



<u>Decision Ref:</u>	2021-0498
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

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

The loan amount was €300,000 and the term of the loan was 35 years. The Letter of Approval which was signed by the Complainant on **18 December 2007** outlined the loan type as a "4 Year Fixed Rate Home Loan".

The Complainant's Case

The Complainant states that she drew down two mortgage loan accounts ending **0210** and **1029** with the Provider in **December 2007**. The Complainant submits that she requested a tracker interest rate for both mortgage loan accounts.

The Complainant states that the loan offer for mortgage loan account ending **1029** provided for a loan in the amount of €60,000 and a tracker interest rate of ECB + 0.80%, as requested by her. However, she submits that the loan offer for the mortgage loan account ending **0210** provided for a loan in the amount of €300,000 on a four-year fixed interest rate of 5.5%.

The Complainant details that she is of the opinion that the broker who facilitated the mortgage loans was the “Banks representative” as “Numerous letters from the Broker to the [Complainant] and the Bank which have stated on its Letter Headed Note Paper that he is a Mortgage Broker for [the Provider]. Therefore, he represents [the Provider] and operates for and on their behalf”.

The Complainant submits a loan offer was issued to her which she signed and accepted on **18 December 2007**. The Complainant maintains that she “had no choice but to accept or lose her contracted purchase. The signing of this offer letter was done under duress, was not what she requested, and was only signed because the Bank representative advised the [Complainant] that they could alter the position after the Xmas break”.

The Complainant states that a lending interest sheet dated **28 September 2007** “clearly shows that there were numerous other options available to the Bank at the time to provide facilities in line with what the client wanted, which was to match her existing terms on her existing facilities (i.e. other loan held by client with the same Bank).” The Complainant details further that “As the facilities are crossed secured and linked the rate of interest charged on both accounts should also have been linked/matched. The Bank chose not to do so even though there were options available to do so but decided instead to choose an option that suited it not the client (i.e. higher margin rate).”

The Complainant asserts that she signed the loan offer for mortgage loan account ending **0210** on **18 December 2007** on the understanding that she could transfer to a tracker interest rate in **January 2008** as tracker rates were “readily available at the time”. The Complainant further asserts that her “original application form for loan facilities in 2007 did not state that she was requesting a fixed rate facility, and the Bank’s broker did not request one”. The Complainant submits that this “shows the original intention of the [Complainant] and supports her position that she never requested what the Bank provided to her.”

The Complainant submits that following this, both she and her broker contacted the Provider on numerous occasions to request that the applicable interest rate be rectified. She submits that the Provider “assured [the Complainant] many times over the years ... that it would be sorted out.”

The Complainant states that she contacted the Provider on the following occasions to request a tracker rate of interest:

- She wrote to the Provider in **January 2008** but did not receive any response;

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- Her broker forwarded a further written request to the Provider on her behalf in **June 2008** *“but apparently they have no record of it”*;
- She telephoned the Provider in or around **October/November 2008** to query whether the tracker rate had been applied and was informed that it had not. The Complainant submits she *“was horrified but was assured that it could be sorted by simply paying 100 euro fee to transfer to a tracker rate.”*
- She submitted a further written request for a tracker rate in **December 2008** and received a letter from the Provider dated **16 December 2008** which stated that *“the tracker rate is no longer available to existing customers however you can avail of the LTV variable rate of 5.40%”*.
- She wrote to the Provider on **4 January 2010** to complain. She submits that in response, the Provider *“gave me back two months’ mortgage as compensation”*, which she accepted as she was informed that the mortgage loan account would revert to a tracker rate at the end of the fixed period in **December 2011**.

The Complainant details that she received a rate options letter dated **30 November 2011** from the Provider and was shocked by the *“exceptionally high”* tracker rate option of ECB + 3.25% on offer. She asserts that *“this is scarcely better than the fixed rate [she] had been on and [she] feel[s] excessive”*. The Complainant notes that a tracker rate of ECB + 3.25% was applied to her mortgage loan account in **December 2011**.

The Complainant submits that the Provider has used its own definition of a tracker mortgage loan and as the Complainant *“already had a Tracker rate loan on her other facility with the same bank (ECB + 0.8%)”* she was *“assuming that this is the rate she would revert to once the fixed term of her loan expired”*. In this manner the Complainant states that the Provider *“should have stated what exactly was going to be the “percentage over the ECB rate” and “As is based in Irish Law it’s the client’s interpretation of the contract that applies because the bank issued the contract, and because it did not clearly state what this additional rate is (which they should have based on their own definition) the loan should have reverted to the same rate of her other facility (i.e. ECB RATE + 0.8%).”*

The Complainant wants the Provider to reimburse her for the interest she asserts she has overpaid on her mortgage loan account and for the correct tracker interest rate to be restored to her mortgage loan account ending **0201**.

The Provider's Case

The Provider submits that a **Letter of Approval** issued to the Complainant's broker on **17 December 2007** in relation to mortgage loan account ending **0201** which provided for a four-year fixed interest rate, following which the Complainant would be offered a tracker interest rate as per **Special Condition 6** of the **Letter of Approval**.

In relation to the Complainant's other mortgage loan account ending **1029**, the Provider explains that *"both of the Complainant's loans are separate facilities each with its own terms and conditions"* and the Provider *"was not and is not obliged to apply the same interest rate to both loans"*.

The Provider submits that it is satisfied that it was sufficiently clear and transparent in its communications with the Complainant in or around **December 2007** with regards to the effect of applying a four-year fixed interest rate to the mortgage loan account at inception and the subsequent tracker interest rate entitlement.

The Provider submits that it has no record of receiving correspondence from the Complainant's broker on **3 January 2008**. The Provider states it only became aware of this correspondence from the Complainant's subsequent communication on **28 May 2012**. The Provider details that when the Complainant contacted the Provider on **8 December 2008**, it wrote to the Complainant detailing that the tracker interest rate was no longer available to existing customers, but the Complainant could avail of the LTV variable rate of 5.40%.

The Provider confirms that it *"did not inform the Complainant directly at any other point between December 2007 and December 2008 that a tracker rate was not available to customers who were enquiring about changing their interest rate."*

The Provider states that on **9 March 2009** the Complainant requested to break out of her fixed rate term. The Provider submits that it responded to this request by way of letter dated **13 March 2009** *"confirming she could break out of the fixed rate period and that a fixed rate exit fee applied (€17,667.00)."*

In response to the Complainant's submission that the Provider offered her *"two months' mortgage as compensation"* as a result of her letter of **4 January 2010**, the Provider states that it *"did not offer the Complainant "two months' mortgage as compensation" or any other compensation at any time during the lifetime of her mortgage."* The Provider submits that on **31 March 2009** a tax relief at source (TRS) refund of €34.35 was applied to the Complainant's mortgage loan account and a further refund of €346.90 was given to the Complainant on **16 November 2010**.

The Provider details that approximately twenty days prior to the expiration of the fixed rate period on **20 December 2011**, it issued an options letter to the Complainant outlining the available interest rate options. The Provider submits that the options letter detailed that if the Provider did not receive a response from the Complainant before the expiration of the fixed rate period on **20 December 2011**, a tracker interest rate would automatically apply to her mortgage loan account. The Provider also details that the correspondence issued *“also advised that if the Complainant chose a fixed rate or variable rate, the Bank’s tracker rate commitment to her would be deemed to be at an end.”*

The Provider details that the following interest rates were offered to the Complainant prior to expiration of the fixed rate period in **December 2011**:

<i>“Tracker variable rate</i>	<i>4.50% (ECB + 3.25%)</i>
<i>LTV variable rate</i>	<i>5.80%</i>
<i>2 year fixed rate</i>	<i>7.25%</i>
<i>5 year fixed rate</i>	<i>8.75%”</i>

The Provider states that the tracker interest rate of ECB + 3.25% was applied to the Complainant’s mortgage loan account by default on **20 December 2011** and the account has remained on this interest rate to date.

The Provider details that the appropriate tracker rate of ECB + 3.25% as of **20 December 2011** was based *“on commercial decisions, made by the Bank, dependent on market conditions”*. The Provider states that it took *“into account of a number of factors such as:-*

- *Wholesale lending and borrowing rates*
- *Interest rates paid on deposits and*
- *The Bank’s competitive position”*

The Provider details that its *“tracker rate of ECB+3.25% was implemented [in late] 2009.”* The Provider states that *“During a fixed rate period, the Bank does not communicate directly with a customer in respect of each rate change taking place during the fixed rate period”* and its *“rate changes are available in its branches, on its website and by telephone enquiry”*.

In response to the Complainant’s assertion that she is entitled to a tracker interest rate of ECB + 0.80%, the Provider states that a *“tracker rate of ECB+0.80% was available to certain customers maturing from a fixed rate period for a period in 2007 only. A tracker rate of ECB+0.80% has not been available since that time.”*

The Provider contends that the terms and conditions of the Complainant's mortgage loan account ending **0210** do not provide for a tracker interest rate of ECB+0.80%.

In response to the Complainant's assertion that both she and her broker contacted the Provider a number of times between **December 2007** and **December 2011** to request a tracker interest rate, the Provider submits that it "*has no record*" of any such communication.

The Provider asserts that the Complainant's broker was "*not at any time a tied agent of the Bank*" and it "*had no direct communication with the Complainant during the application process as she dealt only with [named Broker]*".

The Complaints for Adjudication

The complaints for adjudication are as follows:

- (a) The Provider did not apply a tracker interest rate to mortgage loan account ending **0201** as requested by the Complainant in **December 2008**, or on any of the subsequent occasions when the Complainant and her broker requested a tracker interest rate; and
- (b) The tracker interest rate of ECB + 3.25% offered to the Complainant when the fixed rate period expired in **December 2011** is "*exceptionally high*".

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

In the absence of additional submissions from the parties, within the period permitted, 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 Complainant 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 Complainant was informed of the parameters of the investigation by this office by way of letter issued to her nominated third-party representative dated **16 January 2019**, which outlined as follows:

“In the interests of clarity, the complaint that you are maintaining on your client’s behalf 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 Complainant, does not form part of this investigation and Decision for the reasons set out above.

In order to determine the complaint, it is necessary to review and set out the relevant provisions of the Complainant’s mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainant and the Provider from drawdown of the loan in **December 2007 to 2017**.

The Provider issued a **Letter of Approval** dated **17 December 2007** to the Complainant, through her third-party broker. A copy of the Letter of Approval together with the terms and conditions attaching to the Letter of Approval was also sent to the Complainant's solicitor under cover of letter from the Provider dated **17 December 2007**. The **Letter of Approval** dated **17 December 2007** details as follows:

"

<i>Loan Type:</i>	<i>4 Year Fixed Rate Home Loan</i>
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Purchase Price/Estimated Value: EUR €312,500.00
Loan Amount: EUR 300,000.00
Interest Rate: 5.55%
Term: 35 year(s)"

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

"1. [Provider] normal Terms and Conditions apply.

...

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.

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."

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General Condition 5 of the **General Mortgage Loan Approval Conditions** attaching to the Letter of Approval details 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.

5.3 Whenever repayment of a loan in full or in part is made before expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:

- (a) a sum equal to one half of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid, for the remainder of the Fixed Rate Period, or*
- (b) a sum equal to [the Provider’s] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such a sum to a Borrower at its then current New Business Fixed Rate with a maturity date nearest to the end of the Fixed Rate Period of the loan, or part thereof, being repaid.*

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”.

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.”

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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 **Acceptance of Loan Offer** was signed by the Complainant on **18 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.”

It is clear that the **Letter of Approval** dated **17 December 2007** envisaged that a fixed interest rate of 5.55% would apply to the Complainant’s mortgage loan account ending **0201** for four years, with tracker interest rate appropriate to the loan to apply thereafter.

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

The Complainant accepted the **Letter of Approval** having confirmed that the Letter of Approval and the mortgage conditions had been explained to her by her solicitor.

Mortgage loan account ending **0201** was drawn down on **20 December 2007**.

The Complainant issued a letter to the Provider dated **8 December 2008**, detailing as follows:

"I took out the above mortgage in December 2007. However, in January '08 I wrote to [the Provider's] Head Office requesting that the mortgage be transferred to a Tracker Rate Mortgage as I have on my second Mortgage [ending 1029]. I have heard nothing from [the Provider] since, about this request.

I am again requesting that you put this on Tracker Rate for me as promised to me by your Head Office when I rang immediately after Christmas 2007. before writing in the above mentioned request."

The Complainant appears to have sent a letter dated **08 January 2008** (as referred to in the above letter) to her third-party broker noting that she wished *"to change my mortgage from a 4 year fixed rate to a variable tracker rate and I wish for this to be done with immediate effect"*. I have not been provided with any documentary evidence indicating that the Complainant or her third-party broker contacted the Provider in **January 2008** or **June 2008** to request that a tracker interest rate be applied to the Complainant's mortgage loan account ending **0201**. In fact, the Provider asserts that it first had sight of the letter dated **08 January 2008** from the Complainant on **28 May 2012**, when the Complainant wrote to the Provider enclosing a copy of that letter.

The Provider responded to the Complainant's correspondence of **8 December 2008**, by way of letter dated **16 December 2008** as follows:

"I acknowledge receipt of your recent request in relation to the above numbered mortgage account.

Please note that the tracker rate is no longer available to existing customers however you can avail of the LTV variable rate of 5.40%.

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There is no fixed rate exit fee on your account, this is valid for 20 days. Please confirm in writing if you wish to switch to the LTV variable rate.

Please also be advised that we did not receive a letter from you in January 2008 to transfer your loan on to a tracker rate.

I trust the above is to your satisfaction and should you require further information please do not hesitate to contact 'Mortgage Services' @ [contact number]."

The evidence on file does not indicate that the Complainant chose to accept the Provider's offer to apply a LTV variable rate at this time.

The Complainant sent a further letter to the Provider dated **9 March 2009** detailing as follows:

"Dear [Provider's representative],

I am writing to you with regard to my mortgage [ending 0210]. I think you might be familiar with my case – my broker – [named Broker] has been in contact with several people in [the Provider] on my behalf.

I'd like to explain my predicament – I'll be as brief as possible but unfortunately it's a long story.

I took out my mortgage in Dec '07. I was borrowing €360,000, my broker arranged it in two mortgages - €300,000 and a separate one for €60,000. For some reason, that I'm still not aware of, when I went to sign with my solicitor the €60,000 was on a tracker rate, the €300,000 was on a fixed rate for four years at 5.5%. I had been v.clear that I wanted a tracker on both I was v.taken aback. I phoned my broker, [named Broker], he advised me to sign, that we would sort it out in January.

In the meantime, I had requested a six month 'holiday period' which meant that I didn't actually start paying my mortgage until July. This took the urgency off my request for a tracker but on 6th June I sent a letter to [named Broker] requesting that my mortgage be put on a tracker. He forwarded that to [the Provider] but it seems [the Provider] has no record of it. He does have a copy of that letter in his office which he can supply you with.

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[Named Broker] has been trying several times a week for the last few months but unfortunately seems to be getting different people all the time, we are getting nowhere fast. I received a letter from you on 16/12/08 and that's where I got your name, why I'm writing to you now. I realise that the tracker rates are not available but I do feel strongly that in my case I should be able to switch to a variable rate. I was offered this in December, realise time has passed but [named Broker] has been trying to negotiate a tracker rate for me, we did wait three weeks for an 'exit letter' from [the Provider]. Anyway, at this stage I would be v.grateful if you would let me have the variable rate.

Finally, [Provider's representative], I feel I should add that I am a fair person, if it had been the case that I had opted for a fixed rate, I would have no problem with taking the hit now that the rates are going down. But you can imagine how stressful this has all been when it was the tracker I was supposed to get in the first place. Could a compromise be reached on this? I'd love to speak to you or someone else if that's possible.

Apologies for being so long-winded! I look forward to hearing from you, hopefully reaching an amicable agreement".

The Provider responded by letter dated **13 March 2009** detailing as follows:

"I refer to your recent query in relation to switching out of your fixed rate mortgage contract.

In order to break your current 4 year fixed rate contract, we require that all parties to the loan sign this form below and return to [the Provider].

A consequence of your wish to switch from your fixed rate is that the funding arrangements that the bank has put in place for your mortgage will have to be unwound. The cost to the bank of doing this is €17,667.00, to allow us to proceed with your switch request we require payment of this amount.

Payment can be sent to us by cheque or can be lodged directly to your mortgage account.

This quote is valid for 10 business days after which a fresh quotation must be obtained."

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It does not appear that the Complainant responded to the Provider's letter dated **13 March 2009**.

The Provider issued a letter to the Complainant dated **30 November 2011** prior to the expiry of the fixed rate period in **December 2011**, as follows:

"Dear [Complainant],

I am writing to remind you that the current rate option on your mortgage account will end on 20 Dec 2011. 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. 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 the 20 Dec 2011, the interest rate on your mortgage will be the Tracker Variable Rate.*

Switches to Fixed Rates

If you avail of a Fixed Rate, our tracker rate commitment to you is deemed to be at an end and our prevailing variable rate (currently LTV variable) will apply on expiry of this fixed term (although we may offer you a further fixed term at the interest rates then prevailing). For the avoidance of doubt, we wish to advise you that if you avail of a Fixed Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

Switches to Variable Rates or Other Rates

If you avail of or default to a Variable Rate (currently LTV variable) or Other Rate, our tracker rate commitment to you is deemed to be at an end. For the avoidance of doubt, we wish to advise you that if you avail of a Variable Rate or Other Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

We strongly suggest you consult your financial or legal advisor before making a decision regarding mortgage options."

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The rate options form attached to the letter dated **30 November 2011** listed the following rate options that were available for selection by the Complainant on the expiry of the four-year fixed interest rate period:

"Option		Monthly Repayment – (EUR)
<i>Tracker Variable Rate*</i>	<i>Currently 4.50%</i>	<i>1,520.07</i>
<i>LTV Variable Rate **</i>	<i>Currently 5.80%</i>	<i>1,754.74</i>
<i>2 Year Fixed Rate</i>	<i>Currently 7.25%</i>	<i>2,034.33</i>
<i>5 Year Fixed Rate</i>	<i>Currently 8.75%</i>	<i>2,340.65</i>

[...]

***In calculating your loan to value ("LTV") ratio, we use the current loan balance and the most recent valuation on file for this mortgage.*

** The interest rate that applies to this Tracker Mortgage Loan will never be more than the European Central Bank Refinancing Rate (the "ECB Rate") plus a margin of 3.25 %.*

See over the page for more details on Tracker Mortgage Loans."

The reverse of the Provider's correspondence dated **30 November 2011** details as follows under the heading 'Tracker Mortgage Loans':

"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.

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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."

It would appear from the evidence that the Complainant did not respond to the Provider's correspondence dated **30 November 2011**. The Provider subsequently issued correspondence to the Complainant dated **20 December 2011** detailing as follows:

"I wish to advise you that in accordance with the terms of your loan, the rate of interest has been amended to a Tracker Variable Rate currently 4.500 %.

Confirmation of your revised monthly payment calculated at the new rate of interest will be forwarded to you shortly.

I trust that the above is to your satisfaction. However should you have any further queries please do not hesitate to contact [number]."

The Complainant sent an undated letter to the Provider, which was received by the Provider in **December 2011**, which details as follows:

"Re. your letter of 30/Nov/'11 outlining the new options available to me, I was shocked to see that your current Tracker rate is quoted at 4.5% (3.25% above E.C.B. rate), which is exceptionally high.

In 2007, when I took out this mortgage plus mortgage acct. no. [ending 1029], both were meant to be put on a tracker rate but mistakenly only the latter was done correctly. It was set at 0.8% above E.C.B. rate. The former was put on a fixed rate for four years even though I had clearly requested a tracker, which was readily available at the time. I have been in dispute with [the Provider] over this issue for four years now and have been told umpteen times over the years that it would be sorted "in a couple of days" A year ago I was offered a variable rate but was advised by [the Provider] to hold off as I would be reverting to a tracker in Dec.'11. I have put up with overpayments for four years now because I felt it would end in Dec.'11, only to find that the tracker rate being offered is scarcely better than the rate I am presently on.

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It seems to me that you are making up your own rules as you go along and constantly moving the goalposts. My broker [named broker] and I have been constantly told by numerous individuals in [the Provider] that things would be sorted.... well they haven't been and here I am four years later, when I thought this nightmare was finally coming to an end, thrown into another extremely stressful situation and again being treated unfairly by [the Provider]. To be honest I have had too many sleepless nights over this and am determined not to allow you to continue to treat me in what anyone would agree is an unfair manner.

It is my hope that you will come back to me with a more reasonable and fair option and that this issue can be resolved finally and amicably. In the event that this doesn't happen, I will have to involve a third party and will refer the matter to the financial ombudsman. I have a thick file of correspondence between myself and [the Provider] dating back over the past four years.

Finally I would like to repeat my wish that this matter be resolved for once and for all because I genuinely believe that I have been treated extremely unfairly by [the Provider] throughout this process and in the final resolution that you are offering.

I will await your reply but would advise that I will send on a full report to the ombudsman if we have not reached agreement by mid January - after all it has been four years"

The Provider responded to the Complainant's letter on **23 December 2011** as follows:

"I am writing to you with regard to your recent letter in relation to the above numbered mortgage account.

Please find enclosed a copy of your loan agreement as requested. I refer you to a special condition 6 which states -

"On Expiry of the fixed rate period and without affecting the entitlement of the applicant to apply at any time to forthe (sic.) rate for a further period (if available), the interest rate applicable to the loan will be the 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)". The the (sic.) event of any variation of the ECB rate, the revised interest rate for the Loan will apply no 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".

/Cont'd...

Your 4 year fixed rate expired on 20th December 2011. The appropriate tracker rate available at this time was ECB+3.25. It does not specify on your loan approval that your loan would switch to ECB+0.80%.”

A further letter was sent by the Complainant to the Provider dated **2 February 2012**, detailing as follows;

“Dear [Provider’s representative],

I am writing to you in the hope that you might look into my case, and , if possible, be open to a compromise. I have already sent a complaint form to The Financial Services Ombudsman, I received a letter from [named person], advising me to write to you outlining my complaint, requesting that a Final Response Letter be issued to me.

My complaint is two fold, I will try to be as brief as possible...

1) [the Provider] mistakenly put my mortgage on a fixed rate (see Letter 1 for clarification) and assured me many times over the years (by phone to me, with my broker – [named Broker and phone number]) that it would be sorted out. They gave me back two months mortgage (in three cheques) as a good-will gesture / compensation after they received Letter 1 (see attached). I accepted this as I was informed by them that I would be reverting to Tracker Rate at the end of my fixed term. (At that point it had been going on for three years)

2) At the end of the fixed term, they wrote to me to say that my mortgage would indeed be moved [text illegible] tracker rate would be 3.25% above E.C.B. rate. This is scarcely better than the fixed rate I had been on, I feel excessive, particularly considering my particular situation.

I really hope that you might be able to intervene, that a compromise might be reached. I realise I was foolish to sign the contract in the first place on the premise that it would be sorted ‘in a couple of weeks’ but I was under severe pressure from the builder at the time, as a tracker rate was readily available at the time, I thought I’d be safe enough. I have been passed from Billy to Jack so many times over the last four years I feel that I have been treated v.unfairly by [the Provider] and am at the end of my tether at this stage. As I’ve said so many times over the last 4 years –

/Cont’d...

I'm a decent person, will always pay what I owe but I'm extremely frustrated to be paying so much more every month than I should be. I am enclosing the last letter I sent to [the Provider] and a letter I sent in Jan '10 which outlines exactly what happened.

Finally, I'd like to thank you for taking the time to read these letters. I would be so grateful if you could do anything to help".

The Provider responded to the Complainant's letter of **2 February 2012** by issuing a Final Response Letter dated **27 March 2012** detailing as follows:

"I understand from your correspondence your mortgage account numbers [ending 1029] & [ending 0210] were issued by [the Provider] on the 20th December 2007. You advised your mortgage account number [ending 0210] was mistakenly issued at a 4 year fixed rate instead of a Tracker rate. As outlined, you contacted your broker, [named Broker] re this and were advised to sign the relevant documentation as he would sort this in a couple of weeks. I also note you mentioned, two months mortgage repayments, in three separate cheques, were received by you as a gesture of goodwill. Despite numerous calls from both you and your broker [named Broker], you advised this was not amended.

On expiry of the 4 year Fixed Term rate your mortgage account number [ending 0210] was amended to a Tracker Rate of ECB + 3.25% which you feel is excessive.

As per your letter of loan approval for account number [ending 0210], a copy of which was issued to you on the 23rd December 2011 by our Mortgage Department, it clearly states the loan type as a 4 year Fixed Rate Home Loan. By signing the Acceptance of Loan Offer it indicated your Solicitor had fully explained the said Terms and Conditions of the Mortgage. Acceptance of the Loan Offer forms part of the legal documents and your Solicitor would have advised you of this. I would note if you had any concerns in relation to the loan offer this should have been raised prior to signing the letter of Acceptance and refraining from signing until the matter had been sorted to your satisfaction. The Bank cannot comment on any conversation you may have had with your broker in relation to being advised to sign the Acceptance for a 4 year Fixed rate on the promise that it would be sorted later.

Having listened to numerous calls from your broker, [named Broker], I have only managed to locate one call that relates to your mortgage account.

/Cont'd...

In this call [named Broker] raised a query in relation to the increase in your repayments from €1611.05, as outlined in your Letter of Loan Approval to €1698.92 on expiry of the 6 month repayment holiday you undertook at the start of your mortgage. This would have been due to the fact that no repayments had been received in the first 6 months of your mortgage and also the term of your mortgage had been amended from 35 years to 33 years as requested (I have enclosed a copy for your attention).

Our Mortgage Department received correspondence from you requesting to transfer your mortgage account number [ending 0210] to a Tracker rate dated the 8th December 2008. This letter referred to a previous letter you had sent in January 2008 requesting this. As a Tracker rate was not applicable to customers breaking out of a Fixed rate, our Mortgage Department wrote to you on the 16th December 2008 advising that a Tracker rate was not available. However this letter advised, should you wish to avail of the Variable rate, to confirm this request in writing. I note it was also confirmed the letter you mentioned you had sent in January 2008 had not been received. (I have enclosed a copy for your attention).

A letter dated the 9th March 2009 [...] was received from you. In this letter you requested to amend your mortgage to a Variable rate. On the 13th March 2009 our Mortgage Department wrote to you enclosing the relevant documentation required to be completed in order to amend your Interest rate and also outlined the cost of the Fixed rate Exit Fee. The completed documentation was not received and hence your mortgage remained on the Fixed rate.

An options letter issued to you 20 days prior to the expiry of your 4 year Fixed rate. As the Bank did not receive a response you[r] account automatically defaulted to the current Tracker rate appropriate to the loan at the time, as per the original Terms and Conditions of your Letter of Loan Approval. I have enclosed a copy of your Letter of Loan Approval. The appropriate Tracker rate available at the time was ECB + 3.25% which was 4.5%, this has subsequently reduced to 4.25% inline with ECB rate reduction. This was outlined in the letter issued to you from our Mortgage Department dated 23rd December 2011....

I note that a refund of Tax Relief at Source (TRS) in the amount of €346.90 was issued from your mortgage account number [ending 0210] on the 16th November 2020. A TRS refund in the amount of €265.26 was issued from your corresponding mortgage account number ending [1029].

/Cont'd...

I have been unable to locate the refund of the two Mortgage repayments you referred to in your correspondence, however should you wish to provide further details of this refund, such as amounts and dates you received same, I would be happy to investigate further..."

The Complainant sent a response letter dated **28 May 2012** to the Provider, which detailed as follows:

"...I wish to address a couple of points which you raised in your last letter. The first point is re. my solicitor advising me re. signing for the four year fixed rate. As mentioned in my last letter I was shocked to see the four year fixed rate in my contract my solicitor advised me there & then to ring my broker, which I did. His advice was go ahead, sign, it would be sorted within a couple of weeks after Christmas. Of course I realise that I shouldn't have signed but I did so in good faith, the fact remains it was supposed to be a tracker rate.

The second point I wish to address is the three cheques that were sent to me from [the Provider] as compensation / goodwill gesture. My broker has stated in his letter, these were issued to him, sent to me.

I was grateful because I was glad of the money I felt that at least there was some recognition of the fact that I had overpaid by thousands at that stage.

Finally, I am appealing to you again to reconsider your position, even meet me halfway on this. I have accepted that I'm not going to ever be on the rate I should have been put on in the beginning but I genuinely feel that, because of the circumstances of my case, [the provider] should cut me some slack on this. Thank you for the time, effort you are putting into my case."

The Complainant appears to have attached pages from an undated handwritten letter from her third-party broker to her response to the Provider. The letter from the broker details as follows in relation to the cheques that issued to the Complainant:

"...because of her dissatisfaction over the whole thing and also partially because I blamed myself over letting her sign the original loan offer, I decided to arrange a refund of all commissions paid over on this case. This amounted to €3,200.00 and I got that refunded to her over 3 instalments in late 2010 and early 2011".

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The Provider subsequently issued a letter to the Complainant dated **2 July 2012** detailing as follows:

“Kindly note, the mortgage loan application was introduced to [the Provider] by a broker, [named Broker] of [brokerage firm]. In such circumstances, the intermediary and not the Bank meet[s] customer and provide[s] financial advice. The issue of financial advice regarding the acceptance of the loan conditions is a matter between you, your chosen financial advisor and your Solicitor.

On the 17th December 2007 the Bank issued a Letter of Approval to your Broker & Solicitor for Mortgage Account number [ending 0210]. This letter showed the Loan Type as 4 Year Fixed Rate Home Loan, at a rate of 5.5% over a period of 35 years.

You signed the acceptance on the 18th December 2007, in the presence of your Solicitor, accepting the Terms and Conditions for a 4 Year Fixed rate. The Bank processed this and issued your Solicitor with the funds on the 19th December 2007.

The cheques you received from [named Broker] were not issued by [the Provider]. These were issued to you by your Broker [named Broker]. It would appear from (sic.) [named Broker’s] letter that he decided to forward any commissions he received in this case to you. Any queries you may have in this matter should be directed to [named Broker].

I have contacted our Mortgage Department and they have advised me that [...] we are not in a position to amend the interest rate on your loan. We have no record of your Broker requesting to change the loan to a Tracker. The only request we have at the time of drawdown is related to a change in term of the mortgage.”

The Complainant sent a further letter to the Provider dated **26 October 2017** detailing as follows:

“To whom it concerns,

I am writing in connection with my mortgage. There is a very thick file in [the Provider] with my name on it and in the light of recent developments relating to Tracker Mortgages, I have decided once again to pursue reimbursement for overpayment and to be put on the correct tracker rate.

/Cont’d...

The attached document which I am forwarding to the financial ombudsman outlines my situation in detail. There are also many letters with [the Provider] which I have written over the past nine years explaining my grievances.

Very briefly my case is this....

I took out two mortgages with [the Provider] in December 2017....one for 60K and the other for 300K. Through no fault of my own the larger mortgage was put on a four year fixed rate. I fought that for two years and eventually had to let it go because I was unable to sleep and extremely stressed. I had also been reassured, in writing, by [the Provider] that at the end of the four years I would be reverted to the Tracker Rate (this was written into my contract). When the four years were finally up, I was horrified to see that the "current" tracker rate was, according to [the Provider] 3.5% above the ECB rate! Again I disputed this, in writing and was baffled at where that "current" figure had come from since tracker rates were no longer available by then.

I believe I have been treated very unfairly by [the Provider] and look forward to finally having a resolution to this."

The Provider issued a further **Final Response Letter** dated **14 May 2018** to the Complainant.

Upon a careful consideration of the evidence before me, it is clear that that the Complainant 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 **December 2011**, or indeed at any other stage during the term of the mortgage loan in respect of mortgage loan account ending **0210**. While the terms and conditions of the Letter of Approval dated **17 December 2007** provided for a four-year fixed interest rate with a tracker interest rate to apply thereafter, the loan agreement did not stipulate that a specific tracker interest rate of ECB +0.80% would apply.

The Complainant appears to be of the view that given she was offered a tracker interest rate of ECB + 0.80% on another mortgage loan that she held with the Provider (mortgage loan account ending **1029**), she was somehow entitled to the same tracker interest rate on the expiry of the fixed rate on mortgage loan account ending **0210**.

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It is important to highlight that mortgage loan account ending **1029** and mortgage loan account ending **0210**, which is the subject of this complaint, are two entirely separate loan facilities that are governed by different terms and conditions, despite being secured against the same mortgaged property.

The Complainant further submits that she signed the **Letter of Approval** dated **17 December 2007** "*under duress*" as she was under pressure to close the sale on the house purchase. It is important to note that it was at all times open to the Complainant to decline the Provider's loan offer if she felt that the mortgage product offered by the Provider was not suitable to her. If the Complainant was not happy with the terms of the Letter of Approval in relation to mortgage loan account ending **0210**, to include the applicable interest rate and what would transpire at the end of the initial fixed interest rate period, the Complainant could have decided not to accept the loan offer made by the Provider. However, the evidence is that the Complainant, having consulted with her solicitor and her third-party broker, and despite raising what appears to have been some initial concerns in relation to the applicable interest rate, decided to accept the terms of the loan offer and proceeded to draw down the loan in **December 2007**. In circumstances where the Complainant applied for the mortgage loan through a third-party broker, I do not consider that the Provider was privy to any concerns that the Complainant may have had prior to signing the **Acceptance of Loan Offer** on **18 December 2007**.

The Complainant submits that she made a request to apply a tracker interest in **January 2008** and again in **June 2008**. Neither the Provider nor the Complainant have submitted any documentary evidence to show that a request for a tracker interest rate was made as described by the Complainant.

In any event, even if the Complainant had requested a tracker interest rate, it was within the Provider's commercial discretion to decide whether to accede to such a request in circumstances where the fixed rate term on the Complainant's mortgage loan had not yet concluded.

On **8 December 2008**, the Complainant made a request to amend the interest rate on her mortgage loan to a tracker interest and a copy of this request has been furnished in evidence. I note that the Provider notified the Complainant that tracker interest rates were no longer available to existing customers and that the Complainant could avail of the LTV variable rate at the time which was 5.40%. It is disappointing that the Provider did not clarify to the Complainant that she was not entitled to a tracker rate of interest if she broke away early from the fixed interest rate at that time, however she would be entitled to the Provider's tracker rate appropriate to the loan some 3 years later, on expiry of the fixed rate period in **December 2011**.

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Notwithstanding, I acknowledge that the terms of the Letter of Approval dated **17 December 2007** were clear that the interest rate on the Complainant's mortgage loan account would convert to a tracker interest rate at the end of the four-year fixed interest rate period. Pursuant to **General Condition 5** of the **General Mortgage Loan Approval Conditions**, the interest rate applicable to the Complainant's mortgage loan was fixed at a rate of 5.55% for a period of 4 years. In circumstances where the Complainant had only completed one year of her four-year fixed interest rate period in **December 2008**, I accept that the Provider was under no obligation to apply a tracker interest rate to mortgage loan account **0210** on foot of the Complainant's request dated **8 December 2008**. It was entirely a matter within the Provider's commercial discretion as to whether it wished to accede to any such request.

In accordance with the terms and conditions of the **Letter of Approval** in relation to mortgage loan account ending **0210**, the Complainant had a contractual entitlement to the "the then current [Provider's] Tracker Mortgage rate appropriate to the Loan" on the expiry of the fixed interest rate period in **2011**. The tracker interest rate on offer by the Provider in **December 2011** was ECB + 3.25%. I note that a tracker interest rate of ECB + 3.25% was introduced by the Provider from **mid-2009** and I accept that the Provider was entitled to set this rate using its own commercial discretion. The Provider offered this tracker interest rate to the Complainant along with the option of a LTV variable interest rate and a further fixed interest rate on the expiry of the fixed interest rate period. In the absence of selection of any of the alternative interest rates by the Complainant, a tracker interest rate was applied to the Complainant's mortgage loan account ending **0210** on **20 December 2011**, pursuant to the terms of the **Letter of Approval** dated **17 December 2007**. The Provider was under no obligation, contractual or otherwise, to offer the Complainant a tracker interest rate of ECB+0.80% in **December 2011**.

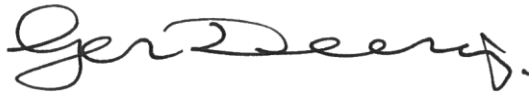
I would also point out that the Complainant seems to be of the opinion that the Provider refunded some of her mortgage payments as a gesture of goodwill. However, the evidence does not support this assertion. It appears that it was the Complainant's broker, and not the Provider, which made the payments totalling €3,200 to the Complainant.

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.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

9 December 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.