



<b><u>Decision Ref:</u></b>	2021-0444
<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 one of two mortgage loan accounts held by the Complainants with the Provider. The mortgage loan accounts held by the Complainants with the Provider are as follows:

- Mortgage loan account ending **8549** was drawn down on **10 January 2008** for an amount of €129,150 for a term of 25 years. The particulars of the **Letter of Approval** dated **17 December 2007** detail the loan type as a “Tracker (LTV<80%/<500K) Int Only RIP”. Mortgage loan account ending **8549** was secured on the Complainants’ residential investment property.
- Mortgage loan account ending **8484** was drawn down on **15 February 2008** for an amount of €257,850 for a term of 28 years. The particulars of the **Letter of Approval** dated **17 December 2007** detail that the loan type as a 1-year fixed rate home loan. Mortgage loan account ending **8484** was secured on the Complainants’ principal primary residence. It is this mortgage loan account that is the subject of this complaint. Mortgage loan account ending **8484** was redeemed on **11 January 2010**.

### The Complainants' Case

The Complainants explain that they held the following two mortgage loan accounts with the Provider:

- Mortgage loan account ending **8459** which was drawn down on a tracker interest rate of 4.80% (ECB + 0.80%), pursuant to the terms of a Letter of Approval dated **17 December 2007**.
- Mortgage loan account ending **8484** which was drawn down on a 1-year fixed interest rate of 4.99%, pursuant to the terms of a further Letter of Approval dated **17 December 2007**.

The Complainants submit that **Special Condition 6** of the Letter of Approval in relation to mortgage loan account ending **8484** states that at the end of the fixed interest rate period *“the interest rate applicable to the loan will be the then current [Provider] Tracker Mortgage rate appropriate to the loan as may be varied from time to time in accordance with variations to the European Central Bank refinancing rate (“the ECB rate”).”*

The Complainants submit that the Provider wrote to them on **26 January 2009** setting out the interest rate options available to them at the end of the fixed interest rate period for mortgage loan account ending **8484**. The Complainants note that the Provider’s letter included the option of a tracker interest rate of 4.75% (ECB + 2.25%). The Complainants explain that they selected a variable interest rate of 4.55% as it was the lowest interest rate option available to them at the time.

The Complainants maintain that they were not provided with the correct information to make an informed decision in respect of their interest rate options in **January 2009**.

The Complainants submit that they should have been offered a tracker interest rate of ECB + 0.80% in respect of mortgage loan account ending **8484** in **January 2009**. They contend that this was the tracker rate of interest that was agreed at the application stage of both mortgage loans. They further submit that this was the rate used to calculate the cost of credit and the repayments schedule in the European Standardised Information Sheet (ESIS) for both mortgage loan accounts ending **8484** and **8549** in **December 2007**.

The Complainants also contend that they should have been offered a tracker rate of 4.25% (ECB + 2.25%) in **January 2009** in circumstances where the ECB rate was 2.00% at that time.

The Complainants are seeking that the Provider:

- a) Place mortgage loan account ending **8484** on a tracker interest rate of ECB + 0.80% from the end of the fixed rate interest period in **February 2009**.
- b) Redress mortgage loan account ending **8484** from **February 2009**.

### The Provider's Case

The Provider details that the Complainants submitted two mortgage loan applications through a third-party broker, one being for a home loan and the other for a residential investment property. The Provider submits it *"would not have had any direct contact with the applicants and therefore was not a party to any discussions that would have taken place in relation to mortgage products or specific interest rates"*.

The Provider states that a Letter of Approval dated **17 December 2007** issued to the Complainants in respect of mortgage loan account ending **8484** that provided for a loan in the amount of €257,850 on a 1-year fixed interest rate of 4.99%. The Provider details that the *"loan was to be drawn down in defined stages in relation to construction of the Complainants' home"*. The Provider submits that the first stage payment of €55,000 was drawn down on **15 February 2008**.

The Provider refers to the **General Mortgage Loan Approval Condition 5** attached to the Letter of Approval and in particular **provision 5.1** which *"provided for the application of the fixed rate of 4.99% for a period of one year from the date on which the loan was drawn down by the Complainants, 15 February 2008"*. The Provider explains that the other provisions of **General Condition 5** were not applied to the account before it was closed.

The Provider asserts that **Special Condition 6** of the **Letter of Approval** in respect of mortgage loan account ending **8484** details what would occur on the expiration of the initial fixed interest rate period in **February 2009**. The Provider submits that **Special Condition 6** clearly provided that, at the end of the fixed rate period in **February 2009**, the interest rate applicable was the Provider's *"current tracker rate in February 2009"*.

The Provider states a further Letter of Approval issued to the Complainants **17 December 2007** in respect of mortgage loan account ending **8549** in relation to the Complainants' residential investment property offering a specific tracker margin of ECB + 0.80% for the terms of the loan.

The Provider explains that the *“two individual Letters of Approval offered the Complainants two loan facilities with separate and unique terms and conditions including what rates would be applicable to the loans”*.

The Provider states that prior to the expiry of the fixed interest rate period on mortgage loan account ending **8484** in **February 2009**, it issued a letter to the Complainants on **26 January 2009** to inform them of the current interest rate options available to them. The Provider details that the options letter included a tracker interest rate of 4.75% (ECB + 2.25%), a LTV variable rate and a number of fixed rate options.

The Provider explains that the Complainants *“returned their options form, signed and dated 28 January 2009, in which they confirmed they wished to avail of the current LTV variable rate of 4.55%”*. The Provider states that it subsequently amended the interest rate on mortgage loan account ending **8484** to a *“LTV variable rate of 4.05% on 13 February 2009 as the LTV variable rate had by then been reduced from 4.55% to 4.05%”*. The Provider submits that the LTV variable rate was applied to the mortgage loan account ending **8484** until it was redeemed in full in **January 2010**.

The Provider states that it refutes the Complainants' submission that they should have been offered a tracker interest rate of ECB + 0.80% in **February 2009**. The Provider asserts that the Complainants *“did not have any entitlement in their loan agreement with respect to a particular tracker interest rate applying at the end of the fixed rate period in February 2009”*. The Provider states that the *“current tracker rate applicable”* to mortgage loan account ending **8484** in **February 2009** was a tracker interest rate of ECB + 2.25% and it was not ECB+ 0.80%.

In response to the Complainants' submissions in relation to the European Standardised Information Sheet (ESIS), the Provider details that *“the ESIS clearly states that the document does not constitute a legally binding offer”*. The Provider states that the table included with the ESIS is *“illustrative”* and *“assumes that the loan will roll over into the tracker mortgage rate appropriate to the loan at the end of this period as may be varied from time to time”*. The Provider submits that these assumptions *“did not, in fact, arise on expiry of the Complainant's fixed rate”*. The Provider states that it does not accept that the ESIS led the Complainants *“reasonably to believe that the mortgage loan account would default to a tracker rate of ECB + 0.80% on the expiry of the fixed rate period”*.

In relation to the Complainants' submission that they should have been offered a tracker interest rate of 4.25% (ECB + 2.25%) in **January 2009** in circumstances where the ECB rate was 2.00% at that time, the Provider states that the tracker rate option in the rate options form dated **26 January 2009** was 4.75% (ECB + 2.25%).

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The Provider explains that the ECB reduced its rate from 2.50% to 2.00% on **21 January 2009** and the new ECB rate of 2.00% was implemented by the Provider on **13 February 2009**. The Provider states therefore that the ECB rate of the Provider on the date on which the rate options letter issued was 2.50%.

The Provider states that its applicable home loan interest rate in **January/February 2009** was based on a number of factors, to include the following:

*“(i) the bank’s cost of funds which is influenced by wholesale borrowing rates and deposit interest rates;*

*(ii) the cost of credit risk associated with lending, the operational costs (costs of originating and servicing the product on an ongoing basis), the cost of capital (the economic cost of capital which must be held against the risk being taken on, in line with prudential regulations i.e. risk weighted assets), and;*

*(iii) the Bank’s competitive position”*

The Provider asserts that *“it was entitled to consider the above factors when setting the tracker margin, and to do so was not unreasonable or improper”*.

### **The Complaint for Adjudication**

The conduct complained of is that the Provider offered the Complainants a high tracker rate margin of ECB + 2.25% on mortgage loan account ending **8484** in **January 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.

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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 following submissions were received from the parties:

1. Correspondence from the Complainants' representative to this office dated **28 September 2021**;
2. Correspondence from the Provider to this office dated **12 October 2021**; and
3. Correspondence from the Complainants' representative to this office dated **17 October 2021**.

Copies of these additional submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished by both parties to this office, I set out below my final determination.

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.

The Complainants were informed of the parameters of the investigation by this office, by letter dated **29 August 2019**, which outlined as follows:

*“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”*

Therefore, the conduct of the third-party broker engaged by the Complainants, does not form part of this investigation and this Decision for the reasons set out above.

In order determine this complaint it is necessary to review and set out the relevant provisions of the Complainants’ loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2009**.

The mortgage loan account that is the subject of this complaint is mortgage loan account ending **8484**, however I consider it helpful to also outline at the outset the details of mortgage loan account ending **8549**, which relates to the Complainants’ residential investment property.

**Mortgage loan account ending 8549**

The Provider issued a **Letter of Approval** dated **17 December 2007** to the Complainants in respect of mortgage loan account ending **8549**, detailing as follows:

“

<i>Loan Type:</i>	<i>Tracker (LTV&lt;80%/&lt;500K) Int Only RIP</i>
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<i>Purchase Price/Estimated Value:</i>	<i>€250,000.00</i>
<i>Loan Amount:</i>	<i>€129,150.00</i>
<i>Interest Rate:</i>	<i>4.8%</i>
<i>Term:</i>	<i>25 year(s)”</i>

The reverse side of each page of the Letter of Approval contains the following in relation to tracker mortgage loans under the heading **Housing Loans under Consumer Credit Act 1995**:

*"1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate ("the ECB Rate") plus a percentage over the ECB Rate.*

*The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.*

*2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.*

*3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.*

*4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate."*

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

*"...*

*4. If, for whatever reason, an event occurs which fundamentally affects the use of the ECB rate as a reference rate for this loan, [the Provider], in its sole discretion, shall be entitled to use such other reference rate or other method or basis of calculation as it deems fair and reasonable and notwithstanding the use of such other reference rate or method or basis of calculation, the rate so calculated by [the Provider] shall be and apply as the reference rate applicable to this loan in place of the ECB rate.*

*5. The interest rate and mortgage repayment indicated in the letter of approval are based on the ECB rate applicable at the date of the letter of approval and may change on or before draw down.*

*6. Where more than one tracker mortgage loan is advanced on the security, the tracker mortgage loans will not be aggregated for the purposes of applying a different rate over the ECB rate.*

*[...]*

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*11. The interest rate applicable to this tracker mortgage loan may be varied from time to time by [the Provider] provided the interest rate will not exceed 0.80% over the European Central Bank refinancing rate (the "ECB Rate"). The ECB rate may be varied from time to time by the European Central Bank (the "ECB").*

*In the event of any variation of the ECB rate as varied by the ECB and the revised interest rate for the loan will apply not later than one calendar month from the date provided by the ECB as the date on which the variation to the ECB rate will take effect."*

The **Acceptance of Loan Offer** was signed by the Complainants on **20 December 2007** on the following terms:

*"1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval conditions*
- iii. [the Provider] Mortgage Conditions*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

*4. My/our Solicitor has fully explained the said terms and conditions to me/us."*

The mortgage loan account statements provided in evidence indicate that mortgage loan account ending **8549** was drawn down on **10 January 2008**.

It is clear to me that the **Letter of Approval** in respect of mortgage loan account ending **8549** dated **17 December 2007** envisaged that a tracker interest rate of ECB + 0.80% would apply to the Complainants' mortgage loan account for the term of the loan. The ECB rate at the time was 4.00%.

I note that a tracker interest rate of ECB + 0.80% continues to apply to this mortgage loan account.

**Mortgage loan account ending 8484**

The Provider issued a further **Letter of Approval** dated **17 December 2007** to the Complainants in respect of mortgage loan account ending **8484** which details as follows:

<b>Loan Type:</b>	<b>1 Yr Fixed (LTV&lt;80%/&lt;500K) Homeloan</b>
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*"Purchase Price/Estimated Value:* €525,000.00  
*Loan Amount* €257,850.00  
*Interest Rate:* 4.99%  
*Term:* 28 year(s)"

...

**IMPORTANT INFORMATION AS AT December 17<sup>th</sup>, 2007**

1. *Amount of credit advanced:* €257,850.00
2. *Period of Agreement* 28 years(s)
3. *Number of Repayment Instalment* 336
4. *Amount of each instalment* €1,425.84
5. *Total Amount Repayable* €469,773.59
6. *Cost of This Credit (5 minus 1 )* €211,923.59
7. *APR\** 4.9%"

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

"...

4. *General mortgage loan approval condition 5 "conditions relating to fixed rate loans" applies in this case. The interest rate specified above may vary before the date of completion of the mortgage.*

5. *If, for whatever reason, an event occurs which fundamentally affects the use of the ECB rate as a reference rate for this loan, [the Provider], in its sole discretion, shall be entitled to use such other reference rate or other method or basis of calculation as it deems fair and reasonable and notwithstanding (sic.) the use of such other reference rate or method or basis of calculation, the rate so calculated by [the Provider] shall be and apply as the reference rate applicable to this loan in place of the ECB rate.*

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6. On expiry of the fixed rate period and without affecting the entitlement of the Applicant to apply at any time to fix the rate for a further period (if available), **the interest rate applicable to the Loan will be the then current [Provider's] Tracker Mortgage rate appropriate to the Loan as may be varied from time to time in accordance with variations to the European Central Bank refinancing rate** ("the ECB rate"). In the event of any variation of the ECB rate, the revised interest rate for the Loan will apply not later than 1 calendar month from the date provided by the ECB as the date on which the variation to the ECB rate will take effect.

...

14. General mortgage loan approval condition 2.5 relating to stage payments applies. Any fees to be deducted from the loan cheque as specified in these conditions will be deducted from the first stage payment. Schedule for stage payments :- Substructure €55,000, Wall Plate €50,000.00, Roofed & Sealed €50,000, First Fix €65,000, On completion €37,850.00" [my emphasis]

**General Condition 1.10** of the **General Mortgage Loan Approval Conditions** attaching to the Letter of Approval dated **17 December 2007** details as follows:

**"STANDARD CONDITIONS RELATING TO ALL LOAN APPROVALS**

1.10 Whenever the Directors of [Provider] in their absolute discretion consider it desirable the interest rate payable under this advance may be varied".

**General Condition 5** of the **General Mortgage Loan Approval Conditions** attaching to the Letter of Approval dated **17 December 2007** detail as follows:

**"CONDITIONS RELATING TO FIXED RATE LOANS**

5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.

5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.

...

5.4 Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee".

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The **General Mortgage Loan Approval Conditions** also outline:

*“IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:*

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

**Page 1** of the **European Standardised Information Sheet** attaching to the Letter of Approval details as follows:

*“This document does not constitute a legally binding offer.*

*The figures are provided in good faith and are an accurate representation of the offer that the lender would make **under current market conditions** based on the information that has been provided. **It should be noted, however, that the figures could fluctuate with market conditions.***

*The provision of this information does not oblige the lender to grant credit.*

...

**Nominal Rate** *The interest rate is 4.99 percent.*

*This rate is fixed for 1 year(s).*

*The interest rate applicable for this loan will be fixed for a period of 1 year(s) from the date of cheque issue.*

*At the end of the Fixed Rate Period, the interest rate applicable will be the then current [Provider] Tracker Mortgage Rate, appropriate to the Loan, and which may be varied from time to time in accordance with variations to the European Central Bank Refinancing Rate.*

*The lock-in period for this product is the fixed term. However, this can be broken subject to payment of a redemption fee as described in the section on Early Repayment below.”[my emphasis]*

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**Pages 4 and 5** of the **European Standardised Information Sheet** contain an “*Illustrative Amortisation Table*” illustrating the capital outstanding and the monthly repayments for the first year of the term of the loan, followed by yearly figures over the term of the loan based on the following assumptions as detailed in the **European Standardised Information Sheet**:

*“Assumptions:*

*The table above illustrates the amortisation of the loan assuming the loan runs full term and interest rates that currently prevail are available for the term of the loan.*

*The rate is fixed for 1 year(s). The above table assumes that the loan will roll over into the Tracker Mortgage Rate appropriate to the loan at the end of this period and as may be varied from time to time”.*

The **Acceptance of Loan Offer** was signed by the Complainants on **20 December 2007** on the following terms:

*“1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. The General Mortgage Loan Approval conditions*
- iii. [The Provider] Mortgage Conditions*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

*4. My/our Solicitor has fully explained the said terms and conditions to me/us.”*

The mortgage loan account statements provided in evidence indicate that the mortgage loan account ending **8484** was drawn down on **15 February 2008** in staged payments with the drawdown dates as follows:

15 February 2008	€55,000
4 April 2008	€100,000
8 July 2008	€65,000
8 December 2008	€37,850

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It is clear to me that the Letter of Approval dated **17 December 2007** provided that a 1-year fixed interest rate would apply to mortgage loan account ending **8484** with the Provider's current tracker mortgage interest rate appropriate to the loan to apply thereafter.

The Special Conditions and the General Conditions attaching to the **Letter of Approval** do not state that a specific tracker interest rate margin will apply to the mortgage loan account on the expiry of the initial fixed interest rate period.

Prior to expiration of the 1-year fixed interest rate period on **15 February 2009**, the Provider issued a letter to the Complainants dated **26 January 2009** enclosing a rate options form. The letter dated **26 January 2009** details as follows:

*"Dear customer,*

*I am writing to remind you that the current rate option on your mortgage account will end on 15/02/2009.*

*Please find attached the current options available to you.*

*We recommend that you consider your options carefully before making your selection. If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option. Our rates at that time could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan.*

*If we do not receive a written instruction from you in relation to the above on or before 15/02/2009, the interest rate on your loan will be the tracker variable rate which currently stands at 4.75% (ECB+2.25%)\*."*

The rate options form enclosed with the letter of **26 January 2009** details as follows:

*"Account number: [ending 8484]*

*Current options available:*

*You may only select one option.*

*--- Tracker variable rate (ECB + max 2.25%)\**

*Currently 4.75%*

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--- 2 year fixed rate	Currently 5.75%
--- 5 year fixed rate	Currently 5.75%
--- 7 year fixed rate	Currently 6.10%
--- 10 year fixed rate	Currently 6.10%
--- LTV Variable <80%	Currently 4.55%

[...]

*\* The interest rate that applies to this Tracker Mortgage Loan will never be more than 2.25% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans."*

The Complainants signed the rate options form on **28 January 2009** indicating their preference for a LTV variable interest rate of 4.55%. The mortgage loan statements provided in evidence indicate that a LTV variable interest rate was applied to mortgage loan account ending **8484** on **13 February 2009**, at which point the applicable LTV variable interest rate had reduced to 4.05%.

The Provider issued a further letter to the Complainants dated **27 July 2009** on foot of receiving a query from the Complainants in relation to fixed interest rate options on mortgage loan account ending **8484**. The letter dated **27 July 2009** details as follows:

*"Dear [Complainants]*

*You recently contacted us about the mortgage account shown above.*

*I am attaching a list of our current fixed rate options. Please tick the rate you would like and return it, signed to:*

*[Provider's address]*

*If you want to change to a fixed rate, you should also send us **a transfer fee of €100**. Please do not send cash in the post, cheques should be made payable to [the Provider].*

*We would strongly recommend that you consider your options carefully before choosing to fix your mortgage. If you are currently on a Tracker Rate Mortgage please note that our current margin commitment to you will default to a variable rate which may not be a tracker rate.*

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*Your new rate could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan”*

The rate options form enclosed with the above letter details as follows:

**“Account Number: [ending 8484]**

*Current Rate* 3.05% €1,157.08

Please tick the option you want below.

<b>Approximate repayment</b>		<b>eur €</b>
<i>2 Year fixed rate Mortgage currently</i>	5.25%	€1,470.82
<i>5 Year fixed rate Mortgage currently</i>	5.75%	€1,547.51
<i>7 Year fixed rate Mortgage currently</i>	6.10%	€1,602.29
<i>10 Year fixed rate Mortgage currently</i>	6.10%	€1,602.29

[...]

- *The above figures only give you an idea of your revised monthly repayment, and may change.*
- *We will send you on details of your actual repayment shortly.*
- *If you choose a fixed rate, the standard fixed rate conditions apply.*
- *The above fixed rates are valid for 7 working days*
- *Please enclose your €100.00 fixed rate transfer fee with this form. Otherwise this fixed rate transfer will not proceed.”*

I have not been provided with any evidence that would indicate that the Complainants completed the above form to switch their mortgage loan account to a fixed interest rate. The mortgage loan statements provided in evidence indicate that the Complainants lodged a cheque on **11 January 2010** to redeem mortgage loan account ending **8484** in full.

The Complainants maintain that the Provider should have offered them a tracker interest rate of ECB + 0.80% on the expiry of the initial 1-year fixed rate period on mortgage loan account ending **8484** in **February 2009**. The Complainants appear to be of the view that this was the tracker rate margin agreed at the application stage in respect of both mortgage loan accounts ending **8484** and **8549**, however, the evidence does not support the Complainants’ assertion in this regard.

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While I acknowledge that the Letter of Approval dated **17 December 2007** in respect of mortgage loan account ending **8549** provided that the interest rate applicable to the mortgage loan would not exceed a margin of 0.80% over the ECB refinancing rate, no such reference to a specific tracker rate margin is contained in the Letter of Approval dated **17 December 2007** in respect of mortgage loan account ending **8484**. Rather, the Letter of Approval dated **17 December 2007** for mortgage loan account ending **8484** stated that a 1-year fixed interest rate of 4.99% applied with the Provider's then current tracker mortgage interest rate appropriate to the loan to apply on expiry of the fixed interest rate period.

The Complainants appear to rely on the **European Standardised Information Sheet** that accompanied the Letter of Approval for mortgage loan account ending **8484**. The **European Standardised Information Sheet** in relation to mortgage loan account ending **8484** was generated on **17 December 2007** and contains a table illustrating the amortisation of the loan assuming that the loan will roll over onto the tracker mortgage rate appropriate to the loan. The tracker mortgage rate appropriate to the Complainants' mortgage loan account ending **8484** in **December 2007** was ECB +0.80% however the **European Standardised Information Sheet** clearly states that the *"payment rates on the housing loan may be adjusted by the lender from time to time"*.

The Complainants' representative, in his post-Preliminary Decision submission dated **28 September 2021**, refers to the **European Standardised Information Sheet** in relation to mortgage loan account ending **8484** and submits that it *"clearly represents the Loan Offer Letter. It is noted that the cost of the credit is the same figures in both the Loan Offer Letter (the contract) and the ESIS (the pre-contractual information)"*. The Complainants' representative notes that the cost of credit as per the **European Standardised Information Sheet** is also €211,923.59, *"which is based upon a 4.99% rate for 1 year and then ECB +0.80% thereafter"*. In this regard, the Complainants' representative maintains that *"any consumer would be led to believe that they have purchased a 1-year fixed rate of 4.99% which would then roll on to a tracker rate."*

Under the **European Voluntary Code of Conduct on Pre-Contractual Information for Home Loans**, the Provider must supply certain standard pre-contractual information to borrowers by means of a personalised European Standardised Information Sheet.

The purpose of a European Standardised Information Sheet is to enable a borrower to make an informed decision on whether or not to accept a loan offer from the Provider by comparing the credit available from the Provider to what is available in the market.

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The Complainants' representative has also made detailed post-Preliminary Decision submissions in respect of the Annual Percentage Rate (APR) as detailed in the **European Standardised Information** and states that *"Any reasonable person would be led to believe that from this date, if the ECB went up by 0.25%, the APR would go up by 0.25%."* The Provider details, in its post-Preliminary Decision submission dated **12 October 2021**, that the Complainants' submission in this regard fails to take account of **Special Condition 6** of the Letter of Approval.

I note that it is specifically detailed on **page 1** of the **European Standardised Information Sheet** that the document is not a legally binding offer. Furthermore, on **page 1** of the **European Standardised Information Sheet**, it is set out clearly that the figures provided, to include the figures in the illustrative amortisation table, are based on *"current market conditions"* as of **December 2007**, but that those figures could *"fluctuate"*. It is therefore important to highlight that the information provided in the **European Standardised Information Sheet** was provided for illustration purposes only and was not a formal offer of a one-year fixed interest rate mortgage loan which would convert to a tracker interest rate of ECB +0.80% thereafter. Equally, the information contained in the **Letter of Approval** dated **17 December 2007** to include the fixed interest rate, amount of each monthly instalment, total amount repayable and cost of credit was information that was valid as of **17 December 2007**. There was no guarantee provided in the **Letter of Approval** that the mortgage loan account would convert to a specific tracker interest rate of ECB+0.80% on the expiry of the initial fixed interest rate period.

The Complainants' representative, in his post-Preliminary Decision submission dated **17 October 2021**, continues to make assertions as to his interpretation of the **European Standardised Information Sheet** and the figures referred to therein. I am satisfied that the information contained in the *"Illustrative Amortisation Table"* contained in the **European Standardised Information Sheet** is for illustrative purposes only and was prepared on the basis of the rates applicable at the time the Letter of Approval was issued in **December 2007**. The Complainants were in no way entitled to or guaranteed a tracker interest rate of ECB + 0.80% at the end of the fixed interest rate period in **February 2009** simply because the illustrative amortisation table may have been prepared using this rate.

The Complainant's representative has also quoted the **Consumer Credit Act 1995, Section 122. (2)**, the text of which details as follows:

*"(2) In calculating the APR in relation to a housing loan, the following assumptions shall be made*

*[...]*

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*(b) in the case of credit agreements providing for variations in the rate of interest or other charges which are unquantifiable at the time of calculation, the APR shall be calculated on the assumption that the future rates of interest or charges are the current variable rates which will remain fixed and will apply until the end of the credit agreement. In circumstances in which the initial or subsequent interest rate is fixed for a specific period or periods, the calculation shall assume that the fixed rate or rates shall apply only for the period or periods specified and that the rates applicable to other periods of the contract are the current variable rates which will remain fixed for those periods”*

The Provider details that it “*is clear*” that it has complied with **Section 122(2)(b)** as detailed above when preparing the APR calculation for the Complainants. The Provider states that “*Not only did the Bank make the assumptions prescribed in Section 122(2)(b) but, as detailed in previous submissions and above, the Bank clearly informed the Complainants that these assumptions had been made.*”

It is clear to me, that the text in the **Consumer Credit Act 1995, Section 122. (2)** as quoted above indicates that where the APR in a housing loan is being calculated, which provides for variations in the rate of interest, then the APR will be calculated on “*the assumption*” that the current variable rates “*will remain fixed and will apply until the end of the credit agreement*”. This does not give the consumer a guarantee that these rates will remain stagnant, but merely details the procedures that must be followed by a financial service provider in its calculation of the APR for the purpose of presenting that information to a consumer, where this would be otherwise impossible to do with a interest rate that varies. This does not, in any manner, support the Complainants’ representative’s claims that “*in January of 2009, on expiry of the fixed rate period, when the ECB was 2.00%, the APR should have been 2.90%.*”

It is the Letter of Approval that was signed by the Complainants on **20 December 2007** in respect of mortgage loan account ending **8484** and the terms and conditions attaching to the Letter of Approval, that forms the basis of the contractual agreement between the Complainants and the Provider. Each of the Complainants’ mortgage loans are entirely distinct and separate and are governed by different terms and conditions. Just because the Complainants were offered a tracker interest rate of ECB + 0.80% for the term or mortgage loan account ending **8549**, it does not mean that they were automatically entitled to the same tracker interest rate on mortgage loan account ending **8484**, which was an entirely separate loan facility. If the Complainants were not happy with the terms of the Letter of Approval in relation to mortgage loan account ending **8484**, to include what would transpire at the end of the initial fixed interest rate period, the Complainants could have decided not to accept the loan offer made by the Provider.

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Instead, the Complainants accepted the Provider's offer by signing the **Acceptance of Loan Offer** on **20 December 2007**, and in doing so, confirmed that their solicitor had fully explained the terms and conditions of the mortgage loan to them.

The Complainants further maintain that they should have been offered a tracker rate of 4.25% (ECB + 2.25%) in **January 2009** rather than a rate of 4.75% (ECB + 2.25%) in circumstances where the ECB rate was 2.00% at that time. I note that the ECB refinancing rate reduced from 2.50% to 2.00% on **21 January 2009** however the new ECB rate was only implemented by the Provider on **13 February 2009**. When the Provider issued a rate options form to the Complainants on **26 January 2009**, a tracker interest rate of "ECB + max 2.25%" was offered to the Complainants and the rate options form stated that this was "Currently 4.75%". Tracker interest rates by their very nature fluctuate in line with the ECB refinancing rate.

Therefore, it would appear to me that if the Complainants had chosen the option of a tracker interest rate as opposed to a LTV variable interest rate, a tracker interest rate of ECB + 2.25% would have been applied to their mortgage loan account on **13 February 2009**, at the end of the fixed interest rate period. The applicable tracker interest rate in respect of the Complainants' mortgage loan on **13 February 2009** had reduced from 4.75% (ECB + 2.25%) to 4.25% (ECB + 2.25%) while the applicable LTV variable interest rate had reduced from 4.55% to 4.05%. The Complainants clearly chose to apply a LTV variable rate of 4.05% which, as it transpires, was lower than the available applicable tracker interest rate at the time.

I note the Complainants' representative, in the post-Preliminary Decision submission dated **28 September 2021**, appears to submit that I consider that "a contract with a tracker mortgage rate, can vary the margin".

The mortgage loan provides that the on expiry of the fixed rate period "the interest rate applicable to the Loan will be the then current [Provider's] Tracker Mortgage rate appropriate to the Loan as may be varied from time to time in accordance with variations to the European Central Bank refinancing rate". This clearly indicates that the applicable interest rate, on expiration of the fixed interest rate period, would be the tracker rate margin as set by the Provider in or around **February 2009** plus the ECB main refinancing rate applicable at that time. The Provider was entitled, under its commercial discretion, to vary its applicable tracker rate margin, however, it would not be entitled to alter the tracker rate margin after it was applied to the mortgage loan without the express consent of all the parties to the mortgage agreement. The Complainants were not availing of a tracker interest rate when the Provider altered its then applicable tracker interest rate margin.

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In the absence of a contractual guarantee to a specific tracker margin detailed in the Complainants' mortgage loan documentation, the Provider offered the Complainants its "then current [Provider's] Tracker Mortgage rate" in **February 2009**.

Upon a careful consideration of the evidence before me, it is clear to me that that the Complainants did not have a contractual or any other entitlement to a tracker interest rate of ECB + 0.80% on the expiry of the fixed interest rate period in **February 2009**, or indeed at any other stage during the term of the mortgage loan. The Complainants had a contractual entitlement to the "the then current [Provider's] Tracker Mortgage rate appropriate to the Loan" which was ECB + 2.25% on the expiry of the fixed interest rate period in **February 2009**. The Provider duly offered this tracker interest rate to the Complainants pursuant to the terms of the Letter of Approval in relation to mortgage loan account ending **8484**, however the Complainants chose to apply a LTV variable rate instead.

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

### **Conclusion**

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

**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**

25 November 2021

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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.

