



<u>Decision Ref:</u>	2021-0510
<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 two mortgage loan accounts held by the Complainants with the Provider. The two mortgage loan accounts that are the subject of this complaint are secured on the Complainants' private dwelling house.

The details of both mortgage loan accounts are set out below:

- Mortgage loan account ending **3356** is for an amount of €165,000 and a term of 25 years. The **Letter of Approval**, which was signed and accepted by the Complainants on **20 November 2003**, outlined that the interest rate applicable to the loan was a 1-year fixed rate of 2.59% from the date of drawdown until **29 November 2004**. This mortgage loan account was drawn down on **28 November 2003**.
- Mortgage loan account ending **7036** is for an amount of €100,000 and a term of 15 years. The **Letter of Approval**, which was signed and accepted by the Complainants on **09 March 2008**, provided for an equity release mortgage loan and outlined that the interest rate applicable to the loan was 5.44%. This mortgage loan account was drawn down on **14 March 2008** and redeemed by the Complainants on **29 January 2016**.

The Complainants' Case

The Complainants submit that they currently hold two mortgage loans with the Provider.

Mortgage loan account ending 3356

The Complainants submit that they took out mortgage loan account ending **3356** with the Provider in **October 2003**. The Complainants state that they were not offered a tracker rate at the time of their loan application. The Complainants note that they drew down this mortgage loan account on a 1-year fixed interest rate of 2.59%.

The Complainants outline that they opted for further fixed interest rate periods in **November 2004** and **November 2005**. The Complainants note that the Provider sent them the following letters at the end of their fixed interest rate period in **November 2007**:

- Letter dated **9 November 2007** detailing interest rate options, which included a tracker interest rate option of 4.80% (ECB + 0.80%).
- Letter dated **20 November 2007** detailing fixed rate options only.
- Letter dated **29 November 2007** confirming that the interest rate on the mortgage loan account had been amended to a tracker interest rate.
- Letter dated **5 December 2007** confirming that the interest rate on the mortgage loan account had been amended to a 2-year fixed interest rate of 5.55%.

The Complainants submit that the Provider has stated that they chose a 2-year fixed rate of 5.55% in **November 2007**, however, the Complainants contend that they have "*no recollection whatsoever*" of choosing a 2-year fixed interest rate in **November 2007**. They submit that it would have been "*financial madness*" for them to choose a fixed interest rate instead of the tracker rate of interest. The Complainants also query the validity of the rate instruction form that they signed to select a 2-year fixed rate, on the basis that it is not dated.

In addition, the Complainants state that the mortgage loan statements show inconsistencies in the calculation of the interest rates that were charged on the mortgage loan account on a monthly basis. The Complainants refer to the fluctuating monthly repayments made between **January 2011** and **September 2011**. The Complainants submit that they queried these inconsistencies with the Provider and were not satisfied with the Provider's explanation.

Mortgage loan account ending 7036

The Complainants submit that they took out mortgage loan account ending **7036** with the Provider in **March 2008**. The Complainants note that the **Letter of Approval**, dated **6 March 2008**, provided for a loan amount of €100,000 and detailed the loan type as an "*Equity Release Variable Rate Secured Personal Loan of 5.44%*".

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The Complainants submit that no interest rate options were offered or discussed with them when they applied for this mortgage loan. The Complainants explain that their mortgage loan application was completed by an employee of the Provider. The Complainants contend that the application was very poorly completed and lacks important details. The Complainants state that they are “*baffled*” as to why the Provider chose to apply a variable interest rate of 5.44% to this mortgage loan account.

The Complainants contend that the Provider sold them “*mortgages that were not in [the Complainants] best interest*” and as a result, the Complainants “*constantly financially struggled to pay both mortgages*”.

The Complainants are seeking compensation from the Provider in respect of both mortgage loan accounts.

The Provider’s Case

Mortgage loan account ending 3356

The Provider submits that the Complainants applied for a 1-year fixed rate home loan in **2003**. The Provider explains that this was a suitable product for the Complainants in light of the Complainants’ “*financial circumstances, needs and requirements identified in the loan application and the assessment process*”.

The Provider notes that it issued a **Letter of Approval** dated **6 October 2003** to the Complainants in relation to mortgage loan account ending **3356**, repayable over a term of 25 years. The Provider submits that on **20 November 2003**, the Complainants signed and accepted this loan offer in the presence of their solicitor.

The Provider states that the Complainants were not offered a tracker interest rate in relation to mortgage loan account ending **3356** in **2003** because the Provider did not offer tracker rate mortgages as part of its suite of mortgage products at that time. The Provider submits that it introduced tracker interest rate loans for new mortgage business in **early 2004**.

Prior to the expiry of the 2-year fixed rate period, the Provider submits that it issued a **Rate Options Letter** to the Complainants on **9 November 2007**, offering the then available interest rates, which included a tracker interest rate of ECB + 0.80%. The Provider submits that this letter advised the Complainants that in the absence of an instruction, their mortgage loan account would default to the tracker rate on **29 November 2007**.

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The Provider submits that on **19 November 2007**, the Complainants contacted the Provider advising that they had not received an options letter. The Provider states that it subsequently issued a fixed rate options letter on **20 November 2007**. The Provider outlines that it issued a letter to the Complainants on **29 November 2007** confirming that the mortgage loan account had defaulted to the tracker interest rate of 4.80%.

The Provider submits that on **03 December 2007**, upon receipt of a signed instruction form from the Complainants, it amended the Complainants' interest rate to a 2-year fixed rate of 5.55%. The Provider states that it issued a letter to the Complainants confirming this change on **05 December 2007**. The Provider rejects the Complainants' submission that the rate instruction form received by the Provider in **December 2007** is invalid on the basis that it is undated. The Provider details that its records indicate that the rate instruction form was received and implemented.

In addition, the Provider rejects the Complainants' assertion that the mortgage loan account statements for mortgage loan account ending **3356** show inconsistencies in the calculation of interest rates charged on a monthly basis. The Provider contends that the "*inconsistencies*" to which the Complainants refer to were due to the Complainants' insurance policy ceasing to be paid through that mortgage loan account from **May 2008**. The Provider explains that this resulted in a decrease in the overall monthly payment on the mortgage account. The Provider also highlights that a fixed interest rate applied to the Complainants' mortgage loan account from **03 December 2007** to **03 December 2009**.

Mortgage loan account ending 7036

The Provider asserts that the Complainants were not offered a tracker interest rate on mortgage loan account ending **7036** from inception in **2008** because it made a commercial decision not to apply tracker interest rates to "*Equity Release Secured Personal Loans*" when it began offering tracker rates in **2004**. The Provider submits that at no time did it offer customers an equity release product with a tracker rate of interest.

The Provider contends that the Complainants mortgage loan account ending **7036** was issued as an Equity Release Variable Rate Secured Personal Loan in **2008** because that was the product for which the Complainants had applied. The Provider notes that the Complainants accepted its offer of an Equity Release Variable Rate Secured Personal Loan and agreed to the terms and conditions of the loan by signing the **Letter of Approval** on **09 March 2008**.

The Provider states that it does not accept the Complainants' submission that the application form was completed by the Provider's employee in **2008** and was "*poorly completed and missing important*" information. The Provider states that the Complainants completed the application form on **08 January 2008** wherein they selected the equity release product option. On foot of receipt of the Complainants' mortgage loan application, the Provider states that it confirmed the proposed loan offer to the Complainants in writing on **6 March 2008**. The Provider explains that this loan offer was based on the information supplied by the Complainants in the application form. The Provider submits that all available interest rate options were discussed with the Complainants during the application process and the decision as to which rate option or product best suited the Complainants' needs rested with the Complainants. The Provider contends that the Complainants had the opportunity to review the information and raise any queries prior to signing their acceptance of the loan offer and drawing down the funds.

The Provider asserts that it was clear that by opting for an equity release mortgage loan product, the Complainants could not avail of a tracker interest rate for mortgage loan account ending **7036**.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- (a) The Provider did not offer the Complainants a tracker interest rate on mortgage loan account ending **3356** in **2003**;
- (b) The Provider transferred the Complainants' mortgage loan account ending **3356** from a tracker interest rate to a fixed interest rate in **2007**;
- (c) The mortgage loan account statements for the mortgage loan account ending **3356** show inconsistencies in the calculation of the interest rates charged on a monthly basis; and
- (d) The Provider did not offer the Complainants a tracker interest rate on mortgage loan account ending **7036** in **2008**.

Decision

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

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

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

Following the issue of my Preliminary Decision, the following submissions were received from the parties:

1. E-mail from the Complainants to this office dated **04 November 2021**; and
2. Letter from the Provider to this Office dated **17 November 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.

In order to determine this complaint, it is necessary to set out and review the relevant provisions of the Complainants' mortgage loan documentation in relation to mortgage loan accounts ending **3356** and **7036**. It is also necessary to consider details of certain interactions between the Complainants and the Provider between **2003** and **2007** in relation to mortgage loan account ending **3356** and in **2008** in relation to mortgage loan account ending **7036**.

I note from the outset that the Complainants, in their post Preliminary Decision submission dated **04 November 2021**, make several requests for various pieces of documentation and information regarding their mortgage loan accounts. I am satisfied that the information and documentation furnished by the Provider over the course of the investigation of this complaint is sufficient for me to make my final determination.

I will now consider the two mortgage loan accounts that are the subject of this complaint in turn below:

Mortgage Loan Account ending 3356

The Provider has submitted a copy of its **Lending Interest Rates** document in evidence, which is noted as being "*effective from the start of business on 21st August 2003*".

This document outlines the interest rate options as follows:

	RATE	APR
Repayment Home Loans		
Variable Rate	3.55%	3.6%
1 Year Fixed Rate	3.49%	3.6%
2 Year Fixed Rate	3.89%	3.7%
3 Year Fixed Rate	4.25%	3.8%
4 Year Fixed Rate	4.59%	4.0%
5 Year Fixed Rate	4.75%	4.2%
7 Year Fixed Rate	4.99%	4.5%
10 Year Fixed Rate	5.29%	5.0%
 Rates applicable to new Home Loans		
1 Year Discounted Variable Rate	2.69%	3.5%
1 Year Discounted Variable Rate (when borrowing <50% of the property value)	2.49%	3.5%
1 Year Fixed Rate	2.59%	3.5%
2 Year Fixed Rate	3.49%	3.6%

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Upon receipt of the Complainants' application for a mortgage loan, the Provider issued a letter to the Complainants on **03 October 2003**, which states as follows:

"I am pleased to inform you that your application for a mortgage has been successful subject to the terms and conditions set out in the following documentation:

- (a) Copy of Letter of Approval*
- (b) General Mortgage Loan Approval Conditions*
- (c) [Provider] Mortgage Conditions*

...

Please indicate your acceptance by signing the Acceptance of Loan Offer, in the presence of your solicitor who is required to witness your signature, and return it to the Mortgage Processing Centre as soon as possible so we can ensure your loan is completed accordingly."

The enclosed Letter of Approval, dated **03 October 2003** detailed the loan type as a "1 Year Fixed Rate Home Loan" and provided as follows:

*"Loan Amount: EUR 165,000.00
Interest rate: 2.59%
Term 25 year(s)"*

I note that this **Letter of Approval** was not signed by the Complainants in circumstances where the Provider had to issue another **Letter of Approval** to the Complainants containing a condition that required the non-owning borrower to sign the mortgage deed as a joint borrower.

The Provider subsequently issued a **Letter of Approval** to the Complainants dated **06 October 2003**. The Letter of Approval dated **06 October 2003** details as follows:

"

<i>Loan Type</i>	<i>1 Year Fixed Rate Home Loan</i>
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*Loan Amount: EUR 165,000.00
Interest Rate: 2.59%
Term: 25 year(s)"*

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

“Special Conditions

- A. *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.”*

General Condition 5 of the **General Mortgage Loan Approval Conditions** 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 the 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 the amount 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 to that 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 sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.

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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 detail as follows:

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."

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **20 November 2003**.

I note that the Acceptance of Loan Offer states as follows:

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

- i. Letter of Approval*
- ii. The General Mortgage Loan Approval Conditions*
- iii. [the Provider's] 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."

Mortgage loan account ending **3356** was drawn down on **28 November 2003**.

It is clear to me that the **Letter of Approval** dated **06 October 2003** envisaged a 1-year fixed rate of 2.59% and thereafter a variable rate of interest. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

The Complainants contend that the Provider did not offer them a tracker interest rate on mortgage loan account ending **3356** in **2003**. It is important to note that the Provider did not offer tracker interest rate mortgages as part of its suite of mortgage products in **2003** when the Complainants applied for a mortgage loan with the Provider.

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The lending rates document detailed above shows that discounted variable interest rates and fixed interest rates were available to new home loan customers like the Complainants. Tracker interest rate mortgage products were not introduced by the Provider until **early 2004**. The Provider offered the Complainants a variable interest rate in the Letter of Approval dated **06 October 2003**, in line with the lending rates on offer to new customers in **October 2003**. The Complainants accepted the **Letter of Approval** having confirmed that the terms and conditions of the Letter of Approval had been explained to them by their solicitor on **20 November 2003**.

Prior to the expiry of the 1-year fixed interest rate period, the Provider issued a letter to the Complainants dated **28 October 2004** enclosing a **Rate Options form**. The letter dated **28 October 2004** states as follows:

"I am writing to inform you that the Fixed Rate period on your above mortgage account is due to expire on 28/11/04.

In keeping with the terms of your loan, you now have the option to convert your loan back to a variable rate loan, currently 3.55%. [The Provider] also offers you the opportunity of fixing your interest rate for a further period and I enclose details of the fixed rates currently available.

It is important to note that if we do not receive a written instruction from you in relation to the above on or before 28/11/04 your loan will convert to a variable interest rate loan, currently 3.55%."

An *"Important Information"* section is contained in the letter which provides as follows:

"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME. (This does not apply to fixed rate housing loans for the duration of the fixed rate period)."

The **Rate Options Form** details as follows:

"PLEASE TICK BESIDE THE DESIRED OPTION

Account Number: [ending 3356]

...

<i>Variable rate Mortgage currently</i>	<i>3.55%</i>
<i>1 Year Fixed Rate Mortgage currently</i>	<i>3.60% ✓</i>
<i>2 Year Fixed Rate Mortgage currently</i>	<i>3.95%</i>
<i>3 Year Fixed Rate Mortgage currently</i>	<i>4.15%</i>

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<i>5 Year Fixed Rate Mortgage currently</i>	<i>4.69%</i>
<i>7 Year Fixed Rate Mortgage currently</i>	<i>5.20%</i>
<i>10 Year Fixed Rate Mortgage currently</i>	<i>5.40%</i>

The Complainants selected a 1-year fixed interest rate of 3.60% and signed the **Rate Options Form** on **23 November 2004**.

The Provider subsequently issued a letter to the Complainants dated **28 November 2004** to confirm that a rate of 3.60% had been applied to their mortgage loan account. The letter outlines as follows:

"I refer to previous correspondence and I confirm your monthly instalment calculated at a rate of 3.60% amounts to €936.56"

Prior to the expiry of the further 1-year fixed interest rate period, the Provider issued a letter to the Complainants dated **31 October 2005** enclosing a **Rate Options form**. The letter dated **31 October 2005** states as follows:

"I am writing to inform you that the Fixed Rate Period On Your Above mortgage account is due to expire on 29/11/05.

In keeping with the terms of your loan, you now have the option to convert your loan back to a variable interest rate loan, currently 3.55%. [the Provider] also offers you the opportunity of fixing your interest rate for a further period and I enclose details of the fixed rates currently available.

It is important to note that if we do not receive a written instruction from you in relation to the above on or before 29/11/05 your loan will convert to a variable interest rate loan, currently 3.55%."

I note that a handwritten note appears on the letter dated **31 October 2005** as follows:

*"2 yr Fixed Rate 3.39%
28/11/05-28/11/07"*

The Complainants sent a letter to the Provider dated **21 November 2005**, which provides as follows:

"To whom it may concern

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Please find enclosed my Mortgage Option for the coming two years. I have spoken by telephone this morning to [name redacted] who advised me I could fax this to you. I am also forwarding all originals by post."

A handwritten note appears at the end of the letter as follows:

"I chose fixed 2 year rate on 19/11/2005 of 3.39%"

The **Rate Options form** details as follows:

"PLEASE TICK BESIDE THE DESIRED OPTION

Account Number: [ending 3356]

...

Variable rate Mortgage currently	3.55%
1 Year Fixed Rate Mortgage currently	3.25%
2 Year Fixed Rate Mortgage currently	3.39% ✓
3 Year Fixed Rate Mortgage currently	3.55%
5 Year Fixed Rate Mortgage currently	3.79%
7 Year Fixed Rate Mortgage currently	3.99%
10 Year Fixed Rate Mortgage currently	4.39%"

The Complainants selected a 2-year fixed interest rate of 3.39% and signed the rate options form on **19 November 2005**. A 2-year fixed interest rate of 3.39% was applied to the Complainants' mortgage loan account on **29 November 2005**.

Prior to the expiry of the 2-year fixed interest rate period, the Provider issued a letter to the Complainants dated **09 November 2007** enclosing a **Rate Options form**. The letter dated **09 November 2007** states as follows:

"I am writing to remind you that the current rate option on your mortgage account will end on 29 Nov 2007.

Please find attached the current options available to you, including our competitive tracker variable rate.

If we do not receive a written instruction from you in relation to the above on or before the 29 Nov 2007, we will automatically default your loan to the tracker variable rate."

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The **rate options form** enclosed with the letter dated **09 November 2007** details as follows:

“Current options available:

You may only select one option.

Account Number: [ending 3356]

<i>-Tracker variable rate</i>	<i>Currently: 4.80%</i>
<i>(ECB +0.8000%)*</i>	
<i>-Standard variable rate</i>	<i>Currently 5.35%</i>
<i>-1 year fixed rate</i>	<i>Currently 5.35%</i>
<i>-2 year fixed rate</i>	<i>Currently 5.55%</i>
<i>-3 year fixed rate</i>	<i>Currently 5.60%</i>
<i>-4 year fixed rate</i>	<i>Currently 5.50%</i>
<i>-5 year fixed rate</i>	<i>Currently 5.60%</i>
<i>-7 year fixed rate</i>	<i>Currently 5.60%</i>
<i>-10 year fixed rate</i>	<i>Currently 5.60%</i>

....

- Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page).*
- * The interest rate that applies to this Tracker Mortgage Loan will never be more than 0.8000% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on tracker mortgage loans”.*

The Complainants appear to have contacted the Provider stating that they did not receive the above rate options form as an internal request was made by one of the Provider’s employees on **19 November 2007** to send out another rate options form to the Complainants.

The Provider subsequently issued a letter to the Complainants dated **20 November 2007**, enclosing a further rate options form. The letter dated **20 November 2007** states as follows:

“Further to our recent communication, I am attaching a list of our current fixed rate options. Please tick the rate you would like and return it [to the Provider]”.

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The **Rate Options form** enclosed with the letter dated **20 November 2007** details as follows:

"PLEASE TICK BESIDE THE DESIRED OPTION

Account Number: [ending 3356]

...

Current Rate	3.39%
1 Year Fixed Rate Mortgage currently	5.35%
✓ 2 Year Fixed Rate Mortgage currently	5.55%
3 Year Fixed Rate Mortgage currently	5.60%
5 Year Fixed Rate Mortgage currently	5.60%
7 Year Fixed Rate Mortgage currently	5.60%
10 Year Fixed Rate Mortgage currently	5.60%

...

- If you choose a fixed rate, the standard fixed rate conditions will apply
- The above fixed rates are valid for 7 workings days".

I note that the above rate options form only contained details of the fixed interest rate options available and did not contain details of the default tracker interest rate of 4.80% (ECB+0.80%). It appears from the letter dated **20 November 2007** that the Provider only provided a list of current fixed interest rate options on foot of the Complainants' request.

The Complainants, in their post Preliminary Decision submission dated **04 November 2021**, query why the **Rate Options form** of **20 November 2007** did not include a tracker interest rate and the 4-year fixed interest rate of 5.5% that appeared in the **Rate Options form** of **09 November 2007**. It appears to me that the **Rate Options form** that issued on **20 November 2007** specifically listed the "*current fixed rate options*" available to the Complainants as of that date. It appears that a 4-year fixed interest rate of 5.5% was no longer available for selection on **20 November 2007**. While I note that a tracker interest rate was not included in the **Rate Options form** of **20 November 2007**, it is important to note that the tracker interest rate of 4.8% (ECB +0.80%) was the default tracker variable rate applicable to the Complainants' mortgage loan. Therefore, the Complainants were afforded the opportunity to have this rate applied to their mortgage loan account regardless of it not being specifically listed in the **Rate Options form** of **20 November 2007**. Therefore, I do not believe that the Complainants were disadvantaged in any way by the tracker rate not being included in the Rate Options form.

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In circumstances where the Provider did not receive a completed **Rate Options form** from the Complainants before the expiry of the 2-year fixed interest rate period on **29 November 2007**, a default tracker interest rate of 4.80% (ECB+0.80%) was applied to the Complainants' mortgage loan account in line with its policy at the time.

The Provider explains that from **autumn 2006** until **autumn 2009**, the current applicable tracker interest rate was applied as the Provider's default maturity variable rate in the absence of a customer selection.

The Provider issued a letter to the Complainants dated **29 November 2007**, which provides 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 rate currently 4.800% (ECB + max 0.800%)."

However, in the intervening period, it appears that the Complainants completed and signed the second rate options form that issued to them, as detailed above, wherein they selected a 2-year fixed interest rate of 5.55%. The Provider states that it received the undated completed rate options form on **03 December 2007**.

The Provider therefore amended the applicable interest rate on the Complainants' mortgage loan from a tracker interest rate of 4.8% (ECB +0.80%) to a 2-year fixed interest rate of 5.55%, in line with the Complainants' instructions. The Provider issued a letter to the Complainants dated **05 December 2007**, which outlines as follows:

"The following outlines the details of your loan which have been put in place based on the information you provided in our discussion, regarding your personal circumstances, financial needs and plans."

Mortgage details

You have instructed us to change your mortgage based on your needs and circumstances which it in line with our lending policy. Your loan details are as follows:

- *Product Type* *2 Year Fixed Rate Home Loan*
- *Term remaining:* *252 Months*
- *Due date:* *28/12/2007*
- ...
- *Interest Rate* *5.55%*

Please review the information in this letter and ensure the mortgage details meet your requirements and wishes, given our discussion and the information you provided. You should take the necessary time to consider and query any information provided to you in relation to your loan.

If you have chosen a fixed interest rate loan and you feel your personal circumstances may potentially change soon, then a fixed interest rate loan term may not be the best option for you and you should contact your branch to discuss.”

The Complainants, in their post Preliminary Decision submission dated **04 November 2021**, refer to a Press Release dated **06 December 2007** titled “*New Mortgage Pricing*” and query whether their mortgage loan accounts ending **3356** or **7036** were affected by these new mortgage rates. The Provider, in its post Preliminary Decision submission dated **17 November 2021**, has clarified that the interest rates referenced by the Complainants took effect on **10 December 2007**, and the 2-year fixed interest rate was applied on or around **03 December 2007**, “*prior to the implementation of the new interest rates*”. In any event, I do not consider this Press Release to be relevant in determining this complaint as it does not form part of the agreement between the parties to this complaint.

Having reviewed the Complainants’ mortgage loan documentation in relation to mortgage loan account ending **3356**, it is clear to me that that the Complainants did not have a contractual, or any other entitlement to a tracker interest rate at the inception of the loan or indeed at any time during the term of the mortgage loan. The Complainants contend the Provider transferred the Complainants’ mortgage loan account ending **3356** from a tracker interest rate to a fixed interest rate in **2007**. It appears to me that the Provider, in line with its own commercial discretion and policy at the time, applied a tracker interest rate as the default maturity interest rate to the Complainants’ mortgage loan account in **November 2007** after the expiry of the fixed interest rate period, in the absence of the Complainants’ selection of an interest rate. The Complainants were notified that their mortgage loan account had switched to a tracker interest rate by way of letter dated **29 November 2007**. If the Complainants wished to remain on a tracker interest rate the Complainants could have done so however the documentation supplied in evidence shows that the Complainants decided they did not wish to stay on the tracker rate and subsequently opted for a fixed interest rate of 5.55% to apply to their mortgage loan account, a few days later in **December 2007**. The Provider notified the Complainants that their mortgage loan account had switched to a fixed interest rate by way of letter dated **05 December 2007**. The letter dated **05 December 2007** invited the Complainants to discuss any queries in relation to their mortgage loan account to include the applicable interest rate with the Provider’s branch. If the Complainants had any reservations regarding the switch to a 2 -year fixed interest rate period, the Complainants could have raised any concerns with the Provider and explored other available interest rate options.

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However, the Complainants did not do so and therefore the mortgage loan account remained on a fixed rate for the following 2 years.

The Complainants contend that the mortgage loan account statements for the mortgage loan account ending **3356** show inconsistencies in the calculation of the interest rates charged on a monthly basis. The Complainants appear to submit that mortgage payments were *“increased without explanation within agreed Interest Rate Terms and dates”*.

By way of letter dated **17 April 2015**, the Provider provided the Complainants with a breakdown of the calculation of a monthly instalment.

The letter explained as follows:

“When calculating a monthly instalment at any time during the mortgage terms we must take into account the following three factors:

- 1. Balance*
- 2. The Remaining Term of the Mortgage*
- 3. The Rate of Interest*

The above three elements are applied to our Actuarial Formula that determines the applicable Monthly Instalment.

$$(R*P)/(F*(1-((R/F)+1)^{-N}))$$

R = Rate/100

F = Payments in Year

P = Balance

N = Total Number of Repayments

By way of letter dated **15 February 2016** the Provider wrote to the Complainants on foot of a complaint made to the Provider’s customer service department on **09 February 2016**. The letter details as follows:

“I understand you feel the interest accrual on your mortgage account is excessive. I wish to confirm that interest is calculated on your account as follows:

Calculating Capital (CALCAP) multiplied by the rate divided by 365/366 (dependent on leap year) = daily accrual. Daily accrual is then multiplied by the number of days in the current month plus the interest accrued as of the last day in the previous month to get your monthly interest figure.”*

/Cont’d...

The Provider has submitted a copy of its mortgage processing screen for mortgage loan account ending **3356** from **2003** to **2006** and a copy of the Complainants' mortgage loan account statements for mortgage loan account ending **3356** from **2006** to **2019**. I have carefully considered both documents and note that the correct interest rate applied to the Complainants' mortgage loan during this period. The Complainants appear to raise particular concerns in relation to the interest charged on mortgage loan account ending **3356** from **January 2011** to **September 2011**. I note that a variable rate of interest applied to the Complainants' mortgage loan account during this period, which could be adjusted by the lender from time to time. I note from the mortgage loan account statements submitted in evidence that the following variable interest rates applied to the Complainants' mortgage loan account ending **3356** during **2011**:

Date variable interest rate applicable from	Variable interest rate	Monthly payment when variable interest rate applied
01 January 2011	4.55%	€908.34
21 February 2011	5.55%	€980.26
16 May 2011	5.8%	€998.14
22 August 2011	6.05%	€1,016.14
21 November 2011	5.8%	€998.57
29 December 2011	5.19%	€955.73

I note from the **2011 mortgage loan account statement** submitted in evidence that a total of €7,377.71 in interest accrued. This amount of interest charged aligns with the Interest Certificate that issued to the Complainants in **January 2012** for the year ending **31 December 2011**. The letter dated **January 2012** from the Provider details as follows:

"I enclose your mortgage statement and certificate for year that ended on 31 December 2011.

Below there is some useful information about your mortgage account on 31 December 2011.

Account details

Type of mortgage: Residential Variable Rate Loan
Interest rate: 5.19%
Monthly Repayment €998.57

/Cont'd...

....

Balance remaining: €129,014.69

The above details are details of the Complainants' mortgage loan account as of **31 December 2011**.

The **Interest Certificate** enclosed with this letter details as follows:

<i>Interest charged for year ending 31 December 2011</i>	<i>€7,377.71</i>
<i>In the same period, tax relief claimed on the Instruction of the Revenue</i>	<i>€0.00</i>

On **16 January 2012**, the Provider issued a letter to the Complainants informing them of an interest rate change to their loan. This letter states that “[t]he new interest rate is 5.19% and is applicable from DECEMBER 29, 2011.”

Upon a review of the Complainants' mortgage loan statements and interest certificates, it appears to me that the evidence does not support the Complainants' contention that there are inconsistencies in the calculation of the interest rates charged on mortgage loan account ending **3356** on a monthly basis.

I will now consider the details of the second mortgage loan account held by the Complainants that is also the subject of this complaint.

Mortgage Loan Account ending 7036

I note that in or around **January 2008**, the Complainants sought a further advance of funds from the Provider to be secured against the mortgaged property the subject of their then existing mortgage loan account ending **3356**. The Complainants signed and submitted an **Application for Credit** together with supporting documentation to the Provider on **08 January 2008**. The loan type requested by the Complainants was an equity release mortgage product that was on offer by the Provider at the time. The application form noted that a term of “18/19 years” was required for the maximum loan amount. The Complainants signed the Signature and Declaration section of the application form on **08 January 2008** noting the following:

“I/We declare that I/We am/are of full age and I/We hereby make application for an advance with [Provider] upon mortgage of the property described above.

/Cont'd...

I /We declare that the foregoing statements and particulars and other information we have given to [Provider] to be strictly true, to the best of my/our knowledge and belief.”

The Complainants appear to be of the view that the application form was lacking in information however the Complainants clearly signed the application form and the Provider was able to process the Complainants' application based on the information provided by the Complainants. It is important to note that the application forms did not form any contractual agreement between the parties.

I have not been provided with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants during the application stage in relation to interest rate options.

Notwithstanding this, it is important for the Complainants to be aware that the Provider was under no obligation to offer them any mortgage or any particular type of mortgage in **2008**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowings at the time and secondly, how that offer would be structured.

The Provider states that it made a business decision not to make tracker rates of interest available to existing or future equity release loans.

The Provider issued a letter to the Complainants dated **06 March 2008** on foot of a review of the Complainants' mortgage loan application. The letter outlines the Provider's proposal based on the information supplied by the Complainants and details as follows:

“The following outlines our proposal based on this information you have given use regarding your personal circumstances, financial needs and plans. The loan preferences and options you have chosen are also listed, as at March 5th, 2008.

Proposal

We propose the following:

Standard variable – rate determined by market changed

/Cont'd...

Mortgage details agreed

You have selected a loan type from a range which we are prepared to offer you based on your needs and circumstances. You have chosen a repayment term and flexible options (where relevant) to achieve a repayment amount best suited to your needs and preferences. Details are as follows:

- *Amount of loan required* €100,000.00
- *Property price/value* €0.00/€350,000.00
- *Loan Purpose* Equity Release
- *Loan Type* Equity Release Variable Rate Secured Personal
- *Repayment term required* 15 Years"

The attached **Consumer Credit Act Notice** also states as follows:

"VARIABLE RATE LOANS

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

The Provider issued a further letter to the Complainants on **06 March 2008** enclosing a **Letter of Approval**, which states as follows:

"I am pleased to tell you that we have approved your application for a mortgage. The conditions set out in the following documents apply:

- *Letter of Approval*
- *General Mortgage Loan Approval Conditions*
- *[the Provider's] Mortgage Conditions*
- *Copy of the Valuers report (if this applies)*

If you want to accept our offer, please sign the Acceptance of Loan and return it to us as soon as possible so we can process your loan. We recommend that you get independent legal advice before you sign the acceptance.

...

I have also enclosed the 'European Standard Information Sheet' which further explains the details of the loan."

/Cont'd...

The Provider also issued a **Letter of Approval** to the Complainants dated **06 March 2008** for an *“Equity Release Variable Rate Secured Personal Loan”*, which details as follows;

“

Loan Type:	<i>Equity Release Variable Rate Secured Personal Loan</i>
-------------------	--

<i>Loan Amount:</i>	<i>€100,000</i>
<i>Interest rate:</i>	<i>5.44%</i>
<i>Term</i>	<i>15 year(s)”</i>

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

- 1. [the Provider’s] normal Terms and Conditions apply*
- 2. Unless otherwise agreed with [the Provider], general mortgage loan approval condition 1.17 applies to this loan (mortgage protection)*
- 3. Please note the equity release loan conditions contains in the general mortgage loan approval conditions.*
-*
- 13. That all applicants should obtain independent legal advice and furnish a letter from his/her solicitor confirming that he/she has received independent legal advice.”*

The **European Standardised Information Sheet** also outlines the following:

“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 5.44 percent*

/Cont’d...

The interest rate may vary from time to time. Notice will be given in respect of the rate increases. No notice will be given for decreases in rate.

The option to apply for a fixed rate product (if available) may be exercised by you at any time otherwise the rate will remain at a variable rate.

An administration fee of EUR 100 is payable when switching from a variable to a fixed rate product. In the case of [equity release product] loans where all or part of the loan has been advanced by way of transfer to a Holding Account, the option to apply for a fixed rate product (if available) only arises where all the funds have been withdrawn from the Holding Account.

There are no lock-in periods or penalties associated with this product.

This rate is not subject to indexation.

PLEASE NOTE THAT THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the **Conditions relating to "[Product]" Equity Release Loans** and details the following regarding the calculation of interest:

" ...

11.4 For the purposes of the calculation of interest, the daily balance of the [Product] Equity Release Loan shall be reduced by the then credit balance (if any) in the Holding Account. The credit balance in the Holding Account shall be reduced by the amount of withdrawals on the date of the withdrawal irrespective of when the withdrawal cheque is cashed. No interest will be payable to the Applicant on the balance held in the Holding Account."

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However, there was no specific condition in the **Conditions relating to “[Product]” Equity Release Loans** in relation to the interest rate applicable to the loan.

I note that the information document in relation to the **Housing Loans under Consumer Credit Act 1995** on the reverse side of each page of the **Letter of Approval** outlines as follows:

***“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.””***

The Complainants signed an **Acceptance of Offer of an Additional Loan** dated **06 March 2008** on **09 March 2008** on the following terms:

“1. I accept the above offer of an additional loan under the terms and conditions set out in:

- (i) The Letter of Approval;*
- (ii) The General Mortgage Loan Approval Conditions sent to me with the above Letter of Approval; and*
- (iii) The mortgage conditions applying to the existing loan, as amended by the General Mortgage Loan Approval Conditions.*

2. I agree that the existing mortgage you have over the property will extend so this loan is also secured on the property.

...

4. I declare that all statements, details and any other information, which I have given you in relation to my application for the additional loan, is true as far as I know and believe.

5. I confirm that I have received/have had the opportunity to receive independent legal advice before accepting this offer of additional loan.

6. If the loan is an equity release loan in joint names, and all or part of the loan will be transferred to a holding account, withdrawals from the holding account can be made by any one of us, in line with condition 11.10 of the General Mortgage loan Approval Conditions”.

/Cont'd...

The Provider issued a letter to the Complainants on **13 March 2008**, which states as follows:

"I enclose herewith loan cheque in the sum of EUR 70,000.00. A sum representing EUR 30,000.00 has been transferred to the Holding Account."

It is clear to me from the Letter of Approval dated **06 March 2008** that the loan envisaged was an equity release mortgage loan on a variable interest rate. The variable interest rate applicable to mortgage loan account ending **7036** made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

I note that the Complainants, in their post Preliminary Decision submission dated **04 November 2021**, submit that they "*fail to see*" how their loan approval documentation for mortgage account ending **7036** "*can be legally acceptable as [they] did not know or see the content or lack of content on [their] Application Form until [they] requested [their] file from [the Provider] in 2018*". It is important to note that it is the **Letter of Approval** dated **06 March 2008** that forms the contractual basis of the mortgage loan agreements between the parties as opposed to the application form which is not a legally binding document. The Complainants accepted and signed the terms of the Letter of Approval acknowledging that they had received or had the opportunity to receive independent legal advice. If the Complainants were unsure of the contents of their loan documentation, they had ample opportunity to avail of independent legal advice to have such terms explained to them. In any event, the Complainants accepted and signed the loan acceptance, thereby agreeing to be bound by the terms and conditions contained therein and the Provider is entitled to rely on this.

The Complainants contend that the Provider did not offer them a tracker interest rate on mortgage loan account ending **7036** in **2008**. The application form submitted by the Complainants shows that the Complainants applied for the Provider's equity release mortgage loan product. The Provider subsequently issued a **Letter of Approval** to the Complainants offering an equity release mortgage loan product. If the Complainants did not want to pursue this option because they were unhappy with the rate applicable to the equity release mortgage, they could have decided not to accept the Provider's offer of the equity release product. Instead, the Complainants accepted the Provider's offer by signing the **Acceptance of Offer of an additional loan** on **09 March 2008** an equity release mortgage loan was subsequently drawn down by the Complainants. This loan was redeemed by the Complainants on **29 January 2016**.

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The Provider submits that at no point did it offer tracker interest rates on equity release products. In this regard, I accept that the Provider operates as a business and is entitled to offer products and set interest rate options based on its own commercial discretion. The Provider's decision to not offer tracker interest rates on equity release products in **March 2008** or at any other time was a commercial decision the Provider was entitled to make. The Provider was not under any obligation to offer the Complainants a tracker interest rate option on the equity release product option in **March 2008**, or at any other time.

For the reasons outlined 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**

13 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.

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