



<b><u>Decision Ref:</u></b>	2021-0530
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint is secured on the Complainant's principal private residence.

The loan amount was €360,000 and the term of the loan was 25 years. The **Mortgage Loan Offer Letter** which was signed by the Complainant on **08 December 2005** outlined that the interest rate applicable to the loan was a fixed interest rate of 3.09% for the first 12 months of the loan, which would thereafter convert to a variable rate of interest.

**The Complainant's Case**

The Complainant submits that she signed a **Mortgage Loan Offer Letter** on **07 July 2005** which provided for a "Tracker Rate Variable 2.95%". The Complainant details that an **Amended Mortgage Letter of Offer** was issued to her on **08 December 2005**, which provided for a fixed interest rate of "3.09%".

The Complainant submits that on **07 December 2006**, she changed her mortgage to a "staff non-standard variable rate" which contained a "reference to [the] ECB". The

Complainant submits that on **12 January 2007** she subsequently changed to a “*staff 2 year fixed rate*” of 3.95%, due to a change in the budget in **December 2006**.

The Complainant asserts that on **20 November 2008**, she received a letter from the Provider which stated that, following the Provider’s final assessment of their withdrawal of tracker mortgages from the market, the Provider would not be “*giving the tracker mortgage option [at] rollover*”.

The Complainant contends that “*at all times [she] was led to believe*” that she had the “*option to revert to [a] tracker*”. The Complainant further submits that she was never informed that by signing the **Amended Loan Offer** which was issued to her on **05 December 2005**, and the subsequent **Mortgage Forms of Authorisation**, that she would not have the option to switch to a tracker rate of interest.

In addition, the Complainant submits that she disagrees with the Provider’s submission that the **Mortgage Form of Authorisation** from **2006** or the **Mortgage Form of Authorisation** from **2007**, when read in conjunction with the **Amended Mortgage Letter of Offer**, contain no ambiguity, lack of clarity or vagueness concerning the rate which the mortgage would revert to. The Complainant submits that “*the June 2005 Offer Letter provided for a tracker interest rate of no more than .95% above the European Central Bank rate, whereas [the Provider] omitted this line in the December 2005 Offer Letter and never stated either verbally or in writing that this omission [had] been made*”.

The Complainant maintains that her “*original signed mortgage agreement was signed in June 2005 and stated that [she] could revert to a tracker rate*”.

The Complainant is seeking the following:

- (a) A tracker interest rate to be applied to her mortgage loan account; and
- (b) Compensation for any overpaid interest on her account.

### **The Provider’s Case**

The Provider details that it issued a **Mortgage Loan Offer Letter** to the Complainant on **30 June 2005**, which provided for a loan in the amount of €360,000 for a term of 25 years.

The Provider details that this loan offer “*provided for a tracker interest rate of no more than 0.95% above*” the ECB refinancing rate, for the term of the loan. The Provider outlines

/Cont’d...

that the Complainant signed and accepted the terms and conditions of the **Mortgage Loan Offer Letter** on **7 July 2005**.

The Provider notes that this **Mortgage Loan Offer Letter** was subject to “*a number of conditions precedent that were required to be completed to the satisfaction of the Provider before the mortgage loan could proceed*”. The Provider further notes that these conditions precedent were completed on **01 September 2005** and “*completing letters were issued to the Complainant*” and her solicitor “*advising that the loan could now be drawn down*”.

The Provider submits that the mortgage loan was “*not drawn down on receipt of completion letters and there is no evidence of further contact from the Complainant*” until **07 December 2005**, when one of the Provider’s branches was contacted by the Complainant with a request to amend the interest rate to a “*1 year fixed rate of 3.09%*”. The Provider contends that it is important to note that the ECB refinancing rate increased from 2.00% to 2.25% on **06 December 2005**, which would have brought the tracker interest rate applicable to the Complainant’s loan offer to 3.20%, which was 0.11% higher than the new fixed rate that the Complainant requested.

The Provider submits that it issued a new **Mortgage Loan Offer Letter** on **08 December 2005**, which superseded the **Mortgage Loan Offer Letter** dated **30 June 2005**. The Provider outlines that this new loan offer provided for a fixed interest rate of 3.09% to apply for the first 12 months of the loan and to convert to a variable interest rate thereafter.

The Provider details that the conditions precedent in the loan offer were satisfied on **15 December 2005** and “*completion letters were issued to the Complainant and to her solicitor advising that the mortgage loan account could now be drawn down*”. The Provider details that it also issued a loan cheque in the sum of €75,000, which was encashed on **23 December 2005**, “*with the balance of €285,000 available to be drawn down at a later date*”.

The Provider submits that the **Mortgage Loan Offer Letter** dated **08 December 2005** does not contain any provision for a tracker interest rate.

The Provider submits that the Complainant signed and accepted a **Mortgage Form of Authorisation** on **07 December 2006**, to change the mortgage loan account to a staff non-standard variable rate. The Provider outlines that a non-standard variable interest rate of 3.5% was applied on **28 December 2006**.

The Provider asserts that the Complainant requested this **Mortgage Form of Authorisation** in response to the Provider's staff intranet notice dated **07 December 2006**, which provided information on the Provider's staff non-standard variable rate.

The Provider asserts that the Complainant "*made her own decision to convert her loan to a more favourable rate*" by completing and signing the **Mortgage Form of Authorisation** in **2006**. In addition, the Provider highlights that staff intranet notice provides a definition of the staff non-standard variable rate that differentiates it from a tracker mortgage by providing the indicators which determine the interest rate.

The Provider submits that the staff non-standard variable rate was a rate "*with no temporal limit*", meaning that this rate would continue to apply for the lifetime of the loan unless further amended at a later date.

The Provider submits that the Complainant subsequently chose of her own volition to apply a "*new Special Staff 2 Years Fixed Rate*" of 3.95% to her mortgage loan account, by completing and signing a **Mortgage Form of Authorisation** on **12 January 2007**. The Provider asserts that there is nothing in this **Mortgage Form of Authorisation** which suggests that the Complainant had any entitlement to convert to a tracker rate of interest, on the expiry of the fixed rate period. The Provider asserts that this **Mortgage Form of Authorisation** "*did not change the underlying terms and conditions within the December 2005 Offer Letter*".

The Provider refers to **General Condition 7(b)** of the **Mortgage Loan Offer Letter** signed in **December 2005** which sets out what will happen when the fixed rate period expires. The Provider submits that it could, at its sole discretion, offer a further fixed period or a choice of interest rate. The Provider also refers to **General Condition 6(b)** which deals with variable interest rates.

The Provider further contends that "*[t]here is no ambiguity, lack of clarity or vagueness contained in the 2006 MFA nor the 2007 MFA, when read in conjunction with the December 2005 Offer Letter*" regarding the interest rate that the Complainants mortgage loan would switch to on the expiry of the fixed interest rate period. The Provider submits that a staff intranet notice dated **22 December 2006** confirmed that "*staff will be advised of their rollover options a number of weeks prior to the expiry of the fixed rate term*".

The Provider submits that on **17 December 2008** a rate options letter was sent to the Complainant however as the Complainant failed to elect an interest rate, the mortgage loan account defaulted to the staff variable interest rate of 3.250% upon the expiry of the fixed interest rate period on **28 January 2009**.

The Provider contends that the offer of a tracker rate after **October 2008**, “*would only be offered upon the expiry of a fixed rate term in circumstances were [sic] the terms and conditions of the offer letter entitled a customer to move to a tracker rate of interest upon the expiry of a fixed term*”. The Provider explains that the Complainant was not offered the option of a tracker interest rate on the expiry of the fixed rate period in **2009** because the Complainant did not have a contractual entitlement to a tracker interest rate.

The Provider disagrees with the Complainant’s contention that that “*at all times*” she was led to believe that she had the option to convert her mortgage loan account to a tracker interest rate. The Provider reiterates that the Complainant never had a contractual entitlement to a tracker rate.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Amended Mortgage Loan Offer Letter that issued to the Complainant on **08 December 2005**, and the subsequent Mortgage Forms of Authorisation, failed to inform the Complainant that she would not have the option of “*reverting to a Tracker rate as per [her] original Letter of Offer, dated 30<sup>th</sup> June 2005*”.

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

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

In order to determine this complaint, it is necessary to set out and review the relevant provisions of the Complainant's mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainant and the Provider between **2005** and **2018**.

The Provider issued a **Mortgage Loan Offer Letter** to the Complainant dated **30 June 2005**, which detailed as follows:

“1. Amount of credit advanced:	€360,000.00
2. Period of Agreement:	25 Years
3. Number of Repayment Instalment	4. Amount of each Instalment
<u>Instalments</u> <u>Type</u>	<u>Instalments</u>
300 Variable at 2.950%	€1,696.46”

**Part 4 – The Special Conditions** of the **Mortgage Loan Offer Letter** provides as follows:

*“The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 0.95% above the European Central Bank Main Refinancing Operations Minimum Bid rate (“Repo Rate”) for the term of the Loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*

....

/Cont'd...

***This is an important legal document. You are strongly recommended to seek independent legal advice before signing it..”***

The **Borrower’s Acceptance and Consents** which was signed and accepted by the Complainant on **07 July 2005** details as follows:

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

The evidence shows that the **Mortgage Loan Offer Letter** dated **30 June 2005**, which was signed and accepted by the Complainant on **07 July 2005**, provided for a tracker interest of ECB + 0.95%. I have not been provided with any evidence to indicate that the Complainant drew down this mortgage loan therefore the loan offer lapsed.

I note that on foot of a request made by the Complainant to amend the applicable interest rate to a fixed interest rate, the Provider subsequently issued a cover letter to the Complainant on **08 December 2005**, which enclosed an amended **Mortgage Loan Offer Letter** dated **08 December 2005**. The cover letter provided as follows:

*“I am delighted to let you know that [the Provider] has approved your mortgage application. This approval is subject to the revised terms and conditions contained in the enclosed Mortgage Loan Offer (“Offer Letter”)*

***This Offer Letter supersedes and replaces all previous versions of this Offer Letter issued to you in respect of this loan.”***

The **Mortgage Loan Offer Letter** dated **08 December 2005** details as follows:

<i>“1. Amount of credit advanced:</i>	<i>€360,000.00</i>
<i>2. Period of Agreement:</i>	<i>25 Years</i>
<i>3. Number of</i>	<i>4. Amount</i>
<i>Repayment Instalment</i>	<i>of each</i>
<i><u>Instalments</u> <u>Type</u></i>	<i><u>Instalments</u></i>
<i>12 Fixed at 3.090%</i>	<i>€1,722.58</i>
<i>288 Variable at 3.800%</i>	<i>€1,616.14”</i>

**Part 4 – The Special Conditions** of this **Mortgage Loan Offer Letter** states as follows:

*“(v) This offer replaces our offer of 30/06/2005*

/Cont’d...

...

***This is an important legal document. You are strongly recommended to seek independent legal advice before signing it....”***

**Part 6 – The General Conditions** also provides the following:

*“1. (d)*

*This Offer Letter replaces and supersedes all earlier versions of this Offer Letter.*

...

#### **6. Variable Interest Rates**

*(a) Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender’s discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the loan without penalty.*

*(b) The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*

*(c) Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month’s money at the Euro Inter Bank Offered Rate (EURIBOR).*

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

*(a) The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan. In the case of a fixed rate loan, the interest shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. The fixed rate of Interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down.*

/Cont’d...



*The actual fixed rate that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of draw down.*

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

In addition, the **Consumer Credit Act Notices** state as follows:

*"If your mortgage loan is at any time at a variable rate, please note:*  
**THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME"**

The Complainant signed and accepted that **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer Letter** on **08 December 2005** which states as follows:

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

I note from the **mortgage loan account statements** furnished in evidence that the first tranche of the loan in the sum of €75,000.00 was subsequently drawn down on **30 December 2005** and second tranche in the sum of €285,000.00 was drawn down on **28 August 2006**.

It is clear that the **Mortgage Loan Offer Letter** dated **08 December 2005** superseded the **Mortgage Loan Offer Letter** dated **30 June 2005**. Consequently, the **Mortgage Loan Offer Letter** dated **30 June 2005** was no longer valid. It is the terms and conditions of **Mortgage Loan Offer Letter** dated **08 December 2005** that therefore form the basis of the contractual agreement between the parties. By signing and accepting the **Mortgage Loan Offer Letter** dated **08 December 2005**, the Complainant confirmed that she understood and accepted the terms and conditions of this amended loan offer. The amended loan offer provided for a fixed interest rate for the first 12 months of the term of the loan with a variable interest rate to apply on expiry of the fixed interest rate period. The nature of the applicable variable rate of interest, as outlined in **General Condition 6**, was one that could be adjusted upwards or downwards at the discretion of the Provider as opposed to tracking the European Central Bank refinancing rate.

The Provider has furnished in evidence a copy of the notice which was published on the staff intranet on **18 August 2006** which provided information in relation to the “*New Staff Non-Standard Variable Rate Mortgage*” with an interest rate of 3.5%. The notice details as follows:

*“The non-standard variable rate mortgage tracks two key indicators, the Revenue Commissioners BIK (Benefit-in-Kind) Reference Rate and the One-Month COF (Cost of Funds).*

*The rate applying to the staff non-standard variable rate mortgage will be whichever is the higher of these two indicators at any given time. This is to ensure that you will never pay BIK on this mortgage under current Revenue rules.*

...

***The non-standard variable mortgage does not track ordinary ECB interest rate movements, which impact on our standard variable and tracker rate products.”***

The Complainant completed an **Application to Change to Staff Non-Standard Variable Rate Mortgage (“Staff Mortgage Rate”) Mortgage Form of Authorisation on 07 December 2006** which detailed as follows:

*“The Staff Mortgage Rate is a variable interest rate and shall be the higher of the following two key indicators: (i) The prevailing Revenue Commissioners BIK (Benefit in kind) reference rate; (2) The prevailing one month Cost of Funds reference rate (which is equivalent to the one month EURIBOR rate issued by [the Provider] on a daily basis.*

**APPLICATION FOR CHANGE OF INTEREST RATE:**

*I/We wish to apply for the Staff Mortgage Rate as detailed above for my/our mortgage loan (the “Loan”)*

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

*I/We wish to change to the rate selected above immediately\**

*I/We wish to change to the rate selected above at the expiry of my/our current fixed rate period (only applicable if your fixed rate is due to expire within 30 days from the date of this Application*

/Cont’d...

*We wish to switch from the staff preferential interest rate to the Staff Mortgage Rate for my/our Loan. Please see conditions overleaf."*

The Complainant selected that she wished to apply a staff non-standard variable interest rate to her mortgage loan on the expiry of the fixed interest rate period.

The **Consumer Credit Act Notices** contained in this **Mortgage Form of Authorisation** state as follows:

*"If your mortgage is at any time at a variable rate, please note:  
**THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."***

The Complainant signed the **Acknowledgement and Agreement** section of this **Mortgage Form of Authorisation** on **07 December 2006** on the following terms:

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

*I acknowledge and agree that:-*

*...*

*3. In converting the Loan to a Staff Mortgage Loan, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The rate shall be the higher of the following two key indicators: (1) the prevailing Revenue Commissioners BIK (Benefit in kind) reference rate; (2) the one month Cost of Funds reference rate (which is equivalent to the one month EURIBOR rate issued by [the Provider] on a daily basis). In the event that the Staff Mortgage Rate is certified by the Bank to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate. Notification of any change in the interest rate shall be given in accordance with Condition 6 (b) of the General Conditions of my original Offer letter.*

*4. Condition 6 (c) of the General Conditions of my original Offer Letter is not applicable for the duration of the Loan when the interest rate is the Staff Mortgage Rate.*

/Cont'd...

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

The evidence shows that the Complainant selected to apply a staff non-standard variable interest rate to her mortgage loan account on the expiry of the fixed rate period at the end of **December 2006**.

By signing and accepting this **Mortgage Form of Authorisation**, the Complainant agreed that the terms of her original mortgage loan agreement would be varied by the terms and conditions set out in the **Mortgage Form of Authorisation**. It is worth noting that this **Mortgage Form of Authorisation** clearly distinguishes staff non-standard variable interest rate from a tracker interest rate by stating that the relevant indicators would be the higher of the Revenue BIK reference rate and the prevailing one-month cost of funds variable rate. I understand that the reference to EURIBOR rates provide the basis for the price and interest rates for various financial products as opposed to the REPO rate which is used in relation to tracker mortgage rates.

I note that the Provider published a further staff notice on **21 December 2006**, which provided details in relation to a “*Staff 2 year Fixed Rate*”. This notice details as follows:

“...

*Staff will be advised of their rollover options a number of weeks prior to the expiry of the fixed term”*

The Provider published a further notice to staff on **22 December 2006**, which notified staff that the staff non-standard variable interest rate was due to increase. This notice details as follows:

*“In the budget on 6 December 2006, the Revenue Commissioners Benefit-in-kind (BIK) Reference Rate was changed from 3.5% to 4.5% with effect from 1 January 2007 in Ireland.*

*As a result the rate on the staff non-standard variable rate mortgage will have to increase to 4.5% with effect from 1 January 2007 to avoid staff having to pay BIK.*

...

/Cont’d...

### **Staff Mortgage Options**

*In light of these changes we are delighted to be able to announce a new range of staff options, which we have put together for you, our customers. These have resulted from negotiations to secure the best possible product options for staff. As a result of these changes, staff can now avail of the following options:*

<b>Option</b>	<b>Rate</b>	<b>Note</b>
<i>Remain on Staff Non-Standard Variable Rate</i>	<i>4.5%</i>	<i>No BIK applicable</i>
<i>New Special Staff 2 Year Fixed Rate</i>	<i>3.95%</i>	<i>Subject to BIK</i>
<i>Staff Tracker Mortgage</i>	<i>ECB + 0.75% (4.25%)</i>	<i>No BIK applicable</i>

...

**a) Remain on the staff non-standard variable rate mortgage...***The rate will increase to 4.5% with effect from 1 January...No further action is required.*

**b) You can avail of our new special staff 2 Year Fixed rate** *which will be priced at 3.95%. This special fixed rate is available for all new and existing mortgage business and includes both PDH (Private Dwelling House) and RIL (Residential Investment Lending).*

*Staff will be advised of their rollover options a number of weeks prior to the expiry of the fixed rate term.*

**c) You will also have the option to convert to the staff tracker mortgage.** *This was priced at ECB + 0.85%, currently 4.35% and was only available on PDH mortgages. We are now delighted to be able to tell you that we have secured agreement to offer this tracker product at ECB + 0.75%, i.e. currently 4.25%. This mortgage rate is available for all new and existing mortgage business and includes both PDH (Private Dwelling House) and RIL (Residential Investment Lending)".*

I note from the **mortgage loan account statements** furnished in evidence that a staff non-standard variable interest rate of 3.5% was applied to the Complainant's mortgage loan account on **28 December 2006**. I further note that that the interest rate changed to 4.5% on **02 January 2007** in line with the increase in the staff non-standard variable rate that was explained in the Provider's internal notice.

/Cont'd...

The Complainant completed an **Application to Change to Staff 2 Year Fixed Rate Mortgage 3.95% Mortgage Form of Authorisation** on **12 January 2007** which detailed as follows:

*"I/We wish to apply for the Staff 2 Year Fixed Rate 3.95% Mortgage Rate as detailed above for my/our mortgage loan (the "Loan")"*

The **Acknowledgement and Agreement** section of this **Mortgage Form of Authorisation** states as follows:

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

*I acknowledge and agree that:-*

***In converting the Loan from a fixed rate to the Staff 2 Year Fixed Mortgage Rate, I understand that I will be liable to pay a funding sum to the [Provider] calculated in accordance with the formula set out above under 'Early Repayment'.***

- 1. In the event of the Borrower (or both Borrowers where both are members of the permanent staff of [the Provider]) ceasing to be employed by [the Provider] the Staff Mortgage Rate shall cease and the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the Bank may, at its absolute discretion, offer to the Borrower.*
- 2. **If the loan is to be converted to a Tracker Mortgage Loan**, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the rate notified above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo rate") for the term of the Loan. Variation in interest rate shall be implemented by the [the Provider] not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper.*

/Cont'd...

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

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

The Complainant signed and accepted this **Acknowledgement and Agreement** on **12 January 2007** electing to apply a staff 2-year fixed interest rate of 3.95% to her mortgage loan account. The **mortgage loan account statements** furnished in evidence show that an interest rate of 3.95% was applied to the Complainant’s mortgage loan account on **16 January 2007**.

While the **Mortgage Form of Authorisation** had the effect of amending the applicable interest rate on the Complainant’s mortgage loan from a staff non-standard variable interest rate to a staff fixed interest rate, the terms and conditions of the **Mortgage Loan Offer Letter** dated **08 December 2005** still applied. Therefore, **General Condition 7 of Part 5 – The General Conditions** of the **Mortgage Loan Offer Letter** dated **08 December 2005** in relation to fixed interest rates, as outlined above, applied to the Complainant’s mortgage loan account from **January 2007**. Consequently, on expiry of the fixed interest rate period, the Complainant could be offered a further fixed interest rate or any other available rate or in the absence of selection of an interest rate by the Complainant, the Provider’s standard variable interest rate would apply.

The Provider published a further staff notice on **09 October 2008** to notify staff customers that the Provider was withdrawing staff tracker mortgages from **10 October 2008** which details as follows:

***“An update on staff mortgage options***

*[The Provider] no longer offers customer or staff tracker mortgages with effect from start of business Friday 10 October 2008*

***An announcement from Consumer Banking***

*Staff trackers are therefore not available for any new or existing staff mortgages, with the exception of those that are currently either on the staff tracker mortgage of ECB +0.75% or those rolling to ECB +0.75% as per their original signed mortgage agreement (see existing staff mortgage section below).*

/Cont’d...

### **1. New staff mortgage applications**

*New staff applications are entitled to avail of the best customer rates available on the matrix.*

*Currently the best rates are:*

- *2-Year Fixed Rate (currently 5.20%)*
- *Variable LTV products. The best available rates are: for residential property, 5.30%, or for investment property, 5.65%*

### **2. Existing staff mortgage accounts**

- *Staff 2-Year Fixed Rate: rate currently 3.95%*

*Staff who are currently on Staff 2-Year Fixed Rate – currently 3.95% - will roll to ECB +0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period. Staff will receive notification 30 days prior to the end of their fixed rate term. This notification will also offer a range of fixed and variable rate products. If you do not respond to this notification, your account will automatically default to the Staff Tracker ECB + 0.75%.*

- *Staff Tracker Mortgage: ECB + 0.75%*

*Staff that are currently on the Staff Tracker of ECB +0.75% will remain on this product. This product does not attract BIK.*

### **3. Existing staff wishing to switch to alternative product options**

*To avail of any of the Variable LTV based product options (5.30% for Residential property and 5.65% for investment properties) staff will need to complete a Mortgage Form of Authorisation (MFA) for either Bank or [Provider] depending on where the account is held. The MFA will need to be completed and signed by all parties on the mortgage account.*

*Please print off and complete the appropriate Mortgage Form of Authorisation below to switch to either of these options.”*



I note that the Complainant's mortgage loan account was never on a tracker interest rate of ECB + 0.75% at any stage. Therefore, it is clear that the Provider's reference to mortgage loans on the 2-year staff interest rate, which would "roll to ECB + 0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period", in the staff intranet notice dated **09 October 2008**, did not apply to the Complainant's mortgage loan account.

A letter from the Provider dated **20 November 2008** has been furnished in evidence. The letter dated **20 November 2008** details as follows:

*"Re: Staff Fixed Rate Mortgage 3.95%*

*Dear [redacted]*

*I am writing to let you know about Staff Fixed Rate Mortgage rollover options, which came into effect on the 7<sup>th</sup> November 2008.*

*As you may be aware, [the Provider] removed tracker mortgage products for new customers on the [end of] 2008. All major financial institutions have also removed their tracker products at this stage. We then assessed the impact of the removal of trackers on Fixed Rate customers at the time of their roll-over.*

*The key finding is that those currently on a fixed rate fall into one of two categories*

- 1. Those who opened their mortgage account on a fixed rate, or took the option of further fixed rates at previous roll-over times, will have a Tracker option on their roll-over letter, as per the terms and conditions of their Letter of Offer.*
- 2. Those who moved into a fixed rate from another product, by signing a mortgage Form of Authorisation, will not have a tracker option on their roll-over letter. The signed Mortgage Form of Authorisation supersedes the original Letter of Offer*

*As, according to our records, your mortgage(s) is currently on the 3.95% staff fixed rate, you will fall into one of the two categories above. As per our contractual commitments to you and the terms and conditions of your agreement with us, this letter outlines your options.*

/Cont'd...

*It is very important to note that as we have introduced similar steps for customers, if we were to treat you as a staff member differently, it would be deemed preferential and would incur BIK. The options available to you now (with the exception of the Staff Preferential 4%) are all exempt from BIK.*

*As outlined above*

- If you are in category 1 you will receive your roll-over letter with the staff tracker (ECB+0.75%) option, as well as the options offered below.*
- If you are in category 2 you will receive your roll-over letter with the options outlined below.*

**Homeloans**

<i>Staff Preferential Rate (for all loan amounts)</i>	<i>4% (subject to BIK)</i>
<i>Highly Competitive 2 year fixed rate</i>	<i>Currently 4.75%</i>
<i>Variable LTV Rate</i>	<i>Currently 4.50%</i>

*If you do not respond to the roll-over letter, we will automatically roll your mortgage to the Variable LTV based rate, currently 4.50%.*

*Please note only staff on the 3.95% fixed rate can move the full amount of their mortgage into the 4%. This is an exception for this group of staff. For staff on all other products, normal limits apply...*

*A communication was issued on [Provider's intranet] on the 9th of October indicating that the Tracker Mortgage would be available on roll over – this preceded our final assessment on our withdrawal from Tracker Mortgages and represented the most accurate information available at the time. The subsequent assessment of the impact of the decision to remove the Tracker Mortgages has led to the outcome outlined in this letter. We apologise for any confusion this has caused.*

*This letter is for your information only. There is no action required by you at this time. Your roll-over letter will issue about 4 weeks before you are due to roll off your fixed rate."*

/Cont'd...

The Provider's letter to the Complainant dated **20 November 2008** clearly outlined that given the Complainant "*moved into a fixed rate from another product*", being the staff non-standard variable rate of 3.5%, by signing a **Mortgage Form of Authorisation**, she would not in fact have a tracker option on their "*roll-over letter*".

The Provider submits that a rate options letter issued to the Complainant on **17 December 2008**. It is disappointing that I have not been provided with a copy of the rate options letter that issued to the Complainant and the Provider has not provided an explanation as to why this letter has not been provided in evidence. However, I note from a screenshot of the Provider's internal system that a **Product Review Notice** issued on **17 December 2008**. The Provider asserts that the Complainant did not respond to the rate options letter or choose any of the interest rates offered. I note from the screenshot of the Provider's internal system and the mortgage loan account statements submitted in evidence that the interest rate defaulted to the Provider's standard variable rate of 3.75% on **16 January 2009** in accordance with the terms of the **Mortgage Loan Offer Letter** dated **08 December 2005**. There was no obligation on the part of the Provider, contractual or otherwise, to offer the Complainant a tracker interest rate on the expiry of the 2-year fixed interest rate period in **January 2009**. I further note that the Provider had withdrawn tracker interest rate mortgages from its mortgage product offering in **October 2008** therefore tracker interest rates were no longer available in **January 2009**.

The Provider issued a further **Mortgage Form of Authorisation** which is not dated but signed by the Complainant on **08 April 2010** and details as follows:

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

...

<i>2 Year Fixed (PDH)</i>	<i>3.150%</i>
<i>3 Year Fixed</i>	<i>3.600%</i>
<i>5 Year Fixed (PDH)</i>	<i>4.250%</i>

The **Acknowledgement and Agreement** section of this **Mortgage Form of Authorisation** detailed as follows:

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

/Cont'd...

*1. If I have applied to convert to a fixed rate Loan, the interest rate shall be fixed from the date of the expiry of my existing rate. The fixed rate of interest that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of the expiry of the existing rate.*

...

*5. I may not select a tracker variable rate unless the terms and conditions applicable to the Loan expressly entitle me to.*

...

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

The evidence shows that the Complainant selected a 2-year fixed interest rate of 3.15%. In circumstances where the Complainant did not have any entitlement to a tracker interest rate in her **Mortgage Loan Offer Letter** dated **08 December 2005**, the Provider was not obliged to offer her a tracker interest rate on this occasion. I also note that tracker interest rate products had been removed by the Provider from its product offering at that point in time. I note from the mortgage loan account statements that the interest rate on the Complainant's mortgage loan account changed to 3.15% on **12 April 2010**.

On foot of a request made by the Complainant over the telephone in **March 2018**, the Provider issued a further **Mortgage Form of Authorisation** dated **23 March 2018** to the Complainant which detailed as follows:

*"This form allows you to select a new interest rate for your Loan. We have sent you this form because (a) you fixed the rate of interest on your Loan for a period which is due to end shortly; OR (b) you have asked us for a new interest rate for the Loan.*

...

***NOTE: This Form is an important document. By signing this form you amend the terms of your Mortgage Loan Offer Letter. Please read ALL of this form before signing it. If you have a query about this form, please contact us.***

...

### **SWITCHES TO FIXED RATES**

***If you avail of a Fixed Rate, our tracker rate commitment to you is deemed to be at and end and the lender's prevailing Standard variable Rate will apply on expiry of this fixed term. 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..***

...

1 Year Fixed <=60% LTV	3.000%
2 Year Fixed LTV <=60%	3.000%
3 Year Fixed LTV <=60%	3.000%
5 Year Fixed LTV <=60%	3.000%
10 Year Fixed LTV <=60%	3.300%

The **Acknowledgement and Agreement** section of this **Mortgage Form of Authorisation** detailed as follows:

***"PLEASE READ THIS SECTION CAREFULLY BEFORE YOU SIGN THIS FORM.***

***By signing and returning this form properly completed you acknowledge and agree that:-***

***1. The terms and conditions of your Mortgage Loan Offer Letter are amended and varied by this form.***

...

***7. Any commitment or obligation by us, in your Mortgage Loan Offer Letter or otherwise, to provide you with a tracker variable rate (as described at clause 6.1 above) for the Loan, now or in the future, will end if you select a fixed rate of interest or a non-tracker variable rate of interest by way of this Mortgage Form of Authorisation. This paragraph takes precedence over any condition of your Mortgage Loan Offer Letter concerning tracker variable rates including any Special Condition."***

The Complainant signed and accepted this **Mortgage Form of Authorisation** on **04 April 2018** selecting a 5-year fixed interest rate of 3%. In circumstances where the Complainant did not have a contractual entitlement to a tracker interest rate, there was no obligation on the Provider to offer the Complainant a tracker interest rate option in the **Mortgage Form of Authorisation** dated **23 March 2018**.

The Complainant refers to a number of telephone calls which took place between her and Provider. I have been provided with recordings of telephone calls which took place between the parties between **2016** and **2018**. The Provider has stated that it does not have recordings of calls for the period between **2011** and **2015**. Having considered the contents of these recordings, I note that these telephone calls relate to requests made by the Complainant for interest rate options over the telephone and also updates regarding a complaint made by the Complainant in relation to the Central Bank directed Tracker Mortgage Examination. The Complainant was informed on a number of occasions that the Tracker Mortgage Examination was ongoing and that she would be updated once it had been completed. The Complainant also made requests for rate options to be sent to her in writing.

I do not consider the telephone recordings to be relevant as part of my determination of this complaint. It is important to note that the Complainant's mortgage loan account is governed by the terms and conditions of the **Mortgage Loan Offer Letter** which was signed and accepted by the Complainant on **08 December 2005** and the subsequent **Mortgage Forms of Authorisations**, where applicable.

The Complainant submits that the **Mortgage Loan Offer Letter** dated **08 December 2005** and the subsequent **Mortgage Forms of Authorisation** that issued to her, and as outlined above, did not clearly set out that she would not have the option of reverting to a tracker interest rate as per her original **Mortgage Loan Offer Letter** dated **30 June 2005**.

It is clear from the evidence that the Complainant never drew down mortgage funds in accordance with the **Mortgage Loan Offer Letter** dated **30 June 2005**, which provided for a tracker interest rate. This **Mortgage Loan Offer Letter** is no longer valid and does not form part of any contractual agreement between the parties. The Complainant however chose to sign and accept the terms and conditions of **Mortgage Loan Offer Letter** dated **08 December 2005**, which provided for a fixed interest rate period of 12 months with the Provider's variable interest rate to apply thereafter. The terms of **Mortgage Loan Offer Letter** dated **08 December 2005** clearly stipulated that it replaced the previous loan offer of **30 June 2005**.

/Cont'd...

Consequently, the Complainant's mortgage loan is governed by the **Mortgage Loan Offer Letter** dated **08 December 2005** and the terms and conditions contained therein, none of which provide for a contractual entitlement to a tracker interest rate.

The evidence shows that the choice not to accept the original tracker rate mortgage loan and to instead request a fixed rate loan, was made freely by the Complainant. If the Complainant was not satisfied with the terms on which the Provider offered the mortgage loan, the Complainant could have decided not to sign and accept the mortgage loan offer and ultimately draw down the mortgage loan. However, the Complainant did not do this and instead accepted the terms and conditions of the **Mortgage Loan Offer Letter** dated **08 December 2005**.

In circumstances where **Mortgage Loan Offer Letter** dated **08 December 2005** contained no contractual obligation on the part of the Provider to apply a tracker interest rate to the Complainant's mortgage loan account, the Provider was not obliged to offer the Complainant a tracker interest rate at any time during the term of her mortgage loan. Therefore, the Provider was not obliged to offer the Complainant a tracker interest rate in any of the **Mortgage Forms of Authorisation** that subsequently issued. Furthermore, the Complainant did not gain a contractual entitlement to a tracker interest rate at any point in her mortgage journey with the Provider.

Therefore, the Provider was not obliged to state in the **Mortgage Forms of Authorisation** that the Complainant would not have the option of "*reverting to a Tracker rate*" as the Complainant's mortgage loan was never on a tracker interest rate.

The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider in **2005** and the subsequent amendments to the Complainant's mortgage loan account were choices that were freely made by the Complainant.

For the reasons outlined in this Decision, I do not uphold the 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**

17 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.