>	<i>10 YEAR FIXED RATE BTL EXIST</i>	<i>6.940%”</i>

I have not been provided with any evidence to suggest that the Complainants completed and returned the MFA and I note from the **mortgage loan statements** that the account rolled to the *“Existing Variable LTV Rate BTL”* of 5.65% on **23 March 2015** in accordance with **General Condition 7(b)** of the Mortgage Loan Offer Letter.

/Cont’d...



The first Complainant wrote to the Provider on **5 May 2015** and stated as follows:

*“We purchased this house as our family home and our principle private residence in late 2004/early 2005 and have lived in it since. It is very much our family home where we live with our three children. The property was never rented or never an investment property. For information, I attach copies of two utility bills showing my name on the accounts.*

*I understand we are paying an investment interest rate on this mortgage and have been doing so from the commencement of the mortgage in January 2005.*

*I know that [the Provider] were fully aware at the time that we took out the mortgage that this was going to be our principle private residence and not an investment property. Therefore we have been charged the incorrect interest rate on this property for the last 10 plus years.*

*We are a young family with substantial outgoings at this point in our life and we feel very strongly about being charged a much higher standard variable interest rate than the standard interest rate for a PPR. Therefore arising out of this situation, there are two issued (sic) that we would like rectified immediately:*

- *Change the interest rate going forward to reflect the rates in the market for principle private residences and*
- *We want to be reimbursed in full for the overcharging of interest on this mortgage account over the last 10 plus years.*

*Can you please look into this as a matter of priority? We know we were incorrectly charged higher interest rates on this property and will vigorously pursue this until we are reimbursed.*

*Finally, we recently came off a 5 year fixed rate on this account. Some of our family members came off similar fixed periods/rates but they got offered tracker rate options. Can you please advise why we did not get offered a tracker rate on this?”*

I note that the Provider issued holding letters to the Complainants advising that its investigation was ongoing in relation to their query on **8 May 2015**, **28 May 2015** and **4 June 2015**.

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The Provider then issued a **Product Review Notice** and **Mortgage Form of Authorisation** to the Complainants on **5 June 2015**. The MFA offered the Complainants the following interest rates:

<i>"Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input type="checkbox"/>	2 Year Fixed LTV >80%	3.750%
<input type="checkbox"/>	3 Year Fixed LTV >80%	3.800%
<input type="checkbox"/>	5 Year Fixed LTV >80%	3.950%
<input type="checkbox"/>	10 Year Fixed LTV >80%	4.400%
<input type="checkbox"/>	Existing Variable LTV Rate PDH	4.500%"

The Provider issued a Final Response Letter to the Complainants on **8 June 2015** which stated as follows:

*"In relation to your recent complaint regarding the rate on your mortgage account that you notified me of by letter on 07<sup>th</sup> of May 2015 having completed my investigation into this matter I can now give you a full response.*

- 1. On 5<sup>th</sup> of January you accepted the bank's Loan Offer Letter dated 15<sup>th</sup> December 2004, which outlined that an amount of €256,000.00 would be issued at a fixed rate of 3.75% (based on interest rates applicable at that point in time).*
- 2. On 14<sup>th</sup> April 2009, your mortgage account rolled to the incorrect variable rate.*

*Unfortunately you were then offered the incorrect rates until present. [The Provider] is now prepared to restore the account [ending **8019**] to the PDH rates with effect from now and backdate from 14<sup>th</sup> of April 2009 (Mortgage Form of Authorisation sent out separately to you). This will include a refund of the difference in the interest rate that applied to the mortgage account and the PDH rate from the approved date to present.*

*On receipt of the signed MFA we will make the interest refund calculation and this will be credited to your mortgage account. The PDH rate will also be applied to your mortgage account. If you want the interest refund credited to an account other than the mortgage account please specify this when returning the completed MFA.*

*The figure for the interest refund today is €12,988.98. Please note that the figures will be finalised on the date that the interest adjustment is made should you accept this offer.*

/Cont'd...

*The above offer to convert your mortgages to a PDH rate in full and final settlement will remain open to you for 21 days from the date of this letter. If we receive the signed MFA accepting this offer we will assume that your dispute is now resolved.”*

The Complainants wrote to the Provider by letter dated **15 June 2015** which detailed as follows:

*“Re: Mortgage Account Numbers: [ending 1296, 1867 and 8019]*

*Dear [name of the Provider’s employee]*

*Please find enclosed signed MFA forms for the above mortgage accounts. On your receipt of these we expect to be refunded immediately the total sum for these three mortgages. Please transfer the funds to [the Complainants’ bank account details].”*

The Complainants completed and signed the **MFA** on **15 June 2015** electing to apply the 2-year fixed rate option of 3.750%. The **mortgage loan statements** show that the fixed rate of 3.750% was applied to the account on **16 June 2015**.

The Provider has submitted that it made a refund payment of €13,200.00 to the Complainants on **16 June 2015** as a result of the incorrect interest rates having been applied to the Complainants’ mortgage loan account.

The **mortgage loan statements** show that on the expiry of the 2-year fixed interest rate period, the mortgage loan account converted to the Provider’s home loan variable rate of 4.50% on **16 June 2017** in accordance with **General Condition 7(b)** of the Mortgage Loan Offer Letter.

It appears that the Complainants contacted the Provider with respect to applying a fixed interest rate to their mortgage loan account as I note that the Complainants were issued a **MFA** on **28 September 2017** which offered 1, 2, 3 and 10 year fixed interest rates at 3%.

The Complainants were issued a further MFA on **17 April 2018** which offered fixed interest rates of 3% for 1, 2, 3, 5 and 10 year periods. I have not been provided with any evidence to suggest that the Complainants completed and returned either the **September 2017** or the **April 2018 MFAs**.

The Complainants were issued a **MFA** on **13 June 2018** which offered them 1, 2, 3, 5 and 10 year fixed interest rate periods. The Complainants signed and accepted a MFA on **20 June 2018** to apply a 5-year fixed interest rate of 3.00% to the account.

/Cont’d...

The **mortgage loan statements** show that the fixed rate was implemented on **25 June 2018**, and it appears that the account remains on this rate to date.

I note that the Complainants are seeking reimbursement of arrears interest, fees and penalties, however I have not been provided with any evidence of arrears or penalties incurred by the Complainants on the mortgage loan account the subject of this complaint.

Finally with respect to the Complainants' request to be reimbursed for professional fees incurred in pursuing their complaint, I would point out that while the use of solicitors, or any other professional assistance to handle a complaint to this office, while not necessary, is acceptable, it is important to note however, that any costs incurred, legal or otherwise, are entirely the responsibility of the Complainants. There is no provision for awarding costs under the ***Financial Services and Pensions Ombudsman Act 2017***.

Having considered the evidence in this matter, the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan. In **September 2005**, the Provider offered the Complainants the option of a tracker interest rate of ECB + 1.2% to be applied on the expiry of the initial 2-year fixed interest rate period in **January 2007**. There are conflicting submissions put forward with respect to whether the completed MFA was returned to the Provider, however it is not relevant as the Complainants opted to break from the initial fixed interest rate early and they applied a 3-year fixed interest rate to their mortgage loan in **April 2006**. Therefore, the tracker interest rate of ECB + 1.2% was never applied to the mortgage loan. The Complainants were not entitled as a matter of policy or contract to a tracker interest rate of ECB + 1.2% on the mortgage loan at the expiry of the 3-year fixed rate period in **April 2009** or at the expiry of any other subsequent fixed interest rate period.

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

### **Conclusion**

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

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

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**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

3 November 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.**